

FOIA MARKER

This is not a textual record. This is used as an administrative marker by the William J. Clinton Presidential Library Staff.

Collection/Record Group: Clinton Presidential Records

Subgroup/Office of Origin: Counsel Office

Series/Staff Member: Robert Weiner

Subseries:

OA/ID Number: 12819

FolderID:

Folder Title:

Don't Ask / Don't Tell #3 [5]

Stack:

S

Row:

114

Section:

4

Shelf:

2

Position:

2

(4) The term "primary next of kin", in the case of a missing person, means the individual authorized to direct disposition of the remains of the person under section 1482(c) of this title:

(5) The term "member of the immediate family", in the case of a missing person, means the following:

(A) The spouse of the person.

(B) A natural child, adopted child, stepchild, or illegitimate child (if acknowledged by the person or parenthood has been established by a court of competent jurisdiction) of the person, except that if such child has not attained the age of 18 years, the term means a surviving parent or legal guardian of such child.

(C) A biological parent of the person, unless legal custody of the person by the parent has been previously terminated by reason of a court decree or otherwise under law and not restored.

(D) A brother or sister of the person, if such brother or sister has attained the age of 18 years.

(E) Any other blood relative or adoptive relative of the person, if such relative was given sole legal custody of the person by a court decree or otherwise under law before the person attained the age of 18 years and such custody was not subsequently terminated before that time.

(6) The term "previously designated person", in the case of a missing person, means an individual designated by the person under section 655 of this title for purposes of this chapter.

(7) The term "classified information" means any information the unauthorized disclosure of which (as determined under applicable law and regulations) could reasonably be expected to damage the national security.

(8) The term "theater component commander" means, with respect to any of the combatant commands, an officer of any of the armed forces who (A) is commander of all forces of that armed force assigned to that combatant command, and (B) is directly subordinate to the commander of the combatant command.

(Added Pub.L. 104-106, Div. A, Title V, § 569(b)(1), Feb. 10, 1996, 110 Stat. 350, and amended Pub.L. 104-201, Div. A, Title V, § 578(a)(4), (b)(3), Sept. 23, 1996, 110 Stat. 2536; Pub.L. 105-85, Div. A, Title V, § 599(a)(4), (b)(2), Nov. 18, 1997, 111 Stat. 1768.)

HISTORICAL AND STATUTORY NOTES

1997 Amendments

Par. (1). Pub.L. 105-85, § 599(a)(4) rewrote par. (1), which formerly read:

"(1) The term 'missing person' means a member of the armed forces on active duty who is in a missing status.

"(A) a member of the Armed Forces on active duty who is in a missing status; or

"(B) a civilian employee of the Department of Defense or an employee of a contractor of the Department of Defense who serves with or accompanies the Armed Forces in the field under orders and who is in a missing status."

Par. (8). Pub.L. 105-85, § 599(b)(2) added par. (8).

1996 Amendments

Par. (1). Pub.L. 104-201, § 578(a)(4), restructured provisions, and as so restructured, struck out: "(A) following the term 'missing person means', substituted a period for "; or", and struck out subpar. (B), which covered civilian employees of the Department of Defense and certain employees of contractors of the Department of Defense.

Par. (8). Pub.L. 104-201, § 578(b)(3), struck out par. (8), which defined the term "theater component commander".

Legislative History

For legislative history and purpose of Pub.L. 104-106, see 1996 U.S. Code Cong. and Adm. News, p. 238. See, also, Pub.L. 104-201, 1996 U.S. Code Cong. and Adm. News, p. 2948; Pub.L. 105-85, see 1997 U.S. Code Cong. and Adm. News, p. —

CHAPTER 79—CORRECTION OF MILITARY RECORDS

§ 1551. Correction of name after separation from service under an assumed name

§ 1552. Correction of military records: claims incident thereto

(a)(1) The Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice. Except as provided in paragraph (2), such corrections shall be made by the Secretary acting through boards of civilians of the executive part of that military department. The Secretary of Transportation may in the same manner correct any military record of the Coast Guard.

(2) The Secretary concerned is not required to act through a board in the case of the correction of a military record announcing a decision that a person is not eligible to enlist (or reenlist) or is not accepted for enlistment (or reenlistment) or announcing the promotion and appointment of an enlisted member to an initial or higher grade or the decision not to promote an enlisted member to a higher grade. Such a correction may be made only if the correction is favorable to the person concerned.

(3) Corrections under this section shall be made under procedures established by the Secretary concerned. In the case of the Secretary of a military department, those procedures must be approved by the Secretary of Defense.

(4) Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States.

(b) No correction may be made under subsection (a)(1) unless the claimant or his heir or legal representative files a request for the correction within three years after he discovers the error or injustice. However, a board established under subsection (a)(1) may excuse a failure to file within three years after discovery if it finds it to be in the interest of justice.

(c) The Secretary concerned may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if, as a result of correcting a record under this section, the amount is found to be due the claimant on account of his or another's service in the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be. If the claimant is dead, the money shall be paid, upon demand, to his legal representative. However, if no demand for payment is made by a legal representative, the money shall be paid—

(1) to the surviving spouse, heir, or beneficiaries, in the order prescribed by the law applicable to that kind of payment;

(2) if there is no such law covering order of payment, in the order set forth in section 2771 of this title; or

(3) as otherwise prescribed by the law applicable to that kind of payment.

A claimant's acceptance of a settlement under this section fully satisfies the claim concerned. This section does not authorize the payment of any claim compensated by private law before October 25, 1951.

[See main volume for text of (d)]

(e) No payment may be made under this section for a benefit to which the claimant might later become entitled under the laws and regulations administered by the Secretary of Veterans Affairs.

(f) With respect to records of courts-martial and related administrative records pertaining to court-martial cases tried or reviewed under chapter 47 of this title (or under the Uniform Code of Military Justice (Public Law 506 of the 81st Congress)), action under subsection (a) may extend only to—

(1) correction of a record to reflect actions taken by reviewing authorities under chapter 47 of this title (or under the Uniform Code of Military Justice (Public Law 506 of the 81st Congress)); or

(2) action on the sentence of a court-martial for purposes of clemency.

(As amended Dec. 6, 1983, Pub. L. 98-209, § 11(a), 97 Stat. 1407; Sept. 29, 1988, Pub.L. 100-456, Div.

727

52.

Department of Transportation, organization and delegation of powers and duties, 49 CFR Part 1.

Add:

32 CFR Part 92
32 CFR Part 516

723

- rats

is it authentic

CROSS REFERENCES

Correction of discharge, 38 USCS @ 1662.

Effective dates of awards, 38 USCS @ 3010.

This section is referred to in 38 USCS @@ 1662, 3010; 42 USCS @ 213a.

RESEARCH GUIDE

Federal Procedure L Ed:

Armed Forces, Civil Disturbances, and National Defense, Fed Proc, L Ed, @@ 5:42, 246, 311, 349, 364-367, 375, 378-380, 399.

Am Jur:

32B Am Jur 2d, Federal Courts @ 2275.

53A Am Jur 2d, Military and Civil Defense @@ 183, 225, 226, 228, 242, 345.

54 Am Jur 2d, Military and Civil Defense @@ 186-189.

Forms:

3 Federal Procedural Forms L Ed, Armed Forces; Civil Disturbances and National Defense, @@ 5:50, 5:108, 5:122, 5:128, 5:129.

3 Fed Procedural Forms L Ed, Armed Forces, Civil Disturbances, and National Defense @@ 5:236, 241, 251-254, 281, 282, 291, 301, 311-313, 316, 317, 321, 341, 343.

15 Federal Procedural Forms L Ed, Statutes of Limitation and Other Time Limits @ 61:32.

15 Federal Procedural Forms L Ed, Statutes of Limitation, and Other Time Limits @ 61:32.

Annotations:

Judicial review of military action with respect to type of discharge given serviceman. 4 ALR Fed 343.

Computation of backpay and allowances to which member of Armed Forces is entitled upon showing that he was wrongfully separated from service. 7 ALR Fed 473.

Discharge from Armed Forces on ground of conscientious objection. 10 ALR Fed 15.

Judicial review of military action with respect to type of discharge given member of Armed Forces. 92 ALR Fed 333.

Law Review Articles:

Relationship Between Military Correction Boards and the Comptroller General; Finality of Correction Board Decisions under 10 USC @ 1552. 22 Am U L Rev 222.

Kabatchnick and Kabatchnick, Practice Before the Boards for Correction of Military Records Within the Various Military Departments. 33 Federal Bar News and Journal 17, January, 1986.

Lunding, Judicial Review of Military Administrative Discharges. 83 Yale LJ 33.

INTERPRETIVE NOTES AND DECISIONS

I. IN GENERAL

1. Generally
2. Purpose
3. Construction
4. Board's function, generally
5. --Delegation
6. --Investigation
7. --Review
8. Finality of board's proceedings
9. Actions by Secretary, generally
10. --Requirement of action through board
11. --Arbitrary and capricious actions, abuse of discretion
12. Undersecretary's actions
13. Application to civilian employment

II. CORRECTION OF PARTICULAR RECORDS

14. Generally
15. Court-martial actions, generally
16. --Review of discharge
17. --Finality
18. Disability pay, generally
19. --Date of disability
20. --Findings of Veterans' Administration
21. Discharge, generally
22. --Date
23. --Improper proceedings
24. --Promotion passovers
25. Length of service
26. Medical records
27. Performance evaluations
- 27.5. --Letters of censure
28. Prisoner of war or missing in action status
29. Rank, generally
30. --Date
31. --Promotion
32. Reinstatement to duty
33. Release from duty, generally
34. --Involuntary
35. Resignation
36. Retirement, generally
37. --Date
38. --Pay
39. Veterans' benefits

III. PAYMENT OF CLAIMS

40. Back pay, generally
41. --Flight pay
42. --Pay grade used in computation
43. --Time parameters
44. Disability pay
45. Retired pay
46. Litigation expenses
47. Set-off in mitigation, generally

- 48. --Civilian employment
- 49. --Military compensation
- 50. --Waiver of right

IV. PRACTICE AND PROCEDURE

A. In General

- 51. Generally
- 52. Due process of law
- 53. Time to request correction [10 USCS @ 1552(b)]
- 54. Right to hearing, generally
- 55. --Appearance of applicant or counsel
- 56. --Denial
- 57. --Discretion
- 58. Evidence considered by Board

B. Judicial Review

1. In General

- 59. Generally
- 60. Scope and standard of review
- 61. Evidence considered by Court
- 62. Issues considered
- 63. Presumptions
- 64. Burden of proof
- 65. Miscellaneous

2. Jurisdiction

- 66. Claims Court, generally
- 67. --Actions for pay
- 68. --Status of plaintiff
- 69. District Court
- 70. Court of Appeals

3. Particular Remedies

- 71. Injunctive and declaratory relief
- 72. Mandamus
- 73. Stay pending appeal

C. Exhaustion of Administrative Remedies

- 74. Generally
- 75. Acts constituting exhaustion, generally
- 76. --Actions concerning court-martial
- 77. --Acts concerning discharge
- 78. ----Conscientious objectors
- 79. --Actions concerning enlistment
- 80. --Actions concerning promotions
- 81. Miscellaneous

D. Limitation of Actions

- 82. Generally
- 83. Accrual of claims
- 84. Continuing claims doctrine
- 85. Laches

I. IN GENERAL

1. Generally

Under 10 USCS @ 1552, Secretary and his Boards have moral sanction to determine, insofar as possible, true nature of alleged injustice to member of military and to take steps to grant thorough and fitting relief. *Duhon v United States* (1972) 198 Ct Cl 564, 461 F2d 1278; *Yee v United States* (1975) 206 Ct Cl 388, 512 F2d 1383, later proceeding 210 Ct Cl 752.

2. Purpose

10 USCS @ 1552 was not intended to affect judicial jurisdiction. *Nelson v Miller* (1967, CA3 Pa) 373 F2d 474, cert den 387 US 924, 18 L Ed 2d 980, 87 S Ct 2042.

10 USCS @ 1552, creating Correction Boards, was not intended as substitute for functions either of specialized military review boards or courts; located as it is at apex of pyramidal system of specialized boards of review, Board for Correction of Military Records cannot function effectively if specialized military boards are bypassed and it is used as forum for presenting complaints in first instance. *Sherengos v Seaman* (1971, CA4 NC) 449 F2d 333.

10 USCS @ 1552 was intended by Congress to take place of private bills for relief from error or injustice at hands of Armed Services; there is no indication of congressional consciousness or intention that judicial jurisdiction would be affected. *Ogden v Zuckert* (1961) 111 App DC 398, 298 F2d 312.

Legislative history of 10 USCS @ 1552 indicates it was intended to provide correction of individual's service record which has entries resulting from actions of general court martial and statutory bodies, such as Boards of Review, and to provide reimbursement of compensation which individual had been denied due to incorrect or unjust entry and purpose of @ 1552 was to relieve Congress of private bills necessary to effect correction of such entries. *Larionoff v United States* (1973, DC Dist Col) 365 F Supp 140, remanded on other grounds 175 App DC 32, 533 F2d 1167, 21 FR Serv 2d 902, affd 431 US 864, 53 L Ed 2d 48, 97 S Ct 2150 and (disagreed with *Bishop v Committee on Professional Ethics & Conduct of Iowa State Bar Asso.* (CA8 Iowa) 686 F2d 1278, 34 FR Serv 2d 1261).

There was intention on part of Congress to free itself from burden of dealing with correction of military records by private bills and to provide method for their disposition by administrative action; therefore, 10 USCS @ 1552 was so construed as to make unnecessary further resort to old method. 40 Op Atty Gen 504.

3. Construction

Statute could not be construed as money-mandating with respect to claims for retroactive promotions and accompanying monetary relief. *Upshaw v United States* (1989) 17 Cl Ct 732.

10 USCS @ 1552 is remedial legislation which should be liberally construed rather than construed narrowly or technically. *Oleson v United States* (1965) 172 Ct Cl 9.

If widow and child bringing action arising from death of armed service member are correct that deceased's military record is incorrect, only relief to which they be entitled before Army Board for Correction of Military Records and which can be reviewed by District Court is correction of that record and not award of damages for alleged intangible injuries. *Moore v Secretary of Army* (1986, DC Conn) 627 F Supp 1538.

Naval officer, who had been serving in position under 10 USCS @ 601 for which he was entitled to grade of Admiral, was entitled, upon retirement, to have

his excess leave liquidated at grade of Admiral, where Board for Correction of Naval Records had changed officer's military records to show that he had retired on 6/1/92 in rank of Admiral, rather than on 7/1/92, at which time he had reverted to permanent rank of Rear Admiral, due to delay in confirmation of his retirement at rank of Admiral. Admiral Jonathan T. Howe, USN (Retired) (5/9/94) Comp. Gen. Dec. No. B-255792.

4. Board's function, generally

ABCMR's function is to investigate and determine if serviceman is suffering from injustice caused by error in military records. *Nolen v Rumsfeld* (1976, CA5 Ga) 535 F2d 888, reh den (CA5 Ga) 540 F2d 1085 and cert den 429 US 1104, 51 L Ed 2d 556, 97 S Ct 1133.

Claims dependent upon constitutional and statutory interpretations are beyond scope of jurisdiction of Boards for Correction of Military Records even though claim also requests reinstatement and backpay. *Glines v Wade* (1978, CA9 Cal) 586 F2d 675, revd on other grounds 444 US 348, 62 L Ed 2d 540, 100 S Ct 594, on remand (CA9 Cal) 618 F2d 623.

Army Board for Correction of Military Records has power under 10 USCS @ 1552 to correct military record and to order payment for losses incurred because of incorrect record, but is not authorized to effect promotion or to award damages relating to such promotion issue. *Thornton v Coffey* (1980, CA10 Okla) 618 F2d 686, 22 BNA FEP Cas 709, 22 CCH EPD P 30796.

Army Board for correction of military records may, "in the interest of justice," review and correct any military record, no matter how long ago alleged error or injustice occurred. *Geyen v Marsh* (1985, CA5 La) 775 F2d 1303.

ABCMR, acting under authority of 10 USCS @ 1552, may substitute "non-rated" officer efficiency rating in place of negative officer rating, and court will not compel Board to substitute new subjective rating. *Turner v Department of Army* (1978, DC Dist Col) 447 F Supp 1207, affd without op 193 App DC 218, 593 F2d 1372 and affd without op 193 App DC 218, 593 F2d 1372.

5. --Delegation

Where serviceman's counsel appeared before Correction Board after court-martial conviction of serviceman for larceny, and during discussion of case counsel raised legal issues which members of Board as civilians were unable to fully comprehend, it was proper and necessary for Board to request legal advice from office of Judge Advocate General and to include comments of Judge Advocate General in its final report despite claim that Board delegated its decision-making authority to Judge Advocate General. *Owings v Secretary of United States Air Force (SAFOS)* (1971) 145 App DC 76, 447 F2d 1245, cert den 406 US 926, 32 L Ed 2d 128, 92 S Ct 1799, reh den 409 US 901, 34 L Ed 2d 162, 93 S Ct 185.

Under @ 1552(a), Board for Correction of Navy Records must render its decisions through Board members, not employees or staff. *Etheredge v United States* (1985) 8 Cl Ct 736.

Under 10 USCS @ 1552(a), Board for Correction of Navy Records must render its decisions through Board members, not employees or staff. *Etheredge v United States* (1985) 8 Cl Ct 736.

6. --Investigation

Board for Correction of Military Records in its investigatory functions may seek advisory opinions in evaluating applicant's record of fitness for service, and hearing is not required on these matters as Board's function does not involve conducting adversary proceedings. *Armstrong v United States* (1974) 205 Ct Cl 754.

7. --Review

Boards for various services were established to correct individual injustices to servicemen and were not intended as substitute for functions either of specialized military review boards or of courts, and they cannot function if specialized military boards are bypassed and board is used as forum for presenting complaints in first instance. *Sherengos v Seamans* (1971, CA4 NC) 449 F2d 333.

Boards for correction of military records were established for purpose only of reviewing military records and to correct errors and injustices, and they have no authority to reverse decision of retiring board which is favorable to applicant. *Friedman v United States* (1958) 141 Ct Cl 239, 158 F Supp 364.

Correction board statute, 10 USCS @ 1552, is merely statute designed to implement substantive rights granted by retirement laws, and correction board acting under that statute is either reviewing agency to decide whether prior administrative actions of retiring boards acting under retirement legislations had been unjust or erroneous, or is acting in place of retiring board where none had acted. *Friedman v United States* (1962) 159 Ct Cl 1, 310 F2d 381, cert den 373 US 932, 10 L Ed 691, 83 S Ct 1540.

8. Finality of board's proceedings

Provision in 10 USCS @ 1552 that correction is final and conclusive on all officers of United States was not intended to preclude any otherwise proper judicial review of departmental action upon petition to change type of discharge. *Ashe v McNamara* (1965, CA1 Mass) 355 F2d 277.

Provision in former 5 USCS @ 191(a) that corrections made by correction boards were final and conclusive on all officers of government except when procured by means of fraud did not render corrections final and conclusive on courts of United States. *Friedman v United States* (1958) 141 Ct Cl 239, 158 F Supp 364.

Decision of board for correction of military or naval records, based on finding that officer was disabled as incident of his naval service while serving in rank of junior grade lieutenant and that he should have been retired for disability upon his release from active service in that rank is final and binding on officer unless he can show that it was arbitrary or contrary to law. *Harris v United States* (1960) 150 Ct Cl 760.

Decision of Board for Correction of Military or Naval Records is not final or binding on questions of law. *Russell v United States* (1963) 161 Ct Cl 183, 314 F2d 809.

Determinations of boards for correction of military or naval records are final and binding unless it is shown by cogent and clearly convincing evidence that such determinations are arbitrary, capricious, or not supported by substantial evidence. *Boland v United States* (1965) 169 Ct Cl 145; *Hoffman v United States* (1966) 175 Ct Cl 457, cert den 389 US 843, 19 L Ed 2d 108, 88 S Ct 88; *Esgate v United States* (1968) 186 Ct Cl 207, cert den 395 US 913, 23 L Ed 2d 226, 89 S Ct 1759.

Findings of Secretary of military service or board for correction of military records respecting discharge of military person are final and binding upon Court of Claims unless it is shown by clear and convincing evidence that such findings were arbitrary and capricious, not supported by substantial evidence or erroneous in law. *Armstrong v United States* (1974) 205 Ct Cl 754.

Once having invoked jurisdiction of Army Board for Corrections of Military Records, veteran is bound by its decision denying his application unless its action was arbitrary or capricious, or violative of constitutional right, otherwise illegal or without basis in fact. *Hoorwitz v Resor* (1970, DC Conn)

329 F Supp 1050, affd (CA2 Conn) 445 F2d 1407.

9. Actions by Secretary, generally

Although terms of 10 USCS @ 1552(a), authorizing Secretary of a military department to correct military records whenever he considers it necessary to correct errors or remove injustices, are permissive, implementation of opinion of Federal Court of Appeals requiring that illegally discharged Army Reserve officers be reinstated to active duty is outside of discretion of Secretary of Army and although District Court remanded matter to Secretary for fashioning appropriate relief, that relief must follow explicit details of Court of Appeal's opinion. *Dilley v Alexander* (1980) 200 App DC 354, 627 F2d 407.

Precept issued by Navy Secretary authorizing use of Board staff members as alternates does not violate 10 USCS @ 1552 as long as staff member is civilian. *Viles v Ball* (1989, App DC) 872 F2d 491.

Statutory ten-month period for final action on applications for correction of Coast Guard records is directory rather than mandatory; Congress specified no consequences for missing deadline, similar language has been used elsewhere where it is clear that no sanction for noncompliance was intended, and, although legislative history indicated Congressional concern about lengthy delays in processing such applications, it also indicated concern for giving Secretary flexibility in timing to ensure just and fair handling of cases. *Gottlieb v Pena* (1994, App DC) 41 F3d 730.

Although service secretary, acting through boards of civilians, may correct military record when he considers it necessary to correct error or remove injustice, it is clear that the secretary's decision is discretionary one. *Jones v United States* (1985) 7 Cl Ct 673.

Under 10 USCS @ 1552(a) Secretary is left with discretion to correct or not to correct military record, and unless court finds that Secretary has abused his discretion, action is proper and will not be disturbed by court. *Jackson v United States* (1962) 156 Ct Cl 183, 297 F2d 939, cert dismd 372 US 950, 9 L Ed 2d 976, 83 S Ct 947.

Congress conferred broad powers on Service Secretaries acting through civilian correction boards to remedy errors and injustices in the maintenance of military records; in so doing, Congress voluntarily and explicitly relinquished its authority in this area and terminated servicemen's access to Congress for correction of military records by way of private bill under 2 USCS @ 190g; conjunction of 10 USCS @ 1552 and 2 USCS @ 190g implies that Secretaries have duty as well as power to afford servicemen proper relief. *Sanders v United States* (1979) 219 Ct Cl 285, 594 F2d 804, later proceeding 221 Ct Cl 988.

Provisions of 10 USCS @ 1552 confer certain amount of discretion on service Secretary, acting through civilian correction boards, and service Secretary is free to prescribe procedures, with approval of Secretary of Defense, for conduct of business by such board, and service Secretary is free to place limitations on range of cases reviewable by board and to differ with recommendation of board where evidence is susceptible to varying interpretations, but, like board, service Secretary must not act in arbitrary, capricious manner, unsupported by substantial evidence or in violation of law, and actions of both board and service Secretary are subject to judicial reversal for violation of such standards, and to say that 10 USCS @ 1552 confers on correction board or service Secretary such discretion that Court of Appeals cannot review their action when case is properly within its jurisdiction, is contrary to purpose of 10 USCS @ 1552. *Sanders v United States* (1979) 219 Ct Cl 285, 594 F2d 804, later proceeding 221 Ct Cl 988; *Skinner v United States* (1979) 219 Ct Cl 322, 594 F2d 824, later proceeding 221 Ct Cl 987.

Secretary of Army has authority under 10 USCS @ 1552 to order convening of

reconstituted promotion boards where original boards did not include reserve officers, as required by 10 USCS @ 266(a); especially where such course of action was recommended by Army Board for Correction of Military Records. *Whitehead v Alexander* (1977, DC Dist Col) 439 F Supp 910.

Secretary of Navy is authorized to overrule Board for Correction of Naval Records recommendations, but he must act on either explicitly stated policy reasons or upon evidence presented in record made to Board; Secretary's decision is then final and conclusive, unless upon judicial review it is found to be arbitrary, capricious, in bad faith, unsupported by substantial evidence, or contrary to applicable law or regulations. *Kolesa v Lehman* (1984, ND NY) 597 F Supp 463.

On basis of extensive powers under 10 USCS @ 1552 and 8297, Secretary had power to set up new selection boards, out of sequence, to correct or remedy admittedly major legal error of improperly constituted selection board which passed over plaintiffs-Reservists who sought promotion. *Doyle v United States* (1979), 220 Ct Cl 285, 599 F2d 984, and on other grounds 220 Ct Cl 326, 609 F2d 990, cert den 446 US 982, 64 L Ed 2d 837, 100 S Ct 2961 and later proceeding 226 Ct Cl 720.

10. --Requirement of action through board

Secretary of Navy is by no means cipher in process of correcting Naval records, as, although 10 USCS @ 1552(a) directs Secretary to act through civilian board, it leaves no doubt that final decision is to be made by Secretary. *Miller v Lehman* (1986) 255 App DC 278, 801 F2d 492.

10 USCS @ 1552 requires that Secretary of service concerned act, if at all, through boards of civilian officers or employees in matter of deciding whether record should be corrected. *Hertzog v United States* (1964) 167 Ct Cl 377.

10 USCS @ 1552 requires that Secretary of service concerned act through boards of civilians of that service in deciding whether or not to correct military or naval record; where Secretary acts instead on recommendations of active duty naval officer and reverses recommendation of Board for Correction of Military or Naval Records, his action violates @ 1552. *Weiss v United States* (1969) 187 Ct Cl 1, 408 F2d 416, later proceeding 190 Ct Cl 945.

Commandant of Coast Guard does not have to act through Board for Correction of Military Records to make any change in individual record, even if certain rights to compensation are ultimately affected, when nature of change is merely to reflect correctly facts as they exist, no new facts are created and no new entitlement is given retroactively, but when nature of change is such that existing facts must be changed to correct error or remove injustice or new record must be created, Commandant may not make correction without acting through Board, which has authority to correct record to undo what has been done or do what should have been done, and as result of whose action, individual whose records have been corrected becomes entitled to pay or benefits which would have been due him if error or injustice had not occurred and thus to retroactive payment. G-LGL Memo, 3 Oct 79, CGLB, Jun 1980.

11. --Arbitrary and capricious actions, abuse of discretion

Despite fact that decision of Board for Correction of Naval Records is only recommendation to Secretary of Navy who may direct action as he deems appropriate, he may not arbitrarily overrule Board recommendations where findings contained therein are supported by record. *Neal v Secretary of Navy & Commandant of Marine Corps* (1981, CA3 Pa) 639 F2d 1029.

Secretary of Navy did not abuse his discretion in rejecting Board for Correction of Naval Records' finding that procedures used to censure Naval officer violated Naval tradition where Board failed to cite any authority in

its decision upon which to conclude that Secretary's finding was arbitrary, capricious, and abuse of discretion, or unsupported by substantial evidence. *Miller v Lehman* (1986) 255 App DC 278, 801 F2d 492.

In determining whether Secretary has improperly failed to correct alleged error or injustice in action under 10 USCS @ 1552, decision is deemed to be final unless it can be clearly shown to be arbitrary, capricious, in bad faith, unsupported by substantial evidence, or contrary to applicable law or regulation; where Secretary denies relief and does not expressly adopt findings, conclusion and recommendations of Board, he must state grounds for denial, but even if he fails to do so his action will be upheld under the enunciated standard of review if it is supported by record and evidence presented to Board. *Jones v United States* (1985) 7 Cl Ct 673.

On record before correction board, findings of majority were fully warranted and Secretary of Army, without benefit of any additional evidence to contrary, acted without proper authorization, contrary to law, and regulations of War Department, in ignoring those findings and denying plaintiff correction of his military records as recommended by correction board. *Proper v United States* (1957) 139 Ct Cl 511, 154 F Supp 317.

It was arbitrary and capricious for Secretary of Army, acting contrary to Correction Board's recommendation that officer's records be corrected, to deny application for purported reason that at time officer resigned he was fully aware of his physical condition and elected to resign, where all evidence showed that officer was permanently incapacitated for active service at time of his separation from active duty, and where Medical Board and Physical Evaluation Board had so found and Physical Review Council had concurred in that conclusion. *Betts v United States* (1959) 145 Ct Cl 530, 172 F Supp 450.

It cannot be said that Secretary of Armed Service acted arbitrarily in refusing to reconsider his earlier decision not to correct military or naval record as requested where it appears that he considered all circumstances of case and legal and factual grounds for application. *Peterson v United States* (1961) 155 Ct Cl 159, 292 F2d 892.

In action by Army officer to recover additional active duty pay, where Secretary overturns correction board's recommendation favorable to officer and Secretary goes outside record before board as basis for his action and states without any support that findings of board were not justified by record whereas all evidence before board was favorable to officer and upheld board's findings, Secretary has acted arbitrarily; likewise, if Secretary bases his action on policy considerations, his failure to explain what he means renders his action arbitrary. *Hertzog v United States* (1964) 167 Ct Cl 377.

Provisions of 10 USCS @ 1552 confer certain amount of discretion on service Secretary, acting through civilian correction boards, and service Secretary is free to prescribe procedures, with approval of Secretary of Defense, for conduct of business by such board, and service Secretary is free to place limitations on range of cases reviewable by board and to differ with recommendation of board where evidence is susceptible to varying interpretations, but, like board, service Secretary must not act in arbitrary, capricious manner, unsupported by substantial evidence or in violation of law, and actions of both board and service Secretary are subject to judicial reversal for violation of such standards, and to say that 10 USCS @ 1552 confers on correction board or service Secretary such discretion that Court of Appeals cannot review their action when case is properly within its jurisdiction, is contrary to purpose of 10 USCS @ 1552. *Sanders v United States* (1979) 219 Ct Cl 285, 594 F2d 804, later proceeding 221 Ct Cl 988; *Skinner v United States* (1979) 219 Ct Cl 322, 594 F2d 824, later proceeding 221 Ct Cl 987.

Secretary of Navy is authorized to overrule Board for Correction of Naval

Records recommendations, but he must act on either explicitly stated policy reasons or upon evidence presented in record made to Board; Secretary's decision is then final and conclusive, unless upon judicial review it is found to be arbitrary, capricious, in bad faith, unsupported by substantial evidence, or contrary to applicable law or regulations. *Kolesa v Lehman* (1984, ND NY) 597 F Supp 463.

Rejection by Secretary of Navy of Board for Correction of Naval Records recommendation that letter written by former Secretary of Navy censuring retired Marine Corps colonel, who had spent 5 years as prisoner of war in Vietnam, be expunged, constitutes abuse of discretion, where Board had concluded that traditional concepts of fair play and justice were violated by Navy's failure to let colonel defend himself before censure was issued, and where former Secretary of Navy had acted outside his authority when he issued administrative letter of censure. *Miller v Lehman* (1985, DC Dist Col) 603 F Supp 164.

Assistant Secretary (AS) acted arbitrarily and capriciously in denying reinstatement of plaintiff's NOE, which was recommended by BCNR; AS failed to establish that BCNR findings were not supported by record, General Counsel conducted de novo review of record and reached identical conclusions as BCNR, and AS consulted non-uniformed officer in making his decision by having military lawyer review BCNR recommendations before they were presented to AS for decision. *Laningham v United States* (1994) 30 Fed Cl 296, 1994 US Claims LEXIS 1.

12. Undersecretary's actions

Action of Undersecretary of Navy in overruling findings and recommendations of board for correction of naval records on advice of judge advocate general of navy was improper and subject to reversal due to requirement of 10 USCS @ 1552 (a) that service secretary act through civilian boards to correct records. *Weiss v United States* (1969) 187 Ct Cl 1, 408 F2d 416, later proceeding 190 Ct Cl 945.

Authority to overturn decision of AFBCMR involves matter of significance to WhiteHouse, Congress, Air Force, and public, and delegation of Secretary's power to accept or reject Board decision must be made in specific, clearly expressed terms, which was not accomplished by broad, general and ambiguous assignments in instant case. *Moehl v United States* (1993) 29 Fed Cl 249, 1993 US Claims LEXIS 130.

13. Application to civilian employment

Boards created under 10 USCS @ 1552 do not have authority or power to order reinstatement with backpay to civilian position even though such position is connected with and dependent upon status of employee as military reservist. *Roller v Civil Service Com.* (1975) 168 App DC 79, 512 F2d 1319.

II. CORRECTION OF PARTICULAR RECORDS

14. Generally

Board may deny application for correction if it determines that insufficient relevant evidence has been presented to demonstrate existence of probable material error or injustice. *Nolen v Rumsfeld* (1976, CA5 Ga) 535 F2d 888, reh den (CA5 Ga) 540 F2d 1085 and cert den 429 US 1104, 51 L Ed 2d 556, 97 S Ct 1133.

Claims dependent upon constitutional and statutory interpretations are beyond scope of jurisdiction of Boards for Correction of Military Records even though claim also requests reinstatement and backpay. *Glines v Wade* (1978, CA9 Cal) 586 F2d 675, revd on other grounds 444 US 348, 62 L Ed 2d 540, 100 S Ct 594,

on remand (CA9 Cal) 618 F2d 623.

Army Board for correction of military records may, "in the interest of justice," review and correct any military record, no matter how long ago alleged error or injustice occurred. *Geyen v Marsh* (1985, CA5 La) 775 F2d 1303, reh den (CA5 La) 782 F2d 1351.

Under 10 USCS @ 1552, military service Secretaries acting through civilian correction boards, may correct not only facts, but also erroneous legal conclusions embodied in military or naval records and pay claimant whatever is due as result of such correction. *Oleson v United States* (1965) 172 Ct Cl 9.

Denial of petition for correction of AWOL record lacks substantial evidence since facts and circumstances surrounding soldier's disappearance reveal no intention to desert and such facts and circumstances form basis of Virginia decree of death. *Midgett v United States* (1979) 221 Ct Cl 171, 603 F2d 835.

Rejection by Secretary of Navy of Board for Correction of Naval Records recommendation that letter written by former Secretary of Navy censuring retired Marine Corps colonel, who had spent 5 years as prisoner of war in Vietnam, be expunged, constitutes abuse of discretion, where Board had concluded that traditional concepts of fair play and justice were violated by Navy's failure to let colonel defend himself before censure was issued, and where former Secretary of Navy had acted outside his authority when he issued administrative letter of censure. *Miller v Lehman* (1985, DC Dist Col) 603 F Supp 164.

Words "error" and "injustice" do not have limited or technical meaning and to be made basis for remedial action, "error" or "injustice" need not have been caused by service involved. 41 Op Atty Gen 94.

15. Court-martial actions, generally

Serviceman had no legal right to demand that BCMR correct errors in court-martial proceedings not amounting to Constitutional violations. *Flute v United States* (1976) 210 Ct Cl 34, 535 F2d 624.

Reason why Congress created civilian boards for corrections of military records had nothing to do with reviewing actions of courts-martial but was to provide efficient mechanism to correct clerical and administrative errors in records and to stem flood of private bills seeking correction of such errors, but Congressional grant of power in 10 USCS @ 1552 was broad enough to allow boards to correct errors in records resulting from improper court martial action. *Brown v United States* (1973, ED Pa) 365 F Supp 328, affd in part and remanded in part on other grounds (CA3 Pa) 508 F2d 618, cert den 422 US 1027, 45 L Ed 2d 684, 95 S Ct 2621.

Secretary of Air Force has no power to overturn court-martial convictions by "correcting the records", under Military Justice Act (10 USCS @@ 101 et seq.). *Stokes v Orr* (1985, DC Kan) 628 F Supp 1085.

16. --Review of discharge

In action to correct military records regarding dishonorable discharge, where conviction was product of court-martial procedure so fundamentally unfair that upon proper petition Federal District Court at place of incarceration would be obliged to grant writ of habeas corpus, it is as much duty of Secretary of Defense and Army Board for Correction of Military Records as it would be for court to treat as void sentence thus unconstitutionally imposed, and matter of changing type of discharge under 10 USCS @ 1552 involves plain duty to grant relief, enforceable by action in nature of mandamus. *Smith v McNamara* (1968, CA10 Kan) 395 F2d 896, 4 ALR Fed 335, cert den 394 US 934, 22 L Ed 2d 466, 89 S Ct 1211, reh den 394 US 995, 22 L Ed 2d 773, 89 S Ct 1477.

Naval Board for Correction of Military Records erred in refusing to consider whether records of serviceman who received dishonorable discharge following

court martial proceedings in which he was not represented by attorney should be corrected because proceedings were unconstitutional; although Board lacks ability to invalidate or overrule court-martial conviction it has power to remove all traces of individual court martial from record and to change dishonorable discharge into honorable one and fact that serviceman waited 20 years to challenge court martial is easily explained since cases which form basis for challenge have been only recently decided. *Baxter v Claytor* (1981) 209 App DC 188, 652 F2d 181.

Correction of officer's military record to set aside conviction under court-martial as null and void amounts to finding by clear legal implication that original discharge was also null and void. *Hamlin v United States* (1968) 183 Ct Cl 137, 391 F2d 941, later proceeding 185 Ct Cl 805.

10 USCS @ 1552 is applicable to cases involving discharges or dismissals by reason of sentence of general court-martial and authorized issuance of new discharges in lieu of those previously granted. 40 Op Atty Gen 504.

17. --Finality

Provisions of 10 USCS @ 1552 provide exception to finality of court martial proceedings provided by 10 USCS @ 876. *Brown v United States* (1973, ED Pa) 365 F Supp 328, affd in part and remanded in part on other grounds (CA3 Pa) 508 F2d 618, cert den 422 US 1027, 45 L Ed 2d 684, 95 S Ct 2621.

18. Disability pay, generally

Board's decision to use VA rating for disabilities and not to include disability involving kneecaps under rating for knees was not arbitrary or capricious; interpretation of "knee" only to meeting of long bones of lower extremities had been employed for over 20 years and remained unchanged in that time. *Fabing v United States* (1989) 18 Cl Ct 769.

In action for disability pay, Air Force Board for Correction of Military Records must base its conclusion on record before it; abdicating its statutory function and duty to Executive Secretary of Air Force Personnel Council is arbitrary, capricious and contrary to law. *Friedman v United States* (1958) 141 Ct Cl 239, 158 F Supp 364.

In action by former Army officer to recover disability retired pay, officer is entitled to judgment for retired pay denied him in violation of his statutory right to such pay when Secretary of Army arbitrarily, and contrary to recommendation of all civilian boards authorized by Congress to assist him in correcting military records, refused to correct officer's records to show that he was permanently incapacitated for active service at time of his separation and that he was retired from active service by reason of physical disability. *Betts v United States* (1959) 145 Ct Cl 530, 172 F Supp 450.

Board's decision adverse to applicant is supported by substantial evidence, where there is conflicting evidence before Correction Board relative to issue of entitlement to disability retirement of applicant whose release from active duty occurred many years prior to making of application, and where much of evidence negated any claim of incapacity for duty as of time of release. *Merson v United States* (1965) 173 Ct Cl 92, later proceeding 186 Ct Cl 964.

Board for Correction of Military Records does not act arbitrarily in not correcting officer's records, where record supporting application for correction of military record to place applicant on disability retired list shows that upon separation from service applicant insisted he was in good health, gave no information on which contrary opinion might be based, and where his medical records showing several attacks of bronchitis were not available to medical officers examining him and where his condition of bronchial asthma was in state of remission. *Hoffman v United States* (1966) 175 Ct Cl 457, cert den 389 US

843, 19 L Ed 2d 108, 88 S Ct 88.

Defendant, who upon his discharge had been rated as having severe paranoid personality, chronic--rendering him unsuitable for military activity but not legally disabled--was not entitled to correction of military records and pay disability benefits since his discharge; there was substantial evidence for AFBCMR to conclude that Air Force's original diagnosis of paranoid personality was not erroneous. *Black v United States* (1993, Ct Fed Cl) 28 Fed Cl 177, 1993 US Claims LEXIS 26.

ABCMR and military review authorities had no basis to lower formal physical evaluation board's (PEB) rating plaintiff's disability from 30 to 20 percent; formal PEB was level of authority at which decisionmakers had benefit of personal appearance by plaintiff in context of formal hearing and PEB is assigned fact-finding role, and in deciding otherwise ABCMR ignored or misinterpreted governing regulations and statute and acted upon insubstantial evidence, or both, and also failed to offer factual or legal theory to support 20 percent disability determination. *Robbins v United States* (1993) 29 Fed Cl 717, 1993 US Claims LEXIS 144.

19. --Date of disability

In action by Army officer to have his record corrected so as to date his physical incapacity as of date of his original release from active duty, Army Board for Correction of Military Records did not act arbitrarily in refusing to correct record or in declining to give plaintiff hearing, where plaintiff, who was wounded in invasion of Italy, was released from active duty in 1948, not by reason of physical disability, and was subsequently restored to active duty but was subsequently honorably discharged as permanently physically disqualified for general military service in 1951. *Davidheiser v United States* (1957) 139 Ct Cl 152.

Army officer, whom undisputed evidence showed was permanently disabled at time of his resignation, was entitled to correction of record and disability pay. *Betts v United States* (1959) 145 Ct Cl 530, 172 F Supp 450.

Correction Board's refusal to correct former officer's record to show that officer was disabled at time of his release from active duty was not arbitrary, where board has before it records and findings of several medical and retiring boards all of which found that officer was physically qualified for active service at time of his release. *Towell v United States* (1960) 150 Ct Cl 422.

There was substantial evidence to support Board's decision that officer was not incapacitated at time of his release from active duty, where evidence before Correction Board relative to issue of whether officer was disabled and entitled to disability retirement as of time of his release from active duty many years previously, was conflicting, and where much of evidence negated any claim of incapacity for active duty at such time. *Boland v United States* (1965) 169 Ct Cl 145.

20. --Findings of Veterans' Administration

Board's finding that service member was not disabled while in military service was not erroneous, despite VA's subsequent disability decision, since it was based on substantial evidence and VA did not make any specific finding as to service member's fitness for service at time of discharge. *Lyons v United States* (1989) 18 Cl Ct 723.

Finding of disability by Veterans Administration is not controlling on board for correction of military records; such board is under no duty to defer to conclusion of Veterans Administration where evidence has persuaded it to contrary conclusion. *Kearney v United States* (1957) 140 Ct Cl 523, 156 F Supp 928, cert den 360 US 916, 3 L Ed 2d 1533, 79 S Ct 1433.

In action to recover disability retired pay based on combined disability rating of more than 30 percent, on ground that plaintiff's service-incurred disabilities existed at time of his separation from service, where disabilities from which officer was suffering were properly ratable under Veterans Administration Schedule for Rating Disabilities with combined rating of at least 50 percent, Board for Correction of Military Records and Secretary of Air Force acted arbitrarily and on basis of findings of fact not supported by evidence of record. *Frith v United States* (1962) 156 Ct Cl 188.

While Veterans Administration ratings, which are based on average impairment of earning capacity in civilian life resulting from service-connected injuries are proper evidence to be weighed by military, including Correction Board, together with all other evidence in passing on claim for disability retirement pay, military's determination is directed to sole question of whether individual is unfit to perform duties of his office, grade, rank or rating; thus disability compensation rating by Veterans Administration is not determinative of issues involved in disability retirement determination by military. *Bennett v United States* (1973) 200 Ct Cl 635.

BCNR decision awarding plaintiff 10 percent service-connected disability rating and severance pay was not deficient as inconsistent with VA's decision ultimately to award plaintiff 100 percent disability rating since BCNR issued its decision with full knowledge of VA's decision, VA's schedule of rating disabilities is applied differently by Navy and VA, and VA rating decision is not controlling on BCNR's disability rating decision. *Bosch v United States* (1992) 27 Fed Cl 250.

21. Discharge, generally

Claim of discharged enlistee that Army, by discharging him for fraudulently enlisting without divulging prior convictions, breached its enlistment contract with him because recruiter had told him not to include convictions on enlistment forms is reviewable by Army Board for Correction of Military Records; enlistee also has available to him procedures under 10 USCS @ 938 and Army regulation pertaining to equal opportunity program; where enlistee failed to avail himself of any of these remedies, he could not obtain judicial review of administrative discharge. *Muhammad v Secretary of Army* (1985, CA9 Wash) 770 F2d 1494.

Military Correction Board in disability review proceeding cannot supply correct standard for disallowing claim after disability board denied claim reciting admittedly incorrect standard. *Sawyer v United States* (1989) 18 Cl Ct 860.

Secretary of Navy did not act arbitrarily when he approved recommendation of Board of Correction of Naval Records to change records of plaintiff, former warrant officer, from separation by dismissal to separation by honorable discharge, but not its recommendation that plaintiff be re-enlisted and transferred to fleet reserve, whereby he would have been eligible for retired pay. *Peterson v United States* (1961) 155 Ct Cl 159, 292 F2d 892.

Plaintiff, after serving for more than 20 years, was court-martialed and given undesirable discharge from navy military service; subsequently and upon plaintiff's application, character of discharge was changed to general discharge; plaintiff still remained discharged and consequently was not entitled to transfer to fleet reserve, and was not then entitled to retainer pay as member of fleet reserve. *Unger v United States* (1964) 164 Ct Cl 400, 326 F2d 996.

Due process does not require that Discharge Review Boards and Boards for Correction of Military Records expressly follow, distinguish or overrule prior Board decisions when plaintiff seeking upgrade cites prior decision in his application. *Strang v Marsh* (1985, DC RI) 602 F Supp 1565.

Serviceman is not entitled to amendment of notation on discharge under 5 USCS @ 706(2)(A) and 10 USCS @ 1552, where basis for notation of drug abuse was based on urinalysis and citizen's report, because notation has not been shown to be arbitrary or capricious. *Bernstein v United States* (1988, ED Pa) 699 F Supp 484.

Correction of record and issuance of new discharge should have been regarded as act of clemency, or in mitigation, and not as affecting conclusiveness of judgments of courts-martial. 40 Op Atty Gen 504.

22. --Date

Discharge issued to correct previous illegal and void discharge should not be made retroactive to date of original void discharge. *Egan v United States* (1958) 141 Ct Cl 1, 158 F Supp 377.

Plaintiffs whose original discharges are invalidated cannot be legally discharged until date of action correcting illegal or wrongful discharge. *Motto v United States* (1965) 172 Ct Cl 192, 348 F2d 523.

Action of Secretary of Army correcting former officer's record to change his dishonorable discharge to honorable discharge upon application showing that officer's conviction in court-martial had been set aside as null and void, making officer's honorable discharge retroactive to date of his original improper dishonorable discharge is arbitrary, capricious and abuse of discretion. *Hamlin v United States* (1968) 183 Ct Cl 137, 391 F2d 941, later proceeding 185 Ct Cl 805.

Discretionary power granted Secretaries acting through Correction Board by 10 USCS @ 1552 includes power to back date discharge of reserve officer where such back dating places claimant where he likely would have been absent improper discharge. *Denton v United States* (1974) 204 Ct Cl 188, cert den 421 US 963, 44 L Ed 2d 449, 95 S Ct 1949.

23. --Improper proceedings

Review of enlisted man's "Section VIII" or "blue" discharge, granted in 1943 by Discharge Review Board established pursuant to 10 USCS @ 1553, in 1947 and subsequent reconsideration in 1967 after full hearing, together with review in 1968 by Army Board for Correction of Military Records, established pursuant to 10 USCS @ 1552, effectively served to remedy any possible violation of due process which may have been inherent at 1943 discharge proceedings and enlisted man was not entitled to correction of record to reflect discharge under honorable conditions. *Peppers v United States Army* (1973, CA4 SC) 479 F2d 79.

Correction Board's decision not to take corrective action was not arbitrary, capricious, or contrary to law where board determined that noncompliance with discharge regulation requiring input from intermediate commanders prior to final approval of discharge did not entitle serviceman to upgrade of discharge as commander who was final decision maker had fair indication of views of intermediate commanders and had granted serviceman audience prior to making final decision. *Wolfe v Marsh* (1987, App DC) 835 F2d 354.

Assistant Naval Secretary's decision to uphold service member's involuntary discharge was not abuse of discretion even though majority of corrections board recommended that service member be retained on equitable grounds, since Board was unanimous in deciding that discharge was proper and free of legal error and Assistant Secretary specifically adopted reasoning and language of Board's minority opinion which contained detailed explanations and gave service member clear notice of reasons for his discharge. *Crager v United States* (1992) 25 Cl Ct 400.

Board of Corrections of Naval Records may correct military records under 10 USCS @ 1552(a)(1), and its refusal to upgrade service member's discharge from

undesirable discharge to honorable is arbitrary and capricious and case is remanded to Secretary of Navy with instructions to upgrade service member's discharge, where service member received undesirable discharge from U.S. Marine Corps in 1969 in lieu of court-martial, because record demonstrates that service member was not advised of charges against him and that form he was required to sign did not adequately inform him of charges or of rights he was waiving. *Henry v Department of the Navy* (1995, ED Ark) 886 F Supp 686.

Enlisted servicemembers have no constitutional entitlement to remain in service until end of enlistment terms, hence Coast Guard regulations providing for involuntary reduction in force that did not provide for predischarge hearings did not violate such servicemembers' due process rights. *Vierrether v United States* (1992) 27 Fed Cl 357.

24. --Promotion passovers

Promotion passover of reserve warrant officer by improperly constituted selection board having no reserve officers as board members is not void per se; Secretary is within his discretion in appointing relook board to review action of prior selection board. *Jones v Alexander* (1980, CA5 Ga) 609 F2d 778, reh den (CA5 Ga) 613 F2d 314 and cert den 449 US 832, 66 L Ed 2d 37, 101 S Ct 100.

Secretary erred in overruling corrections board since contested OFR contained misstatement of significant hard fact rising to level of legal error, without offending OFR plaintiff had exemplary naval record, hence plaintiff should have received requested relief for discharge for promotion passovers. *Germano v United States* (1992) 26 Cl Ct 1446.

Failure of Air Force Board for Correction of Military Records to remove passovers, which resulted in petitioner's discharge, from petitioner's record was arbitrary and capricious where, over five years after his discharge, Assistant Secretary of Air Force held petitioner's discharge constituted injustice and court found that but for passovers, petitioner would not have been discharged. *Yee v United States* (1975) 206 Ct Cl 388, 512 F2d 1383, later proceeding 210 Ct Cl 752.

Action by Correction Board in failing to void promotion passovers, which passovers were predicated upon faulty and subsequently invalidated officer effectiveness reports, and which passovers ultimately led to discharge of defendant from Air Force, was arbitrary and capricious action, and Court of Appeals will direct that passovers be voided, and that discharged officer be reinstated with full backpay, record purged of improper officer effectiveness reports, and he be reconsidered for promotion. *Sanders v United States* (1979) 219 Ct Cl 285, 594 F2d 804, later proceeding 221 Ct Cl 988; *Skinner v United States* (1979) 219 Ct Cl 322, 594 F2d 824, later proceeding 221 Ct Cl 987.

25. Length of service

Correction of Marine gunnery sergeant's records to show continuous service in Selected Marine Corps Reserves and attendance at sufficient number of drills to earn requisite 50 points to qualify for retirement was within discretionary scope of Board for Correction of Naval Records and reasonable where it was done to correct procedural irregularities of involuntarily transferring sergeant to Independent Ready Reserves. *Ayala v United States* (1988) 16 Cl Ct 1.

Where naval officer who had been hospitalized by Navy orders detaching him from duty received notice of his retirement after he had applied for accumulated leave of almost 4 months, which application was denied on ground that he was already retired, action of Secretary of Navy in refusing correction of record to show that officer continued in active service until expiration of leave was arbitrary and capricious. *Eicks v United States* (1959) 145 Ct Cl 522, 172 F Supp 445.

26. Medical records

Court will find that Board did not act in arbitrary manner in refusing to correct record where it is apparent from record that medical records submitted by applicant for correction failed to establish sufficient basis for such correction. *Kurfess v United States* (1965) 169 Ct Cl 486.

Court will find that Board acted in arbitrary and capricious manner in refusing to correct record, and also that denial of claim to recover disability retired pay was not supported by substantial evidence on record before Board, where it is apparent from record that medical records submitted by applicant for correction clearly establish sufficient basis for such correction. *Lawler v United States* (1965) 169 Ct Cl 644.

Marine corps reserve officer's failure to request that Board for Correction of Naval Records correct his medical records or direct reevaluation thereof precluded court of claims from granting such relief. *Abruzzo v United States* (1975) 206 Ct Cl 731, 513 F2d 608.

To extent document of veteran's exposure to radiation furnished to VA by Air Force was incomplete, veteran must look to Air Force, not VA, for correction of military record. *Lauginiger v Brown* (1993) 4 Vet App 214.

27. Performance evaluations

Where under existing Air Force Regulations appropriate forum for hearing applicant's claim that his failure to be promoted to Major were occasioned by improper entries in his evaluation reports was transferred to different board following applicant's change in status to enlisted man, refusal of Board for Correction of Military Records to hear appeal of matter for failure of applicant to exhaust his administrative remedies was proper and district court could not review matter on grounds that further administrative remedies were unavailable to applicant. *Sherengos v Seamans* (1971, CA4 NC) 449 F2d 333.

Although former army officer appealed to Army Board for Correction of Military Records concerning his first officer efficiency report, but no application for correction of second officer efficiency report was submitted, and it is readily apparent that his discharge was attributable to both reports, exhaustion of remedies prior to challenging discharge would therefore entail request for review of both reports so that officer was foreclosed from bringing action for review for failure to exhaust his intra-service remedies. *Horn v Schlesinger* (1975, CA8 Mo) 514 F2d 549.

Air Force Secretary's decision not to correct retired pilot's military record to reflect pilot's sole credit for having shot down Japanese Admiral's bomber was not arbitrary or capricious and was supported by substantial evidence; Secretary reviewed evidence and concluded that, while evidence of second pilot's role remained equivocal, that pilot was no longer available to make his case, interview with Japanese survivor many years after fact was consistent with two bombers having hit Admiral's plane, and contemporary combat records and later decisions of Victory Credit Board and VC Review Board were entitled to considerable weight, especially after passage of 50 years. *Barber v Widnall* (1996, CA9 Or) 78 F3d 1419, 96 CDOS 1750, 96 Daily Journal DAR 2987.

Army Board committed legal error in failing to correct procedural error by which appellant was barred from reenlisting because of an erroneous enlistment evaluation report placed in his file and the correct one not substituted in its place. *Dodson v United States Gov't, Dep't of Army* (1993, CA FC) 988 F2d 1199, reh den (CA FC) 1993 US App LEXIS 8601.

Ratings and promotions are discretionary matters with which court will continue to be scrupulous not to intervene unless clear error is shown. *Hoffman v United States* (1989, Cl Ct) 16 Cl Ct 406.

Board's failure to remove improper fitness reports from plaintiff's record was harmless where plaintiff did not show that error was material or that it substantially influenced selection board's decision to deny him promotions. *King v United States* (1990) 19 Cl Ct 703.

ABCMR's failure to invalidate officer evaluation report was arbitrary, capricious, unsupported by substantial evidence, and clearly contrary to law, since "superior" adjectival description of officer's performance was inconsistent with derogatory narrative comments and therefore report was in legal error and resulted in injustice as well since OER was in fact "adverse" but not properly characterized as such, thereby depriving officer of right to respond. *Muse v United States* (1990) 21 Cl Ct 592.

To overturn Officer Effectiveness Report, plaintiff must establish that significant hard fact is misstated, or that decision of correction board is so unsupported by evidence as to be gross injustice, or that some clear legal error has occurred; Court of Claims can neither second-guess Army Board for the Correction of Military Records nor question discretionary judgments and evaluations by rater and indorser, nor substitute its judgment for Board's judgment when reasonable minds can reach differing conclusions. *Grieg v United States* (1981) 226 Ct Cl 258, 640 F2d 1261, cert den 455 US 907, 71 L Ed 2d 444, 102 S Ct 1251.

ABCMR, acting under authority of 10 USCS @ 1552, may substitute "non-rated" officer efficiency rating in place of negative officer rating, and court will not compel Board to substitute new subjective rating. *Turner v Department of Army* (1978, DC Dist Col) 447 F Supp 1207, affd without op 193 App DC 218, 593 F2d 1372 and affd without op 193 App DC 218, 593 F2d 1372.

27.5. --Letters of censure

District Court erred in imposing limitations that, first, secretarial censures be nonpunitive in nature, and that they relate to minor offenses, as authority of Secretary of Navy to issue censures is inherent in his office, authority is essential instrument for maintaining discipline and protecting integrity of service, and limitation would render administrative censures meaningless as instruments of military discipline. *Miller v Lehman* (1986) 255 App DC 278, 801 F2d 492.

Secretary of Navy adequately explained finding that Naval officer's censure was not legally erroneous where his decision, although not detailed, revealed conclusions that Secretary had authority to issue censure, Secretary was not required to follow procedures set forth in 10 USCS @ 815, relating to nonjudicial punishments, and Naval officer was not deprived of due process to extent that corrective action was warranted, as all three conclusions were directly supported by legal analysis of officer's claims provided to Board for Correction of Naval Records. *Miller v Lehman* (1986) 255 App DC 278, 801 F2d 492.

28. Prisoner of war or missing in action status

Although plaintiff may maintain action against Secretary of Army for government's failure to change his deceased brother's status from missing in action to prisoner of war, only remedy available is correction of records and payment of benefits which result therefrom. *Dumas v President of United States* (1982, DC Conn) 554 F Supp 10.

29. Rank, generally

It is not within power of either Secretary of Navy or Board for Correction of Naval Records to restore named second lieutenant to his former position of first lieutenant. 41 Op Atty Gen 10.

Naval officer, who had been serving in position under 10 USCS @ 601 for which he was entitled to grade of Admiral, was entitled, upon retirement, to have his excess leave liquidated at grade of Admiral, where Board for Correction of Naval Records had changed officer's military records to show that he had retired on 6/1/92 in rank of Admiral, rather than on 7/1/92, at which time he had reverted to permanent rank of Rear Admiral, due to delay in confirmation of his retirement at rank of Admiral. Admiral Jonathan T. Howe, USN (Retired) (5/9/94) Comp. Gen. Dec. No. B-255792.

30. --Date

Officer who was permitted to resign from Navy in 1948 and in that year was appointed second lieutenant in Regular Army, and whose records were corrected to give him credit for naval service and show his date of rank for all purposes was entitled to pay and allowances from correction date. *Darby v United States* (1959) 146 Ct Cl 211, 173 F Supp 619.

Secretary of Army has authority to extend to named lieutenant colonel rights and privileges that he would have, had he been promoted on April 12, 1946, instead of August 4, 1948, and recommendations of Army Board on Correction of Military Records were adequate for this purpose. 41 Op Atty Gen 71.

31. --Promotion

Under 10 USCS @ 1552, where officer's records are corrected to show his promotions to higher ranks at earlier date and correction also provides that it shall be "for all purposes", officer has become entitled to higher pay from those earlier dates. *Darby v United States* (1959) 146 Ct Cl 211, 173 F Supp 619.

In action for award of backpay, where military selection board passed over officer for promotion on basis of certain officer efficiency reports, and where Board for Correction of Military Records subsequently declared certain of reports void and removed them from officer's records but denied officer's request to set aside his pass over for promotion, court will not review or set aside such discretionary denial of promotion where decision of correction board was not arbitrary, capricious, or unlawful and was supported by substantial evidence. *Dorl v United States* (1973) 200 Ct Cl 626, cert den 414 US 1032, 38 L Ed 2d 323, 94 S Ct 461, reh den 415 US 939, 39 L Ed 2d 498, 94 S Ct 1459.

Army Board for Correction of Military Records is empowered to correct failure by Selection Boards to follow Army regulations; notwithstanding fact that Army major's personnel file as presented to two Selection Boards was constituted in violation of Army regulations, major was not entitled to reconsideration for promotion by those two Selection Boards where ABCMR acted neither arbitrarily nor capriciously in correcting records and denying promotion. *Knehans v Callaway* (1975, DC Dist Col) 403 F Supp 290, affd 184 App DC 420, 566 F2d 312, cert den 435 US 995, 56 L Ed 2d 83, 98 S Ct 1646.

Secretary of Army has authority under 10 USCS @ 1552 to order convening of reconstituted promotion boards where original boards did not include reserve officers, as required by 10 USCS @ 266(a); especially where such course of action was recommended by Army Board for Correction of Military Records. *Whitehead v Alexander* (1977, DC Dist Col) 439 F Supp 910.

Conduct of Air Force Board for correction of military records in filing without action application by individual who had been passed over for promotion seeking that his pass-overs be set aside and that he be promoted was arbitrary and capricious; by failing to consider or address merits of application, Board failed to exercise discretion assigned to it by Congress. *Marcotte v Secretary of Defense* (1985, DC Kan) 618 F Supp 756.

32. Reinstatement to duty

Air Force Board for Correction of Records did not act arbitrarily in denying plaintiff's application for correction of his record to show him reinstated following reversal of his civilian conviction, where airman is given less than honorable discharge following his civilian conviction of second degree rape, and where discharge was carried out in accordance with proper and reasonable Air Force regulation calling for such discharge immediately after conviction and before appeal, particularly where Board stated that on basis of plaintiff's record and his own testimony, it was felt that plaintiff was not fit person for reinstatement not having been truthful or straightforward in his testimony before correction board. *Jackson v United States* (1962) 156 Ct Cl 183, 297 F2d 939, cert dismd 372 US 950, 9 L Ed 2d 976, 83 S Ct 947.

In reviewing serviceman's petition for reinstatement, Board for Correction of Naval Records did not err in failing to make de novo evaluation of petitioner's record or in putting burden of showing propriety of decision upon petitioner since these matters were within discretion of Secretary of Navy who created board. *Neal v Secretary of Navy* (1979, ED Pa) 472 F Supp 763, revd on other grounds (CA3 Pa) 639 F2d 1029.

33. Release from duty, generally

Board for Correction of Military Records has authority to discharge Marine Reservist who claims he enlisted because of false representations made by recruiting sergeant concerning educational opportunities available upon enlistment. *Seepe v Department of Navy* (1975, CA6 Tenn) 518 F2d 760.

34. --Involuntary

Air Force Board of Correction of Military Records erred in denying requested correction of military records of reserve officer involuntarily released from active duty where evidence was uncontroverted that plaintiff had attempted to have missing evaluation reports placed in his record and this evidence was supported by signed letters from his commanding officers and, in conjunction with Board's failure to adequately explain existence of 2 versions of record of proceedings, forced court to conclude that "certified" record provided to plaintiff was deliberately altered with intent to deny plaintiff benefit of knowledge that Board did not consider as valid evidence 2 telephone calls in support of plaintiff's application for correction of records. *Murphy v United States* (1989, Cl Ct) 16 Cl Ct 385.

Reserve officer on active duty in United States Air Force is not entitled to relief under 10 USCS @ 1552 merely because he is being involuntarily released from active duty as result of congressionally-mandated reduction in force. *Dowler v Schlesinger* (1974, DC Md) 384 F Supp 39.

Army members involuntarily separated from but later retroactively restored to active duty by administrative record correction action under authority of 10 USCS @ 1552 thereby become entitled to retroactive payment of military pay and allowances; however, they do not gain entitlement to either reimbursement of legal fees incurred in matter or damages based on tort theory of wrongful separation from active duty; in absence of mutual mistake in numerical computation or similar undisputed error which remains undetected at time of settlement, acceptance of settlement by Army member incident to administrative action taken to correct military records bars pursuit of further claims by member against Government. (1978) 57 Op Comp Gen 554.

Where Army officers involuntarily separated from active duty subsequently obtain records correction to show continuation on active duty, readjustment payments made upon separation under 10 USCS @ 687 (together with payments received for accrued leave on separation and for interim Reserve duty) are

thereby rendered erroneous, and such payments may therefore be considered for waiver under 10 USCS @ 2774. 56 Op Comp Gen 587.

35. Resignation

In action to recover active duty pay and allowances lost as result of plaintiff's having resigned from military service for good of service at time he alleges he was of unsound mind, where medical officers who were in charge of plaintiff for several days before he submitted his resignation filed medical reports and later testified that plaintiff was of sound mind when he submitted such reports, Board for Correction of Military Records and Secretary of Air Force were justified in concluding that plaintiff was competent to submit his resignation. Stampados v United States (1960) 150 Ct Cl 408, later proceeding 8 Cl Ct 684.

36. Retirement, generally

Executrix of estate of retired army officer who could have been retired for disability, but who permitted himself to be retired for age, and who was then recalled to active service and later suffered illness which required his appearance before retirement board, which confirmed fact that he originally could have been retired for disability, was entitled to recover federal income taxes paid on his retirement pay, since earlier refusal of board to change record as to form in which his retirement was cast resulted in grave injustice in depriving him of tax advantage. Prince v United States (1954) 127 Ct Cl 612, 119 F Supp 421, 54-1 USTC P 9264, 45 AFTR 730, later proceeding 128 Ct Cl 776.

Decision of Army Board for Correction of Military Records not to increase petitioner's disability rating to allow for physical disability retirement status was not arbitrary, capricious, or unsupported by substantial evidence where Army complied with all required procedures, and there was insufficient evidence that petitioner suffered from L5/S1 spinal injury at time of his separation for physical disability; mere fact that he subsequently was diagnosed with more severe spinal injury did not make Board's decision erroneous. Slesinski v United States (1995) 34 Fed Cl 159, 1995 US Claims LEXIS 191.

Naval officer, who had been serving in position under 10 USCS @ 601 for which he was entitled to grade of Admiral, was entitled, upon retirement, to have his excess leave liquidated at grade of Admiral, where Board for Correction of Naval Records had changed officer's military records to show that he had retired on 6/1/92 in rank of Admiral, rather than on 7/1/92, at which time he had reverted to permanent rank of Rear Admiral, due to delay in confirmation of his retirement at rank of Admiral. Admiral Jonathan T. Howe, USN (Retired) (5/9/94) Comp. Gen. Dec. No. B-255792.

37. --Date

Secretary of Army, if he determined that such action would remove injustice, is authorized to correct records of deceased noncommissioned officer to note thereon that he should have been ~~considered to have been~~ retired at date earlier than his actual retirement date. 41 Op Atty Gen 94.

38. --Pay

Denial of petitions to retire Navy assistant judges advocate general in higher pay grade than that of captain in which they served was not arbitrary or capricious, since "grade" as used in Title 10 refers to "officer grade" rather than "pay grade". Selman v United States (1983, CA FC) 723 F2d 877, cert den 467 US 1226, 81 L Ed 874, 104 S Ct 2678.

Court of Claims may render judgment for active duty pay and increased retired pay which officer would have received if correction board had recommended

correction of, and Secretary had corrected officer's record and Department of Navy had paid him, where officer's application for military leave to which he was legally entitled as matter of right was erroneously denied him and instead he was retired prior to date on which his leave would have expired so that he was not paid active duty pay he would have received during leave period and received retired pay based on shorter active service than would have been case had he been allowed to continue on active duty for period of his leave. *Eicks v United States* (1959) 145 Ct Cl 522, 172 F Supp 445.

Officer who would have received his promotion to colonel not later than his retirement for disability in 1945 but for fact that his records were lost, was entitled to recover difference between 75 per cent of pay of lieutenant colonel with over 24 years service which he had been receiving, and 75 per cent of pay of colonel with ~~over 24 years~~ of service. *Caddington v United States* (1959) 147 Ct Cl 629, 178 F Supp 604.

39. Veterans' benefits

10 USCS @ 1552 authorizes correction of veteran's military record to show timely filing of application for adjusted service benefits under World War Adjusted Compensation Act, as amended (43 Stat. 121) where dishonorable discharge, subsequently changed to "honorable" to remove injustice, precluded effective, timely, application by veteran. 41 Op Atty Gen 203.

Petitioner who was born in Phillipines, enlisted in U.S. Army when Japanese invaded Phillipines, engaged in gorilla actions Japanese throughout war and assisted U.S. troupes in retaking islands, and was honorably discharged was properly inducted and had status as veteran; board's interpretation of General MacArthur's radio order conferring military status only on those present with unit on date of broadcast, and not to those inducted 15 days later as was petitioner, was arbitrary, capricious and not based on substantial evidence. *Guerrero v Stone* (1992, CA9 Cal) 970 F2d 626, 92 CDOS 6254, 92 Daily Journal DAR 9910.

III. PAYMENT OF CLAIMS

40. Back pay, generally

Value of commissary and exchange privilege, cost of medical insurance, and medical expenses may not be recovered as elements of officer's back pay arising from retroactive adjustment of disability retired status. *Lord v United States* (1983) 2 Cl Ct 749.

In former officer's action for backpay, precipitated by erroneous and negligent confinement of officer, denial of authorized promotion, and release from active duty because of diagnosis of insanity, officer is entitled to pay and allowances differential of two ranks from authorized date of promotion to date of erroneous release from active duty, and may recover active duty pay and allowances of higher rank from date of erroneous release to date of corrections less net earnings from civilian employment during this time. *Egan v United States* (1958) 141 Ct Ct 1, 158 F Supp 377.

Service member discharged for homosexual conduct was not entitled to back pay beyond date when she would have been separated because her enlistment expired but for her discharge; neither Back Pay Act nor provision for correction of military records support claim for service never actually performed. *Barth v United States* (1993) 28 Fed Cl 512, 1993 US Claims LEXIS 60.

41. --Flight pay

In action to recover backpay and allowances, court will not consider flight pay for period of recovery, where former Army officer did not, in fact

statute amended since decision

participate in aerial flight. *Boruski v United States* (1957) 140 Ct Cl 1, 155 F Supp 320.

42. --Pay grade used in computation

Serviceman was entitled to recover difference between officer's pay and private's pay during period for which he sought recovery in his complaint, where (1) Army wrongfully refused to accept withdrawal of plaintiff's resignation from Army as officer, and he was wrongfully separated from Army, (2) he was subsequently reinducted as private in Army and placed on active duty. *Appell v United States* (1955) 130 Ct Cl 688, 128 F Supp 153.

In suit for recovery of backpay and allowances, court will not consider promotions which serviceman allegedly would have received but for wrongful separation in computation of backpay owed by government to serviceman. *Boruski v United States* (1957) 140 Ct Cl 1, 155 F Supp 320.

In action for backpay and allowances, backpay award is computed on basis of captain's pay, where, prior to having been illegally released from active duty, Marine Lieutenant had been given temporary promotion to captain, subject to regulation requiring that he be physically and mentally fit to receive that promotion, and promotion was thereafter wrongfully withheld for erroneous reason that he was mentally ill. *Egan v United States* (1958) 141 Ct Cl 1, 158 F Supp 377.

43. --Time parameters

In suits seeking recovery of backpay and allowances by wrongfully separated serviceman, amount of recovery is to be computed from date of wrongful separation. *United States v Perkins* (1886) 116 US 483, 29 L Ed 700, 6 S Ct 449; *Runkle v United States* (1887) 122 US 543, 30 L Ed 1167, 7 S Ct 1141; *United States v Brown* (1907) 206 US 240, 51 L Ed 1046, 27 S Ct 620.

Officer in volunteer regiment who had been illegally dismissed from Army as result of court-martial which was later discovered to be void, is entitled to recover his pay from date he was dismissed from service until date of final muster-out of his regiment, along with 2 months' extra pay for service outside United States. *United States v Brown* (1907) 206 US 240, 51 L Ed 1046, 27 S Ct 620.

Issuance of honorable discharge in lieu of dishonorable discharge previously issued, accompanied by correction of military record, cannot have effect of erasing former enlisted man's separation from service and entitle serviceman to Army pay beyond date of initial separation. *Goldstein v United States* (1955) 131 Ct Cl 228, 130 F Supp 330, affd 350 US 88, 100 L Ed 782, 76 S Ct 143.

Former Army officer is allowed to recover pay and allowances and other benefits to which he would otherwise would have been entitled, such as payment for accrued leave, from date of execution of his court-martial conviction and sentence, together with dismissal from service, until date on which Judge Advocate General of Air Force vacated sentence and substituted honorable discharge. *Boruski v United States* (1957) 140 Ct Cl 1, 155 F Supp 320.

Enlisted personnel are ordinarily allowed to recover backpay or allowances until date on which their enlistments would normally have expired if they had not been wrongfully discharged, where, having enlisted for definite period of time, they have been wrongfully discharged and have not been given new and valid discharge prior to date for expiration of their respective periods of enlistment. *Murray v United States* (1961) 154 Ct Cl 185; *Conn v United States* (1969) 187 Ct Cl 319, 407 F2d 879.

Wrongfully discharged enlisted person whose enlistment was for indefinite time period is allowed to recover backpay and allowances until date of valid discharge. *Garner v United States* (1963) 161 Ct Cl 73.

Former enlisted man in Navy is entitled to recover active duty pay and allowances from date of his invalid discharge and for unexpired portion of his term of enlistment. *Middleton v United States* (1965) 170 Ct Cl 36.

In cases where fact that former officer's separation from service was unlawful has not been determined until suit in Court of Claims for backpay, and thus, date of serviceman's valid separation has not yet been reached, court has used date of judgment as closing date for period of recovery of backpay and allowances. *Sullivan v United States* (1966) 177 Ct Cl 518; *Augenblick v United States* (1967) 180 Ct Cl 131, 377 F2d 586, revd on other grounds 393 US 348, 21 L Ed 2d 537, 89 S Ct 528, on remand 206 Ct Cl 74, 509 F2d 1157, cert den 422 US 1007, 45 L Ed 2d 669, 95 S Ct 2628.

Executor of estate of illegally discharged former Naval officer is entitled to recover amount equal to pay and allowances of lieutenant on active duty until end of month in which former officer would attain age 62, age at which officer would have been retired had he remained in service. *Gearinger v United States* (1969) 188 Ct Cl 512, 412 F2d 862, 7 ALR Fed 465, later proceeding 190 Ct Cl 943.

Active duty backpay claim settlements under 10 USCS @ 1552 are based on date of member's actual return to duty rather than date of board's determination. (1984) 63 Op Com Gen p 385.

44. Disability pay

10 USCS @ 1552(c) does not authorize payment of interest on disability back pay. *Lord v United States* (1983) 2 Cl Ct 749.

Officer is entitled to recover disability retired pay from date of discharge to date of judgment, where, in course of Correction Board proceeding to determine entitlement to disability retirement with pay, Medical Board, Physical Evaluation Board and Army Physical Review Council all found officer to have been permanently disabled for further military duty as of date of his discharge and record before Correction Board contains no evidence to support contrary conclusion, and refusal to correct officer's military records under such circumstances is arbitrary. *Allin v United States* (1959) 147 Ct Cl 459.

In action for disability retired pay, where officer's records are corrected to show earlier day of promotion, officer is entitled to increased disability pay rate from corrected date of promotion. *Caddington v United States* (1959) 147 Ct Cl 629, 178 F Supp 604.

Plaintiff is entitled to summary judgment for pecuniary benefits wrongfully withheld by Air Force misclassification of "disability retirement pay" as taxable "retirement pay". *Ray v United States* (1972) 197 Ct Cl 1, 453 F2d 754.

Claimant may recover from Air Force those amounts of pay withheld for income taxes, in years for which Internal Revenue Service is barred from making tax refunds by statute of limitations, upon correction of his military records to show portion of taxable retirement pay as tax exempt disability retired pay, but 10 USCS @ 1552 does not authorize payment of excess taxes which claimant paid due to being in higher tax baracket. (1979) 58 Op Comp Gen p. 528.

45. Retired pay

Officer who was eligible for retired pay but has been denied that pay for period after his release from service, his retired pay having been fixed to commence at date some time after his release, may recover retired pay for intervening period. *Hiett v United States* (1955) 131 Ct Cl 585, 130 F Supp 338.

46. Litigation expenses

In suit by wrongfully discharged serviceman for backpay and allowances, deduction of attorney fees and other costs incident to litigation from amount

of interim earnings which government has set off against backpay award, will be allowed only where litigation in which those fees were incurred was necessary to secure discharge serviceman's right to interim earnings, as integral part of duty to mitigate. *Egan v United States* (1958) 141 Ct Cl 1, 158 F Supp 377.

In action for correction of military records regarding court-martial conviction and pay and allowances, plaintiff is not entitled to costs of proceedings before Board for Correction of Naval Records. *Gearinger v United States* (1969) 188 Ct Cl 512, 412 F2d 862, 7 ALR Fed 465, later proceeding 190 Ct Cl 943.

Army members involuntarily separated from but later retroactively restored to active duty by administrative record correction action under authority of 10 USCS @ 1552 thereby become entitled to retroactive payment of military pay and allowances; however, they do not gain entitlement to either reimbursement of legal fees incurred in matter or damages based on tort theory of wrongful separation from active duty; in absence of mutual mistake in numerical computation or similar undisputed error which remains undetected at time of settlement, acceptance of settlement by Army member incident to administrative action taken to correct military records bars pursuit of further claims by member against Government. (1978) 57 Op Comp Gen 554.

47. Set-off in mitigation, generally

Application of plaintiff's interim earnings to reduction of his backpay award represents nothing more than common-law duty which calls upon injured party to exercise reasonable caution in effort to avoid additional injury, and defendant's right to rely upon this duty to mitigate does not depend upon express statutory authorization but is as intricately related to law of contracts as notion of consideration itself. *Middleton v United States* (1966) 175 Ct Cl 786.

Generally, debts resulting from requirements to later collect payments which were proper when made are not considered "arising out of erroneous" payments so as to be subject to waiver consideration under 10 USCS @ 2774; however, Comptroller General will hold differently where record correction pursuant to 10 USCS @ 1552 has retroactively rendered what was originally proper payment, improper. Chief Hospital Corpsman, William R. Brown, USN (Ret.)--Waiver Request (12/17/96) Comp. Gen. Dec. No. B-270349.

48. --Civilian employment

In computing amount of backpay and allowances owed by government to wrongfully separated serviceman, government has right to set off amounts earned by serviceman in civilian employment during period for which backpay claim is to be computed. *Egan v United States* (1958) 141 Ct Cl 1, 158 F Supp 377; *Clackum v United States* (1963) 161 Ct Cl 34; *Garner v United States* (1963) 161 Ct Cl 73; *Middleton v United States* (1966) 175 Ct Cl 786; *Motto v United States* (1966) 175 Ct Cl 862, 360 F2d 643; *Conn v United States* (1967) 180 Ct Cl 120, 376 F2d 878, later app 187 Ct Cl 319, 407 F2d 879; *Biddle v United States* (1968) 186 Ct Cl 87, later proceeding 188 Ct Cl 1169; *Conn v United States* (1969) 187 Ct Cl 319, 407 F2d 879; *Gearinger v United States* (1969) 188 Ct Cl 512, 412 F2d 862, 7 ALR Fed 465, later proceeding 190 Ct Cl 943; *Yee v United States* (1975) 206 Ct Cl 388, 512 F2d 1383, later proceeding 210 Ct Cl 752.

Former enlisted Navy man who had been invalidly discharged, may not deduct from his interim civilian earnings which had been computed by government to offset amount of backpay and allowances, expenses incurred for legal fees and polygraph test in connection with successful petition to Board of Correction of Naval Records, for legal fees in civilian court proceedings in connection with same charge as that resulting in invalid discharge from Navy, and for legal

fees in connection with Court of Claims proceedings, notwithstanding contention that costs and expenses were necessarily incurred by plaintiff in connection with his efforts to rectify injuries sustained by illegal discharge and allowance of such deductions would leave him more nearly in position that he would have been in but for his unlawful discharge. *Middleton v United States* (1966) 175 Ct Cl 786.

In suit to recover backpay because of wrongful separation from service, fact that enlisted personnel on active duty often engage in off-duty civilian employment does not prevent use of set off for monies earned during time serviceman was wrongfully separated. *Conn v United States* (1969) 187 Ct Cl 319, 407 F2d 879.

Settlement regulation deducting from award of back pay due to correction of military service records those civilian earnings accruing during affected period, in effect at time of computation of award, but not in effect during service period involved or at time of order of correction, could not be applied to diminish petitioner's award. *Bates v United States* (1972) 197 Ct Cl 35, 453 F2d 1382.

Army members separated from extended active duty, who thereafter earn military pay and allowances as members of Reserve components, but whose records are corrected to reflect continued active duty with no break in service, are liable to repay such interim Reserve pay and allowances; Army members separated from but later retroactively restored to active duty by administrative record correction action (10 USCS @ 1552) thereby become entitled to retroactive payment of military pay and allowances; and while interim civilian earnings may properly be set off against amounts due members, such civilian earnings are deductible only from net balance due members after setoff of their debts to Government and are not recoupable in excess of that net balance. 56 Op Comp Gen 587.

49. --Military compensation

In computing amount of back pay owed officer in armed forces who has been wrongfully separated, but has subsequently re-entered at nonofficer rank, government can deduct salary earned while serving in lower rank. *Appell v United States* (1955) 130 Ct Cl 688, 128 F Supp 153.

Former member of Women's Army Corps is entitled to recover backpay in amount equal to active duty pay of major from date of her invalid discharge until her retirement, less pay which she received as enlisted person from date of her enlistment until date of her retirement, where she was honorably but invalidly discharged in grade of major, subsequently enlisted as private in Regular Army and continued to serve in enlisted capacity until released for retirement as lieutenant colonel in Reserves. *Biddle v United States* (1968) 186 Ct Cl 87, later proceeding 188 Ct Cl 1169.

50. --Waiver of right

Fact that government did not raise civilian pay set off deduction until damages issue was tried does not result in waiver of that deduction. *Motto v United States* (1966) 175 Ct Cl 862, 360 F2d 643.

Former Army member's acceptance of partial settlement of claim does not preclude maintenance of action to convert discharge to medical retirement where Army assured him in writing it would not bar further relief, and Army is estopped from asserting that release signed by claimant waived rights. *Powell v Marsh* (1983, DC Dist Col) 560 F Supp 636.

Generally, debts resulting from requirements to later collect payments which were proper when made are not considered "arising out of erroneous" payments so as to be subject to waiver consideration under 10 USCS @ 2774; however,

Comptroller General will hold differently where record correction pursuant to 10 USCS @ 1552 has retroactively rendered what was originally proper payment, improper. Chief Hospital Corpsman, William R. Brown, USN (Ret.)--Waiver Request (12/17/96) Comp. Gen. Dec. No.compgen B-270349.

IV. PRACTICE AND PROCEDURE

A. In General

51. Generally

Comptroller General lacks jurisdiction to review correction board's actions to determine whether they are arbitrary, capricious, or not in accordance with law; role of Comptroller General is to see that payments to be made as result of record correction under 10 USCS @ 1552 are made in amounts determined to be due by applying pertinent laws and regulations to facts shown by records as corrected. (1983) 62 Op Comp Gen p 406.

10 USCS @ 1552 is not to be construed as superimposing further means of review, freely available, upon procedures previously set up. 40 Op Atty Gen 504.

52. Due process of law

Contention that BCMR acted in arbitrary and capricious manner when it considered JAG advisory opinion on whether to grant convicted serviceman hearing, without permitting such serviceman to comment, was without merit and did not constitute violation of due process where BCMR's review was not adversary proceeding; fact that BCMR requested legal opinion did not make its ultimate decision to deny hearing any less valid, for board could have denied serviceman hearing without seeking legal advice. *Flute v United States* (1976) 210 Ct Cl 34, 535 F2d 624.

Board for Correction of Naval Records did not violate due process in denying former serviceman's request to have undesirable discharge upgraded to honorable, where serviceman was administratively discharged following conviction in civil court of arson, and Board's decision provides ample explanation of factors considered by Board in reviewing serviceman's record, together with reasons why Board viewed undesirable discharge as appropriate and equitable and declined to exercise discretion to upgrade discharge in absence of showing that material error occurred or injustice had been suffered by serviceman. *Lord v Lehman* (1982, ED Pa) 540 F Supp 125.

Due process does not require that Discharge Review Boards and Boards for Correction of Military Records expressly follow, distinguish or overrule prior Board decisions when plaintiff seeking upgrade cites prior decision in his application. *Strang v Marsh* (1985, DC RI) 602 F Supp 1565.

53. Time to request correction [10 USCS @ 1552(b)]

Air Force Board for Correction of Military Records did not abuse its discretion in refusing to excuse serviceman's failure to file request to correct alleged errors in files pursuant to 10 USCS @ 1552(b) in light of serviceman's dilatory pursuit of matter where he took no action between 1957 and 1969. *Boruski v United States Government* (1974, CA2 NY) 493 F2d 301, cert den and app dismd 419 US 808, 42 L Ed 2d 34, 95 S Ct 20 and cert den 421 US 1013, 44 L Ed 2d 681, 95 S Ct 2419.

Six year time limit contained in 10 USCS @ 1552 is not absolute bar to Naval Board for Correction of Military Records' consideration of untimely challenge since Board is free to waive limit if it finds it to be in interest to justice. *Baxter v Claytor* (1981) 209 App DC 188, 652 F2d 181.

When former servicemember seeks to upgrade discharge, three-year limitation period begins to run from time servicemember exhausts remedies before Army Discharge Review Board, not from date of discharge, in view of regulatory requirement that servicemembers exhaust their remedies with Review Board before they seek redress from the Correction Board. *Ortiz v Secretary of Defense* (1994, App DC) 41 F3d 738.

District court would not assume jurisdiction where possibility existed under 10 USCS @ 1552, 1553 that Discharge Review Board would grant plaintiff a hearing despite lapse of three years from allegedly improper discharge for mental incompetency. *Yonan v Seamans* (1974, ND Ill) 380 F Supp 505.

Air Force widow's case is remanded to Board for Correction of Military Records for ascertainment of when she first learned she was receiving reduced annuity, where her husband's election to reduce annuity must be voided due to Air Force's failure to notify and counsel widow whether her application for correction is timely, because current record lacks facts from which to determine whether application came "within 3 years after discovery of error or injustice" under 10 USCS @ 1552(b). *McFarlane v Secretary of the Air Force* (1994, ED Va) 867 F Supp 405.

54. Right to hearing, generally

No provision is made in 10 USCS @ 1552 for formal hearing at which serviceman or his counsel may be present and procedure is not mandatory, yet civilian board may be called to act in behalf of Secretary in considering matter. *Reed v Franke* (1961, CA4 Va) 297 F2d 17; *Courtney v Secretary of Air Force* (1967, CD Cal) 267 F Supp 305.

Service member discharged for homosexual conduct was entitled to hearing on application for correction of records in view of affidavit of witness recanting her testimony which was only corroborating evidence to allegation that service member was homosexual. *Barth v United States* (1992) 24 Cl Ct 836.

Applicant for correction of military or naval records does not have statutory right to hearing and regulations issued under statute provide that boards are to review applications and supporting evidence to determine whether to grant hearing or to act on application without hearing. *Merson v United States* (1965) 173 Ct Cl 92, later proceeding 186 Ct Cl 964; *Harris v United States* (1966) 177 Ct Cl 538.

Boards for correction of military or naval records are not required to grant hearings to all applicants, but hearing is required only where review of applicant's available military records indicates probable substantial error or injustice or where lower boards differed in their conclusions on material issues, or where procedures of lower boards were so defective as to preclude reliance on their advice. *Newman v United States* (1968) 185 Ct Cl 269.

55. --Appearance of applicant or counsel

Procedure under 10 USCS @ 1552 is not mandatory and, while matter is considered by civilian board acting in behalf of Secretary, there is no specific provision for formal hearing permitting presence of serviceman or his counsel. *Reede v Franke* (1960, ED Va) 187 F Supp 905, affd (CA4 Va) 297 F2d 17.

56. --Denial

Board for Correction of Naval Records, in review of denial of marine's request for reenlistment by Enlisted Performance Board (EPB), did not satisfy its statutory obligation to correct an injustice when it failed to recognize that procedures used by EPB, in not providing marine with summary of evidence considered and in not providing hearing at which he might respond, was so inherently unfair as to taint its decision. *Neal v Secretary of Navy &*

Commandant of Marine Corps (1981, CA3) 639 F2d 1029.

Service member was denied procedural due process by being involuntarily discharged for stated reason of "drug abuse-rehabilitation failure" without being given opportunity to defend himself in some reasonable forum equating to adversarial hearing. *Rogers v United States* (1991) 24 Cl Ct 676.

Army Board for Correction of Military Records acted arbitrarily and capriciously in refusing to grant plaintiff hearing or correct his record, when it acted upon recommendation of office of Surgeon General which had not examined plaintiff, when plaintiff's records indicate that he was permanently incapacitated for general or extended limited duty by reason of severe combat wounds and several years after separation condition had not improved and he sought relief from correction board. *Weiner v United States* (1960) 148 Ct Cl 445.

10 USCS @ 1552, creating boards for correction of military and naval records, does not require that hearing be given to applicants for correction, and regulations issued thereunder provide that boards are to review applications and supporting evidence to determine whether to grant hearing or to act on application without hearing; where, after considering substantial record presented by applicant, Board denies application without oral hearing, and attorney for applicant on requesting oral hearing concedes that he has no further evidence to submit, Board does not act arbitrarily or contrary to law in denying hearing. *Boland v United States* (1965) 169 Ct Cl 145.

10 USCS @ 1552, creating boards for correction of military records, does not require that applicants be given hearing; in absence of clear showing that correction board acted arbitrarily in denying hearing on basis of materials supporting application, Court of Claims will not hold denial of hearing improper. *Kurfess v United States* (1965) 169 Ct Cl 486.

In action by former officer to recover disability retired pay, refusal of correction board to grant hearing on application is arbitrary and capricious where prima facie case of error and injustice has been established by applicant through substantial evidence made of record. *Hoppock v United States* (1966) 176 Ct Cl 1147.

Refusal of Army Board for correction of Military Records to grant veteran hearing on his unsuccessful application for correction of his record to show that he was unfit for active duty at time of discharge is arbitrary and capricious, when Army physical evaluation proceedings had not been provided in contrast to extensive evaluation procedures accorded by Veterans Administration, especially where evidence overwhelmingly shows that plaintiff is entitled to Veterans Administration rating of 60 percent disability at time of application. *Taylor v United States* (1970) 192 Ct Cl 581, later proceeding 193 Ct Cl 1105.

Denial of hearing by Board for Correction of Military Records is arbitrary, capricious and contrary to overwhelming weight of evidence, where Physical Evaluation Board proceedings have not been provided, on contrast to extensive evaluation procedures of Veterans Administration which concluded plaintiff was disabled with ratings of 40 percent to 100 percent. *Brown v United States* (1971) 195 Ct Cl 103, later proceeding 196 Ct Cl 808.

Court of claims will not hold denial of 10 USCS @ 1552 hearing improper where applicant has failed to show, based on documentation supporting applicant, that board acted arbitrarily in denying hearing. *Armstrong v United States* (1974) 205 Ct Cl 754.

57. --Discretion

Under procedures established by Secretaries of Armed Services for their correction boards, boards and Secretaries have discretion to recommend or not further hearings on application for correction; such regulations provide that

hearings will only be granted on production of new evidence and further hearings on application for correction of records are not matters of right but of discretion with boards and Secretaries. Peterson v United States (1961) 155 Ct Cl 159, 292 F2d 892.

Boards for correction of military or naval records have discretion in matter of whether or not to hold hearing on application for correction. Hoffman v United States (1966) 175 Ct Cl 457, cert den 389 US 843, 19 L Ed 2d 108, 88 S Ct 88.

10 USCS @ 1552 and implementing regulations do not require that applicant for correction of his military records be given hearing; matter is left to board's discretion. Armstrong v United States (1974) 205 Ct Cl 754.

58. Evidence considered by Board

Failure of Air Force to prove civilian employee in Department of Air Force was fired for reasons within his control and refusal of Hearing Examiner to allow petitioner to introduce evidence to show he was not fired for reasons within his control require reversal of Hearing Officer's decision supporting firing. Rolles v Civil Service Com. (1975) 168 App DC 79, 512 F2d 1319.

Secretaries of Armed Forces and their boards for correction must base their decisions to correct or not on substantial evidence and they may not act arbitrarily. Knight v United States (1961) 152 Ct Cl 298.

Boards for correction of military or naval records may not rely solely upon medical advisory opinions or recommendations of Surgeon General when none of persons making recommendations has ever examined applicant for correction; this does not mean that boards are precluded from seeking and considering comments of available medical authorities within Government. Merson v United States (1965) 173 Ct Cl 92, later proceeding 186 Ct Cl 964.

Action of Board for Correction of Naval Records was not arbitrary or capricious in refusing to consider as material evidence certain reports of special physical examinations provided by plaintiff which he claims warrant finding that he was unfit to perform duties of his grade because of physical disability, where conclusions set forth in reports are erroneous and are unsupportable in record. Bennett v United States (1973) 200 Ct Cl 635.

Board for Correction of Military Records considering serviceman's application for correction of his record to show he was disabled and entitled to disability retirement pay at time of his discharge, may properly consider evidence of his medical history following his separation, as such evidence may be highly pertinent to Board's inquiry. Jordan v United States (1974) 205 Ct Cl 65.

Board's failure to consider evidence leading to state decree of soldier's death vitiates administrative presumption of desertion based on 29 consecutive days of absence without leave since such decree, whether accorded full faith in credit or simply treated as findings of fact for consideration, established facts which Army failed to rebut. Midgett v United States (1979) 221 Ct Cl 171, 603 F2d 835.

Arbitrary and capricious finding of desertion by ABCMR leading to AWOL classification and discharge from Army was to be replaced by entry of death in records where Board failed to consider decree of death from civil court as well as fact of decedent's disappearance at time and place of wartime hostilities. Midgett v United States (1979) 221 Ct Cl 171, 603 F2d 835.

Failure of selection board to consider highly favorable officer effectiveness report in promotional review denies serviceman consideration on fair and equitable basis required under 10 USCS @ 3442. Guy v United States (1979) 221 Ct Cl 427, 608 F2d 867, later proceeding 223 Ct Cl 795.

In reviewing serviceman's petition for reinstatement, Board for Correction of Naval Records did not err in failing to make de novo evaluation of

petitioner's record or in putting burden of showing propriety of decision upon petitioner since these matters were within discretion of Secretary of Navy who created board. *Neal v Secretary of Navy* (1979, ED Pa) 472 F Supp 763, revd on other grounds (CA3 Pa) 639 F2d 1029.

Board did not, in considering that major requesting removal of Article 15 punishment from records had taken polygraph test in attempt to show punishment was improper, impermissibly consider polygraph results as evidence, where test was requested and paid for by major. *Moore v Marsh* (1983, DC Dist Col) 568 F Supp 785.

B. Judicial Review

1. In General

59. Generally

Ex-serviceman may attempt to get relief in Court of Claims under 28 USCS @ 1491 if he is unsuccessful or dissatisfied with result of 10 USCS @ 1552 remedy. *United States v Augenblick* (1969) 393 US 348, 21 L Ed 2d 537, 89 S Ct 528, on remand 206 Ct Cl 74, 509 F2d 1157, cert den 422 US 1007, 45 L Ed 2d 669, 95 S Ct 2628.

Federal court may review and correct administrative action under 10 USCS @ 1552, where it is alleged and proved that discharge which Department refused to change was itself illegal. *Ashe v McNamara* (1965, CA1 Mass) 355 F2d 277.

Otherwise proper judicial review of department action upon petition to change type of military discharge is not precluded by 10 USCS @ 1552, which makes corrections of military records by Secretary of Defense final and conclusive on all officers of United States. *Smith v McNamara* (1968, CA10 Kan) 395 F2d 896, 4 ALR Fed 335, cert den 394 US 934, 22 L Ed 2d 466, 89 S Ct 1211, reh den 394 US 995, 22 L Ed 2d 773, 89 S Ct 1477.

Correction Board's determination that procedural defect did not prejudice member, and thus does not require it to correct error or remove injustice will be overturned only if such determination is arbitrary, capricious, or contrary to law. *Wolfe v Marsh* (1987, App DC) 835 F2d 354.

Actions of correction boards established under 10 USCS @ 1552, or of Secretary of service concerned under @ 1552, are reviewable in Court of Claims under former 5 USCS @ 1009 [now 5 USCS @ 555]. *Hertzog v United States* (1964) 167 Ct Cl 377.

Widow and child challenging correctness in military record of armed service member who died while in service do not have right under @ 1552 to dictate contents of military record, at best they are entitled to consideration by Army Board of Corrections of Military Records of whether military record is incorrect, if ABCMR did not consider allegations of incorrectness then right created under @ 1552 has not been provided but this does not mean they are entitled to de novo determination as to corrections of record nor are they entitled to correcting action by ABCMR because they state record is incorrect, rather right is to a review of ABCMR's action under test of whether ABCMR's action was arbitrary or capricious. *Moore v Secretary of Army* (1986, DC Conn) 627 F Supp 1538.

Pro se complaint by former serviceman seeking to amend his military records is dismissed without prejudice, where serviceman seeks expungement of charge sheet reflecting charges for disrespect, assault, and willful disobedience of superior officer, because serviceman must resort to records correction board remedy under 10 USCS @ 1552 before attempting amendment of his military records under 5 USCS @ 552(a). *Doe v Department of Navy* (1991, ND Ind) 764 F Supp 1324.

Judicial review of military action with respect to type of discharge given

member of Armed Forces. 92 ALR Fed 333.

60. Scope and standard of review

No judicial relief from action of Army Board for Correction of Military Records is available in absence of showing that action was arbitrary or capricious or unsupported by substantial evidence. *Sanford v United States* (1968 CA9 Wash) 399 F2d 693; *Baker v Schlesinger* (1975, CA6 Ohio) 523 F2d 1031, cert den 424 US 972, 47 L Ed 2d 741, 96 S Ct 1473, reh den 425 US 966, 48 L Ed 2d 211, 96 S Ct 1752.

Court review of decision of discharge from military may be invoked under 28 USCS @ 1361 only where there is allegation of deprivation of constitutional right, or allegation that military has acted in violation of applicable statutes or its own regulations, and where petitioner has exhausted available intraservice remedies. *Mindes v Seaman* (1971, CA5 Fla) 453 F2d 197, later app (CA5 Fla) 501 F2d 175 (disagreed with *Dillard v Brown* (CA3 NJ) 652 F2d 316 (disagreed with *Lindenau v Alexander* (CA10 NM) 663 F2d 68) and (disagreed with *Nieszner v Mark* (CA8 Minn) 684 F2d 562, 29 CCH EPD P 32923, cert den 460 US 1022, 75 L Ed 2d 494, 103 S Ct 1273, 32 CCH EPD P 33714) and (disagreed with *Khalsa v Weinberger* (CA9 Cal) 759 F2d 1411, amd (CA9 Cal) 779 F2d 1393)).

Action of Army Board for Correction of Military Records is subject to judicial reversal if it is arbitrary, capricious, unsupported by substantial evidence or erroneous in law, and, although Secretary of Army is authorized in proper case to overrule said Board's recommendations, he cannot do so arbitrarily, but must act on either explicitly stated policy reasons, or on evidence presented in record made to said Board. *Horn v Schlesinger* (1975, CA8 Mo) 514 F2d 549.

In deciding whether to grant review, sufficiency of allegations in complaint is balanced against policies contravening review; factors balanced are: source and weight of serviceman's challenge, injury to serviceman if review is denied, amount of interference with military matters if review were granted, and degree to which military expertise and discretion are involved in decision. *Johnson v Reed* (1980, CA5 Tex) 609 F2d 784.

Relief from decision of Board for Correction of Naval Records denying discharge for alleged breach of enlistment contract will not be granted, notwithstanding plaintiff was wrongly advised and accepted enlistment other than type desired, where his records were eventually corrected to grant him enlistment of type he applied for, excepting participation in special program of limited benefits, since breach was not material and decision of BCNR was not arbitrary or capricious or contrary to law. *Ferrell v Secretary of Defense* (1981, CA5 Tex) 662 F2d 1179.

Where court has before it civil rights claim based on board proceedings, rather than direct review of board's disposition of request for correction of records, District Court should not have given preclusive effect to board's decision since procedures were more investigative than judicial and claimant was denied opportunity for full hearing. *Jorden v National Guard Bureau* (1989, CA3 Pa) 877 F2d 245.

District Court erred in concluding that findings of Board for Correction of Naval Records were binding on Secretary of Navy unless shown to be unsupported by substantial evidence, as substantial evidence standard applies only to judicial review of final agency actions, which, in context of applications for correction of military records, means review of decisions by Secretary. *Miller v Lehman* (1986) 255 App DC 278, 801 F2d 492.

Secretary's decision to correct error or remove injustice is reviewable, albeit by unusual or deferential application of arbitrary or capricious standard; Secretary must give reason that court can measure. *Kreis v*

Secretary of Air Force (1989, App DC) 866 F2d 1508.

In determining whether Secretary has improperly failed to correct alleged error or injustice in action under 10 USCS @ 1552, decision is deemed to be final unless it can be clearly shown to be arbitrary, capricious, in bad faith, unsupported by substantial evidence, or contrary to applicable law or regulation; where Secretary denies relief and does not expressly adopt findings, conclusion and recommendations of Board, he must state grounds for denial, but even if he fails to do so his action will be upheld under the enunciated standard of review if it is supported by record and evidence presented to Board. *Jones v United States* (1985) 7 Cl Ct 673.

In entertaining claim for disability retired pay which military service has denied plaintiff, function of court is to review adverse military board action to determine whether it is arbitrary, capricious or not supported by substantial evidence; court will not substitute its judgment for that of military board and plaintiff has burden of proving to court by clearly convincing proof that action of board or Secretary is arbitrary or capricious. *Newman v United States* (1968) 185 Ct Cl 269.

Court of Claims will not reverse finding by Secretary of military service concerned, or by correction board, that person was physically fit for military service when released from inactive duty in absence of clear and convincing evidence of arbitrary or capricious action or lack of substantial support in record, or that there has been some violation of applicable law or regulation. *Unterberg v United States* (1969) 188 Ct Cl 994, 412 F2d 1341.

Administrative determinations of desertion generate stigma not unlike that created by dishonorable discharge, and thereby merit strict scrutiny of reviewing court; enforcement of evidentiary rules that initiate administrative presumption of desertion does not alter regulatory or administrative procedures providing for administrative determination of desertion and merely reaffirms rule that presumption based on administrative convenience can be rebutted by presentation of contradictory facts and can require party relying on presumption to come forward with facts. *Midgett v United States* (1979) 221 Ct Cl 171, 603 F2d 835.

In reviewing decision of Correction Board, court considers whether such decision was arbitrary, capricious, unsupported by substantial evidence, contrary to law, regulation, or mandatory public procedure of substantive nature which prejudices plaintiff, or made in bad faith. *Midgett v United States* (1979) 221 Ct Cl 171, 603 F2d 835.

Conclusory opinion of correction board which merely catalogs contentions considered by board and does not explain how material and arguments presented were weighed and appraised is given less deference than reasoned explication of rationale for decision. *Hary v United States* (1980) 223 Ct Cl 10, 618 F2d 704.

To overturn Officer Effectiveness Report, plaintiff must establish that significant hard fact is misstated, or that decision of correction board is so unsupported by evidence as to be gross injustice, or that some clear legal error has occurred; Court of Claims can neither second-guess Army Board for the Correction of Military Records nor question discretionary judgments and evaluations by rater and indorser, nor substitute its judgment for Board's judgment when reasonable minds could reach differing conclusions. *Grieg v United States* (1981) 226 Ct Cl 258, 640 F2d 1261, cert den 455 US 907, 71 L Ed 2d 444, 102 S Ct 1251.

Consistent with 10 USCS @@ 1552, 1553, where discharge action has been considered by appropriate Armed Forces Correction or Review Board, proper Court function is to conduct limited judicial review on basis of certified military records, in other words, Court may not substitute its judgment for that of administrative officers, but may only review record to insure that pertinent

laws and regulations were followed. *Amato v Chafee* (1972, DC Dist Col) 337 F Supp 1214.

Secretary of Navy is authorized to overrule Board for Correction of Naval Records recommendations, but he must act on either explicitly stated policy reasons or upon evidence presented in record made to Board; Secretary's decision is then final and conclusive, unless upon judicial review it is found to be arbitrary, capricious, in bad faith, unsupported by substantial evidence, or contrary to applicable law or regulations. *Kolesa v Lehman* (1984, ND NY) 597 F Supp 463.

Army major's claims of violation of due process and Army Regulations stemming from major's discharge for misrepresenting his qualifications as military pilot in endeavoring to obtain commercial pilot's license from Federal Aviation Administration and for conduct unbecoming officer, are appropriate for review by district court, since major's claim is substantial one, denial of relief would result in substantial harm to major, amount of interference with military matters upon granting of relief would be minimal, and matter does not involve any military expertise. *Wronke v Marsh* (1985, CD Ill) 603 F Supp 407, transf to (CA7 Ill) 767 F2d 354.

District Court's review of decision of Army Board for Correction of Military Records' decision ordering Medical Corps physician hospitalized for psychiatric evaluation is governed by arbitrary and capricious standard. *Benvenuti v Department of Defense* (1985, DC Dist Col) 613 F Supp 308.

Proceedings of Board of Corrections of Naval Records are subject to judicial review and can be overturned if they are arbitrary, capricious, or not based on substantial evidence. *Ayala v United States* (1985, SD NY) 624 F Supp 259.

Proceedings of Board of Corrections of Naval Records are subject to judicial review and can be overturned if they are arbitrary, capricious, or not based on substantial evidence. *Ayala v United States* (1985, SD NY) 624 F Supp 259.

Decision of Secretary of Navy's delegate not to delete from official record of Navy seaman documents indicating positive random drug test for LSD will not be disturbed, where it is undisputed that (1) random test was positive, (2) there were no defects in testing procedure, (3) seaman has offered no explanation for how LSD came into his system but denies ingesting it, and (4) his record of service is otherwise exemplary, because decision was based on balancing of considerations and was not arbitrary and capricious. *Daleandro v Dalton* (1996, DC Dist Col) 948 F Supp 95.

61. Evidence considered by Court

Procedures of Enlisted Performance Board and Board for Correction of Naval Records conformed to applicable regulations where Marine Corps separation and retirement manual standards were followed in recommending against reenlistment of marine, and satisfactory explanation was provided by Board in refusing to correct marine's record. *Neal v Secretary of Navy & Commandant of Marine Corps* (1981, CA3 Pa) 639 F2d 1029.

In review of military pay claims, court may rely on administrative record for its investigatory, nonadversary information. *Poe v United States* (1984) 7 Cl Ct 40.

In support of his claim that he was singled out for unreasonable number of urinalysis tests, appellant was permitted to introduce affidavit of urinalysis records custodian not previously available since it established that additional records of test results not reported through FOIA request were beyond his control and if available would substantiate appellant's claim that he was targeted for unreasonable number of urine tests. *Henson v United States* (1991) 24 Cl Ct 786.

Adverse decision of board for correction of military or naval records is

not entitled to finality or even protection, on court review, of substantial evidence rule, where decision of board is based on opinions and recommendations by military boards which indulged in defective procedures in connection with applicant's claim for disability retirement. *Harris v United States* (1966) 177 Ct Cl 538.

While Court of Claims may hold trial on claims for military pay which have been previously heard by military or other board, where plaintiff does not present additional evidence to support his claim but only unsupported statements, court is free to dispose of case on existing administrative record by way of dispositive motion. *Esgate v United States* (1968) 186 Ct Cl 207, cert den 395 US 913, 23 L Ed 2d 226, 89 S Ct 1759.

While Veterans Administration's determination of degree of disability is not conclusive upon Court of Claims, results of medical examination given by VA only 3 months after serviceman's discharge not by reason of physical disability are entitled to considerable weight in Court's review of Correction Board's action in denying plaintiff's request for correction of his records to show retirement for physical disability. *Jordan v United States* (1974) 205 Ct Cl 65.

62. Issues considered

Petitioner who sought habeas corpus action for discharge based upon conscientious objector status initiated this action to prevent army from shipping him to Vietnam; in such case, motion for injunction pending appeal will be decided on merits of case rather than on procedural question which forms basis of this appeal. *McKenzie v Schuppener* (1969, CA5 Ala) 415 F2d 1056.

Army Board for Correction of Military Records' determination whether to waive three-year limitations period for applications for upgrades of discharge classifications in "interest of justice" is subject to judicial review; neither statutory language nor scheme in which it is embedded provide persuasive reason to believe that Congress intended that waiver determinations be committed solely to agency discretion. *Dickson v Secretary of Defense* (1995, App DC) 68 F3d 1396.

Court must examine actions of prosecutor, not reactions of accused, in determining claim of actual prosecutorial vindictiveness. *Martinez v United States* (1989) 18 Cl Ct 559.

Court of Claims is at liberty to hold trial on claims for military pay which have been heard previously by military board such as correction board or physical evaluation board, and need not limit its consideration of issues of arbitrariness or lack of substantial evidence supporting particular board's decision to record which was before that board. *Brown v United States* (1968) 184 Ct Cl 501, 396 F2d 989.

Marine was properly discharged under other than honorable conditions as result of his admitting commission of sexual acts on his 2 daughters and son, all under age of 16, where military procedures were followed and regulations provided options of separation from service or rehabilitation, because final decision not to forego discharge and offer treatment through family advocacy program as necessary "to remove injustice" under 10 USCS @ 1552 was not arbitrary or capricious. *Sibley v Ball* (1990, DC Mass) 739 F Supp 705.

63. Presumptions

There was substantial evidence in record to support Board's conclusion that plaintiff's third-party evidence simply did not overcome presumption of regularity attached to actions of rating officials. *Paskert v United States* (1990) 20 Cl Ct 65.

Presumption favors validity of official military acts and absent contrary evidence it is presumed that military correction board and military personnel whom it is board's function to correct, perform their functions properly,

considering all pertinent records relating to subject military person.
 Armstrong v United States (1974) 205 Ct Cl 754.

64. Burden of proof

When administrative body refuses to excise contested portion of record serviceman must rebut presumption of proper action by board with clear and convincing evidence; however, in determining propriety of promotion passover, burden is upon particular service to show by substantial evidence that it was unlikely that officer would have been promoted in any event. Johnson v Reed (1980, CA5 Tex) 609 F2d 784.

In entertaining claim for disability retired pay which military service has denied plaintiff, function of court is to review adverse military board action to determine whether it is arbitrary, capricious or not supported by substantial evidence; court will not substitute its judgment for that of military board and plaintiff has burden of proving to court by clearly convincing proof that action of board or Secretary is arbitrary or capricious. Newman v United States (1968) 185 Ct Cl 269.

To overturn Officer Effectiveness Report, plaintiff must establish that significant hard fact is misstated, or that decision is so unsupported by evidence as to be gross injustice, or that clear legal error has occurred. Grieg v United States (1981) 226 Ct Cl 258, 640 F2d 1261, cert den 455 US 907, 71 L Ed 2d 444, 102 S Ct 1251.

65. Miscellaneous

There is no per se rule that all military duty assignments are unreviewable. Wallace v Chappell (1981, CA9 Cal) 661 F2d 729, 34 BNA FEP Cas 1840, 27 CCH EPD P 32293, revd on other grounds 462 US 296, 76 L Ed 2d 586, 103 S Ct 2362, 34 BNA FEP Cas 1846, 32 CCH EPD P 33651.

A former serviceman's action to have honorable discharge changed to medical disability discharge or, in alternative, that he be given all pay and benefits he would have earned as reservist through date on which he was erroneously retired through actual retirement was barred when he signed general settlement release and accepted more than \$ 15,000 from government on claim presented to Army Board for Correction of Military Records. Hazan v United States (1987) 13 Cl Ct 66.

Plaintiff in military pay case was not entitled to have records sealed merely because of alleged threat of embarrassment and private harm where precise data sought to be protected was voluntarily made part of public record by plaintiff over one year before motion to seal records. Black v United States (1991) 24 Cl Ct 461, 19 Media L R 1599, class certif den 24 Cl Ct 471.

2. Jurisdiction

66. Claims Court, generally

Court of Federal Claims had exclusive jurisdiction of former servicemember's action seeking correction of his military records to reflect that he received disability discharge rather than honorable discharge from active duty, and to provide him with accounting of disability retirement pay he would have been entitled to had he received disability discharge; even though he did not seek monetary relief, it was clear that his prime objective was to obtain benefits exceeding \$ 10,000 in form of retired pay, VA disability benefits, or combination of both. Burkins v United States (1997, CA10 Colo) 112 F3d 444.

Claims Court has jurisdiction to review decision under 10 USCS @ 1552. Selman v United States (1983, CA FC) 723 F2d 877, cert den 467 US 1226, 81 L Ed 2d 874, 104 S Ct 2678.

Neither 10 USCS @ 1552 nor 37 USCS @ 206 mandate pay for service never actually performed by member of Air National Guard of U.S. so as to give Claims Court Tucker Act jurisdiction of complaint seeking pay for constructive service added to service member's record by corrections board. *Dehne v United States* (1992, CA FC) 970 F2d 890.

Claims Court has jurisdiction to review actions of military correction boards and service secretaries, especially where such actions have monetary consequences. *Jones v United States* (1985) 7 Cl Ct 673.

Court of Claims has jurisdiction to review adverse decision by board for correction of military records which is made arbitrarily, capriciously or contrary to law. *Friedman v United States* (1958) 141 Ct Cl 239, 158 F Supp 364.

1968 decision of Board for Correction of Military Records voiding demotion in 1944 of Air Force officer who was released from active duty in 1945, in which proceedings officer sought only adjustment of rank and voiding of his demotion, cannot be used as springboard to obtain jurisdiction in Court of Claims by petition filed in 1969 seeking relief which he explicitly disowned administratively, i.e., change in his active duty release date to later date and active duty up to that date. *De Bow v United States* (1970) 193 Ct Cl 499, 434 F2d 1333, cert den 404 US 846, 30 L Ed 2d 84, 92 S Ct 150.

Favorable determination of Board for Correction of Military Records may not be used as springboard to obtain relief which claimant never sought from it, explicitly or implicitly, and which he now asserts in Court of Claims; nor can claimant avoid usual limitations bar by contending that Board acted arbitrarily or illegally by failing to approve claim. *Denton v United States* (1974) 204 Ct Cl 188, cert den 421 US 963, 44 L Ed 2d 449, 95 S Ct 1949.

Court has jurisdiction to review question of soldier's status as necessary, though incidental, element of money claim. *Midgett v United States* (1979) 221 Ct Cl 171, 603 F2d 835.

Court of Claims lacks authority over military absent violation of statute or regulation or abuse of discretion amounting to legal error. *Curry v United States* (1979) 221 Ct Cl 741, 609 F2d 980.

Action by former Puerto Rico National Guard officer seeking declaratory and injunctive relief and mandamus on ground that his discharge from National Guard was without due process will be dismissed where plaintiff has failed to exhaust available intraservice remedy in form of application, pursuant to 10 USCS @ 1552, with Army Board for Correction of Military Records seeking relief from decision of Selective Retention Board. *Navas v Gonzalez Vales* (1984, DC Puerto Rico) 592 F Supp 757, affd (CA1 Puerto Rico) 752 F2d 765.

10 USCS @ 1552 is not pay-mandating or money-mandating statute; Court of Federal Claims has jurisdiction thereunder if Secretary makes correction to military records and then fails to pay plaintiff relief that has become due as result of correction. *Ewing v United States* (1996) 36 Fed Cl 159.

10 USCS @ 1552(c), which provides that secretary may pay claimant if, as result of correcting military records, money is found to be due to claimant, does not create monetary entitlement that would allow claimant to obtain jurisdiction in Court of Federal Claims. *Hernandez v United States* (1997) 38 Fed Cl 532.

67. --Actions for pay

In review of military pay claims, court may rely on administrative record for its investigatory, nonadversary information. *Poe v United States* (1984) 7 Cl Ct 40.

There simply is no entitlement in wording of statute to retroactive promotion and attendant backpay where both Secretary and Corrections Board declined to award promotion; fact that correction board may exercise whatever secretarial

power exists to award promotions does not mean Claims Court can do same. *Law v United States* (1992) 26 Cl Ct 382.

Court of Claims has jurisdiction of disability pay cases only where Army boards and Secretary of War have acted arbitrarily or capriciously or otherwise unlawfully. *Furlong v United States* (1957) 138 Ct Cl 843, 152 F Supp 238.

While Court of Claims cannot compel alteration or correction of official military record, it does have jurisdiction to render judgment for pay or other compensation lost by member of military service through arbitrary refusal of Secretary of particular department or correction board to correct member's military record. *Eicks v United States* (1959) 145 Ct Cl 522, 172 F Supp 445.

Court of Claims has no authority to appoint persons to public office, and thus where Army officer resigns his commission because of heart condition which Army officials erroneously advised him was not ground for disability retirement, court cannot restore his commission or place him on retired list of disabled officers, but Court of Claims can award him money judgment for retired pay which he would have received if Secretary of Army had corrected officer's record and placed him on such retired list. *Betts v United States* (1959) 145 Ct Cl 530, 172 F Supp 450.

Court of Claims has jurisdiction to render judgment for pay or other compensation lost by member of military service through arbitrary refusal of Secretary of particular service to correct member's military record. *Weiss v United States* (1969) 187 Ct Cl 1, 408 F2d 416, later proceeding 190 Ct Cl 945.

Discharged inactive reservist failed to state claim for relief for correction of records and back pay since amount of any payment would be determined by basic pay provision of 37 USCS @ 206, but reservist was not entitled to compensation under that statute because he did not perform actual duties and his non-performance did not arise out of injury, illness, or disease. *Sanford v United States* (1994) 32 Fed Cl 363, 1994 US Claims LEXIS 217.

68. --Status of plaintiff

In suits to recover civil service or military pay arising under acts of Congress or regulations of executive departments, lack of status (military or civilian) of plaintiff is usually one of consequences of illegal action of government and, accordingly, such lack of status during period of claim does not deprive court of jurisdiction. *Diamond v United States* (1965) 170 Ct Cl 166, 344 F2d 703.

69. District Court

Federal District Courts have jurisdiction in action for mandamus pursuant to 28 USCS @ 1361 to review decisions by correction Boards established under 10 USCS @ 1552, including those which involve actions by courts-martial as Congress specifically relieved Correction Board from finality provision of Article 76, 10 USCS @ 876, and federal courts have jurisdiction to set aside arbitrary and capricious refusal by Board of exercise its power. *Ragoni v United States* (1970, CA3 NJ) 424 F2d 261.

Military board's action was not arbitrary or capricious, and District Court summary judgment affirming said action for lack of subject matter jurisdiction in declaratory judgment action was proper, where only "coercion" board subjected petitioner to was legitimate choice between facing court martial for fraudulent enlistment or accepting less-than-honorable discharge. *Haines v United States* (1971, CA3 NJ) 453 F2d 233.

Federal District Court had jurisdiction of action by former officer for declaratory judgment that he had right to be placed upon Air Force permanent retired list rather than being separated from service, although he had not sought relief from Air Force Board for Correction of Military Records. *Ogden*

v Zuckert (1961) 111 App DC 398, 298 F2d 312.

District Court would not assume jurisdiction where possibility existed under 10 USCS @@ 1552, 1553 that Discharge Review Board would grant plaintiff hearing despite lapse of 3 years from allegedly improper discharge for mental incompetency. Yonan v Seamans (1974, ND Ill) 380 F Supp 505.

Army major's claims of violation of due process and Army Regulations stemming from major's discharge for misrepresenting his qualifications as military pilot in endeavoring to obtain commercial pilot's license from Federal Aviation Administration and for conduct unbecoming officer, are appropriate for review by district court, since major's claim is substantial one, denial of relief would result in substantial harm to major, amount of interference with military matters upon granting of relief would be minimal, and matter does not involve any military expertise. Wronke v Marsh (1985, CD Ill) 603 F Supp 407.

70. Court of Appeals

Appeals from District Court judgment awarding back pay not exceeding \$ 10,000 lie with Court of Appeals for federal circuit in view of 28 USCS @ 1631. Van Drasek v Lehman (1985) 246 App DC 86, 762 F2d 1065.

3. Particular Remedies

71. Injunctive and declaratory relief

Person who has not exhausted his administrative remedies is not entitled to injunctive relief from refusal of Air Force Board for Correction of Military Records to consider his application to correct certain entries in his evaluation reports. Sherengos v Seamans (1971, CA4 NC) 449 F2d 333.

District Court acted improperly in exercising jurisdiction over selective retention board's decision separating Colonel from West Virginia Army National Guard, and court's issuance of preliminary injunction against decision on basis of composition of board was improper, where Colonel had not exhausted his available intraservice remedies by appealing separation decision under @ 1552. Williams v Wilson (1985, CA4 W Va) 762 F2d 357.

Court of Claims does not have authority to grant injunctive or declaratory relief. Curry v United States (1979) 221 Ct Cl 741, 609 F2d 980.

Petitioner whose condition was diagnosed as unfit for military duty due to combat wounds he suffered, is entitled to enjoin his discharge from Army on any basis other than percentage disability. Lynes v Young (1974, WD Mo) 376 F Supp 725.

District court was without jurisdiction to issue preliminary injunction preventing Navy from ordering Naval Reserve Medical Corps physician to active duty where physician was unable to show that he had exhausted available intraservice corrective remedies under grievance procedures established by Department of Navy pursuant to authorization of 10 USCS @ 1552. Silverman v Middendorf (1976, SD NY) 422 F Supp 471, affd without op (CA2 NY) 553 F2d 94.

Plaintiff alleging that impending honorable discharge from Naval reserve was unconstitutional as based solely on his status as homosexual was not entitled to preliminary injunction to halt discharge since he had not exhausted available post-discharge administrative remedies and since honorable discharge was not stigma sufficient to bring within exception to exhaustion requirement. Heisel v Chalbeck (1976, MD Fla) 405 F Supp 361.

72. Mandamus

Remedy of mandamus to require administrative correction of military records pursuant to 10 USCS @ 1552 is available to serviceman seeking to void punitive sentence imposed by court martial in violation of his constitutional rights.

Kauffman v Secretary of Air Force (1969) 135 App DC 1, 415 F2d 991, cert den 396 US 1013, 24 L Ed 2d 505, 90 S Ct 572, reh den 397 US 1031, 25 L Ed 2d 546, 90 S Ct 1255.

Though serviceman injured by Board's failure to consider officer effectiveness report in promotional review is entitled to restoration to active duty in temporary rank of major, court lacks authority to order promotion since such decisions result from exercise of discretionary functions reserved for Executive Branch of Government. Guy v United States (1979) 221 Ct Cl 427, 608 F2d 867, later proceeding 223 Ct Cl 795.

Post-judgment mandamus ordering that pertinent military records of prevailing plaintiff be corrected is appropriate where, although Air Force Board for Corrections of Military Records complied with previous order by re-issuing upgraded discharge, it did not correct any underlying records which still reflect that plaintiff was issued dishonorable discharge for misconduct. Mulvaney v Stetson (1982, ND Ill) 544 F Supp 811.

Court will not award retroactive promotion and adjustment in pay since to do so would infringe upon discretionary process of selection for promotion; fact that BCMR can order such relief and that court may review BCMR's actions does not mean that court can order such relief. Miller v United States (1993) 29 Fed Cl 107, 1993 US Claims LEXIS 117.

73. Stay pending appeal

Army sergeant who was about to receive demotion to private and undesirable discharge for alleged homosexual activities was granted stay whereby he would retain his present rank and status in good standing pending exhaustion of military remedies and judicial review by United States district court, as there was likelihood sergeant would prevail on merits, sergeant demonstrated that irreparable harm to him might result if there was no stay, and Army failed to show that irreparable harm to it or public good would result from stay. Schwartz v Covington (1965, CA9 Cal) 341 F2d 537.

C. Exhaustion of Administrative Remedies

74. Generally

Court review of decision of discharge from military may be invoked under 28 USCS @ 1361 only where there is allegation of deprivation of constitutional right, or allegation that military has acted in violation of applicable statutes or its own regulations, and where petitioner has exhausted available intraservice remedies. Mindes v Seaman (1971, CA5 Fla) 453 F2d 197, later app (CA5 Fla) 501 F2d 175 and (disagreed with Dillard v Brown (CA3 NJ) 652 F2d 316 (disagreed with Lindenau v Alexander (CA10 NM) 663 F2d 68) and (disagreed with Nieszner v Mark (CA8 Minn) 684 F2d 562, 29 CCH EPD P 32923, cert den 460 US 1022, 75 L Ed 2d 494, 103 S Ct 1273, 32 CCH EPD P 33714) and (disagreed with Khalsa v Weinberger (CA9 Cal) 759 F2d 1411, and (CA9 Cal) 779 F2d 1393)).

Once it is determined that exhaustion of administrative remedies doctrine applies to case, District Court generally may not further entertain complaint until requirement is satisfied. Hodges v Callaway (1974, CA5 Ga) 499 F2d 417, reh den (CA5 Ga) 503 F2d 567 and (disagreed with Montgomery v Rumsfeld (CA9 Cal) 572 F2d 250).

District court was not compelled to dismiss action of Army recruits upon finding that such recruits had failed to exhaust administrative remedy of appeal to Army Board of Correction of Military Records where particular exhaustion requirement involved was judicially developed and not statutorily mandated; rather, district court should have weighed need for administrative record for proper judicial review, agency's interests in applying its expertise, in

correcting its own errors, and preserving efficacy and independence of its administrative system, and particularly, district court should have carefully considered whether allowing all similarly situated individuals to bypass administrative avenue would have impaired ABCMR's ability to perform its functions. *Montgomery v Rumsfeld* (1978, CA9 Cal) 572 F2d 250.

Before action of Correction Board can be reviewed, serviceman must have exhausted administrative remedies; in deciding whether to grant review sufficiency of allegations in complaint is balanced against policies contravening review; factors balanced are: source and weight of serviceman's challenge, injury to serviceman if review is denied, amount of interference with military matters if review were granted, and degree to which military expertise and discretion are involved in decision. *Johnson v Reed* (1980, CA5 Tex) 609 F2d 784.

Strict application of exhaustion doctrine in military discharge cases serves to maintain balance between military authority and power of federal courts; because military constitutes specialized community governed by separate discipline from that of civilian, orderly government requires that judiciary scrupulously avoid interfering with legitimate Army matters. *Von Hoffburg v Alexander* (1980, CA5 Ala) 615 F2d 633.

Policy that administrative remedies should be exhausted so long as agency clearly has jurisdiction over case and so long as resort to agency is not obviously futile is applied in context of Boards for Correction of Military Records and such policy has evolved to point where it can be formulated as rule that administrative remedy should be exhausted unless party invoking court's jurisdiction can demonstrate special circumstances. *Sohm v Fowler* (1966) 124 App DC 382, 365 F2d 915.

In military pay case before United States Claims Court, Ninth Circuit requirement of exhaustion of administrative remedies prior to suit in District Court is not "common-law" binding on Claims Court and does not collaterally estop plaintiff from pursuing action in Claims Court; therefore, plaintiff may bypass Air Force Board for correction of military records and bring action originally in Claims Court, although Claims Court has discretion to require, in interests of justice, that plaintiff seek administrative relief before court decides merits of claim, since administrative record is helpful and often needed for proper judicial review. *Poe v United States* (1984) 7 Cl Ct 40.

District Court has no jurisdiction until administrative remedies provided under 10 USCS @ 1552 have been exhausted, unless it be shown that administrative remedy is futile. *Reed v Franke* (1960, ED Va) 187 F Supp 905, affd (CA4 Va) 297 F2d 17.

Application to Army Board for Correction of Military Records pursuant to 10 USCS @ 1552 is not administrative remedy which must be exhausted and not necessary prerequisite to requesting relief in federal court. *Williams v Froehlke* (1973, SD NY) 356 F Supp 591, affd (CA2 NY) 490 F2d 998.

In suit seeking mandamus for correction of records of invalid court martial proceedings, Federal District Court was not required by doctrine of exhaustion of remedies to abstain from hearing action on grounds that plaintiffs failed to seek correction of records pursuant to 10 USCS @ 1552 where relief which could be provided by Board for Correction of Naval Records was nowhere near full relief. *Brown v United States* (1973, ED Pa) 365 F Supp 328, affd in part and remanded in part on other grounds (CA3 Pa) 508 F2d 618, cert den 422 US 1027, 45 L Ed 2d 684, 95 S Ct 2621.

Policy underlying doctrine of exhaustion of administrative remedies finds particular applicability in cases involving issues of military promotion, given judiciary's lack of expertise in areas of military judgment and its long-standing policy of nonintervention in internal military affairs. *Heidman*

v United States (1976, ND Ohio) 414 F Supp 47.

Apprentice seaman, disenrolled midshipmen of Naval Reserve Officer Training Corps, who seeks his relief from active duty and honorable discharge from Navy because of ineffectual call to active duty, should first seek relief from Board for Correction of Naval Records before petitioning District Court for writ of habeas corpus; however, court will not abstain from review where appeal to BCNR could take as long as 18 months before claim is finally resolved and even if Board were to decide in seaman's favor, only relief forthcoming would be honorable discharge and Board could not adequately compensate seaman for time spent in active enlisted service pursuant to order being challenged. Hickey v Commandant of Fourth Naval Dist. (1978, ED Pa) 461 F Supp 1085.

Individual Navy and Air Force plaintiffs need not exhaust their administrative remedies as prerequisite to suit challenging review procedures employed by administrative bodies created to review and determine whether to recharacterize less than fully honorable discharges given to military personnel, since issue in dispute, whether administrative bodies are required to follow, distinguish or overrule prior decisions, is one of federal law and one with respect to which administrative bodies are bound by applicable regulations. Strang v Marsh (1985, DC RI) 602 F Supp 1565.

Army plaintiffs must exhaust their administrative appeals from adverse decisions prior to bringing action to challenge procedures used by review boards in deciding whether to upgrade less than fully honorable discharges, where Army voluntarily adopted rule obligating it to distinguish past cases if they were not followed by Discharge Review Boards. Strang v Marsh (1985, DC RI) 602 F Supp 1565.

Army major's claims of violation of due process and Army Regulations stemming from major's discharge for misrepresenting his qualifications as military pilot in endeavoring to obtain commercial pilot's license from Federal Aviation Administration and for conduct unbecoming officer, are appropriate for review by district court, since major's claim is substantial one, denial of relief would result in substantial harm to major, amount of interference with military matters upon granting of relief would be minimal, and matter does not involve any military expertise. Wronke v Marsh (1985, CD Ill) 603 F Supp 407, transf to (CA7 Ill) 767 F2d 354.

Rule that military personnel with grievances against military establishment or its personnel must exhaust administrative remedies provided by military service before seeking relief in civilian courts applies where gravamen of complaint is that service did not follow its regulations in arriving at contested decision. Steenson v Marsh (1985, ND Ala) 609 F Supp 800.

Failure of serviceman to exhaust available administrative remedies by first seeking relief with Army Board for correction of military records is fatal to his claim that his involuntary release from his current active duty for training tour violates 10 USCS @ 1163(d), where serviceman has not alleged that administrative system itself is unlawful, unconstitutional, or incapable of redressing his injury. Steenson v Marsh (1985, ND Ala) 609 F Supp 800.

Presence of constitutional claim and claim for damages in suit brought by marine reservist alleging that actions taken by his Marine Corps superiors were racially motivated and resulted in his transfer, did not excuse him from usual requirement that servicemen exhaust administrative remedies before bringing a claim against superiors in civilian courts where Board for Correction of Naval Records is empowered to hear constitutional inquiries and is competent to award backpay and any benefits due. Ayala v United States (1985, SD NY) 624 F Supp 259.

Presence of constitutional claim and claim for damages in suit brought by marine reservist alleging that actions taken by his Marine Corps superiors

were racially motivated and resulted in his transfer, did not excuse him from usual requirement that servicemen exhaust administrative remedies before bringing a claim against superiors in civilian courts where Board for Correction of Naval Records is empowered to hear constitutional inquiries and is competent to award backpay and any benefits due. *Ayala v United States* (1985, SD NY) 624 F Supp 259.

National Guardsman's suit to recover for back injury suffered while loading military equipment onto truck and later aggravated while changing heavy truck tires during military exercises in Panama is dismissed, where relief may be obtained from military under 10 USCS @ 1552(c), because plaintiff has neither pursued nor exhausted his military remedies before seeking federal court intervention, and has not relied on valid exception to exhaustion of administrative remedies requirement. *Snearl v United States* (1987, MD La) 673 F Supp 165.

75. Acts constituting exhaustion, generally

Aggrieved military officer must first exhaust his administrative remedies before his particular service's Board for Correction of Military Records prior to litigating his claim in federal court; such board has sufficient authority to provide relief of full reinstatement backpay. *Knehans v Alexander* (1977) 184 App DC 420, 566 F2d 312, cert den 435 US 995, 56 L Ed 2d 83, 98 S Ct 1646.

Officer has sufficiently exhausted his administrative remedies despite fact that he has not appealed to Board for Correction of Military Records, where officer takes his grievances regarding active duty and retired pay to Secretary of service concerned. *Brownfield v United States* (1960) 148 Ct Cl 411.

Military administrative remedies have been exhausted only after application has been made to Board for Correction of Military Records pursuant to 10 USCS @ 1552. *Morbeto v United States* (1968, CD Cal) 293 F Supp 313.

Petitioner's failure to exhaust military remedies does not automatically require dismissal of pending action when failure to exhaust remedies arose from Army not properly advising petitioner of his appellate rights and his continued performance of duties meets requirements. *Lynes v Young* (1974, WD Mo) 376 F Supp 725.

76. --Actions concerning court-martial

General rule requiring exhaustion of military remedies prior to seeking to collaterally attack of court martial conviction in civilian courts applied to serviceman seeking federal review of court martial for drug abuse where serviceman had two avenues for appealing his conviction by special court-martial the first being through appeal to Judge Advocate General under 10 USCS @ 869 and second avenue of review was through Board of Corrections of Naval Records under 10/USCS @ 1552 which provides Board had power to recommend to Secretary of Navy action necessary to correct errors and records including expunging records, reinstatement, and backpay since serviceman did not avail himself of military service-provided remedy. *Williams v Secretary of Navy* (1986, CA FC) 787 F2d 552.

Serviceman seeking to have his court-martial conviction set aside on constitutional grounds was not required to obtain review by Army Board for Correction of Military Records (ABCMR) as ABCMR lacked power to set aside conviction, and serviceperson exhausts military remedies attempting to obtain review in every forum which could provide meaningful relief. *Cooper v Marsh* (1986, CA FC) 807 F2d 988.

Plaintiff has effectively exhausted his military remedies, where he has completed the military appellate process in attacking his court martial and conviction, and where neither the Navy Discharge Review Board nor Board for

Correction of Naval Records is empowered to review plaintiff's court martial and conviction as such and award full relief which he seeks from district court. *Williamson v Secretary of Navy* (1975, DC Dist Col) 395 F Supp 146, affd without op 178 App DC 410, 547 F2d 707.

77. --Acts concerning discharge

Action seeking declaratory relief from plaintiff's discharge from Marine Corps after becoming stepparent of child under age of 18 years pursuant to Marine regulation did not have to be dismissed when plaintiff failed to exhaust administrative remedies afforded by 10 USCS @ 1552 since action was based upon charge of sex discrimination, constitutional issue singularly suited to judicial forum and clearly inappropriate for administrative board. *Downen v Warner* (1973, CA9 Cal) 481 F2d 642, 8 BNA FEP Cas 332, 6 CCH EPD P 8710.

Exhaustion of administrative remedies doctrine in review of military discharge decisions is inapposite and unnecessary when resort to administrative reviewing body would be futile. *Hodges v Callaway* (1974, CA5 Ga) 499 F2d 417, reh den (CA5 Ga) 503 F2d 567 and (disagreed with on other grounds *Montgomery v Rumsfeld* (CA9 Cal) 572 F2d 250).

Court will not entertain suit seeking to have plaintiff's military discharge declared void and expunged for failure of Air Force personnel to follow regulations in handling discharge, where, although plaintiff has made some requests to Air Force and GAO, he has not presented claim to Air Force Board for Correction of Military Records. *Bard v Seamans* (1974, CA10 Colo) 507 F2d 765.

Inadequacy of remedy available from Army Board for Correction of Military Records, which lacks authority to award damages or to provide formal discovery or subpoena procedures, is outweighed by considerations of efficiency and agency expertise underlying exhaustion requirement and by availability of other remedies such as reinstatement and payment of backpay. *Von Hoffburg v Alexander* (1980, CA5 Ala) 615 F2d 633.

Naval enlisted personnel discharged for engaging in homosexual acts do not have to exhaust administrative remedies by applying for re-enlistment and upon being rejected, seeking review before Board for Correction of Naval Records, where focus of action is on constitutionality of Navy's actions in discharging plaintiffs, not on constitutionality of Navy regulations prohibiting acceptance of enlistment applications from homosexuals, since under Navy policy of requiring discharge of members who engage in homosexual activities, subject only to power of retention vested in Secretary of Navy unrelated to function of board, pursuit of such administrative remedies by plaintiffs would be futile. *Beller v Middendorf* (1980, CA9 Cal) 632 F2d 788, 24 BNA FEP Cas 289, 24 CCH EPD P 31378, reh den (CA9) 647 F2d 80, 25 BNA FEP Cas 1690, 26 CCH EPD P 32028, cert den 454 US 855, 70 L Ed 2d 150, 102 S Ct 304, 26 BNA FEP Cas 1687, 27 CCH EPD P 32145, reh den 454 US 1069, 70 L Ed 2d 605, 102 S Ct 621 and cert den 452 US 905, 69 L Ed 2d 405, 101 S Ct 3030, 25 BNA FEP Cas 1376, 26 CCH EPD P 31843.

Discharge of army sergeant on grounds of homosexuality was unreviewable under standard providing that review of internal military affairs will only be made where there is deprivation of constitutional right or military has acted in violation of applicable statutes or its own regulations, where military regulations discharging servicemen for homosexuality had been upheld against attack. *Watkins v United States Army* (1983, CA9 Wash) 721 F2d 687, 37 BNA FEP Cas 594, 37 CCH EPD P 35276.

Claim by former officer of Puerto Rico National Guard that Selective Retention Board's failure to follow regulations deprived him of property interest without due process is nonjusticiable military matter, where he failed to exhaust his intraservice administrative remedies, and fact that 10 USCS @ 1552 does not make specific mention of availability of Army Board for

Correction of Military Records Review does not affect officer's ability or duty to seek relief from Board. *Navas v Vales* (1985, CA1 Puerto Rico) 752 F2d 765.

District Court acted improperly in exercising jurisdiction over selective retention board's decision separating Colonel from West Virginia Army National Guard, and court's issuance of preliminary injunction against decision on basis of composition of board was improper, where Colonel had not exhausted his available intraservice remedies by appealing separation decision under @ 1552. *Williams v Wilson* (1985, CA4 W Va) 762 F2d 357.

In petition by soldier for writ of habeas corpus to mandate his discharge from Army, where soldier has exhausted his administrative remedy through chain of command, he may seek relief in District Court from adverse decision without first petitioning Army Board for Correction of Military Records. *Hayes v Secretary of Defense* (1975) 169 App DC 209, 515 F2d 668.

Apprentice seaman, disenrolled midshipman of Naval Reserve Officer Training Corps, who seeks his relief from active duty and honorable discharge from Navy because of ineffectual call to active duty, should first seek relief from Board for Correction of Naval Records before petitioning District Court for writ of habeas corpus; however, court will not abstain from review where appeal to BCNR could take as long as 18 months before claim is finally resolved and even if Board were to decide in seaman's favor, only relief forthcoming would be honorable discharge and Board could not adequately compensate seaman for time spent in active enlisted service pursuant to order being challenged. *Hickey v Commandant of Fourth Naval Dist.* (1978, ED Pa) 461 F Supp 1085.

Soldier's challenge to her discharge for homosexuality is dismissed for failure to exhaust administrative remedies. *Krugler v United States Army* (1984, ND Ill) 594 F Supp 565.

Air Force serviceman challenging receipt of less than honorable discharge which was allegedly administered because of homosexuality, must pursue administrative remedies before military personnel review boards prior to pursuing claims in court since (1) court should not address constitutional claims when issues may be resolved in serviceman's favor by administrative level on non-constitutional grounds, (2) administrative review process is not inordinately long, (3) agency's expertise and findings may assist future court review, (4) previous similar actions which were unsuccessful before the board are not determinative of this serviceman's claims, and (5) such review provides opportunity for Air Force to discover its own errors if any. *Bittner v Secretary of Defense* (1985, DC Dist Col) 625 F Supp 1022.

Plaintiff alleging that impending honorable discharge from Naval reserve was unconstitutional as based solely on his status as homosexual was not entitled to preliminary injunction to halt discharge since he had not exhausted available post-discharge administrative remedies and since honorable discharge was not stigma sufficient to bring within exception to exhaustion requirement. *Heisel v Chalbeck* (1976, MD Fla) 405 F Supp 361.

78. ----Conscientious objectors

Member of army seeking release as conscientious objector was entitled to seek writ of habeas corpus before exhaustion of any administrative remedy he might have by applying to army board for correction of military records. *United States ex rel. Brooks v Clifford* (1969, CA4 SC) 412 F2d 1137.

Army enlisted man seeking discharge on grounds of conscientious objector status does not have to go before Board of Corrections before turning to civilian courts for relief sought. *United States ex rel. Healy v Beatty* (1969, SD Ga) 300 F Supp 843, affd (CA5 Ga) 424 F2d 299.

In habeas corpus cases involving applications for discharge from military on conscientious objector grounds, usual exhaustion doctrine applies so as to

require application to appropriate Board for Correction. *Laxer v Cushman* (1969, DC Mass) 300 F Supp 920.

As Army Board for Correction of Military Records is not empowered to redetermine on merits question whether or not reservist is conscientious objector, it is not necessary for reservist to seek relief from Board as condition precedent to existence of jurisdiction of United States District Court to hear and determine his petition for habeas corpus. *Nason v Secretary of Army* (1969, DC Mass) 304 F Supp 422.

Military enlistees who seek discharge on basis of conscientious objection are required to exhaust their administrative remedies, including application to Army Board for Corrections of Military Records, and such application must be substantiated in record, before resorting to United States District Court. *Application of Croyell* (1969, ND Cal) 307 F Supp 209.

Petitioner who seeks discharge from military based on conscientious objector status, by way of writ of habeas corpus, need not resort to Army Board for Corrections of Military Records before petitioning District Court. *Packard v Rollins* (1969, WD Mo) 307 F Supp 1388, *affd* (CA8 Mo) 442 F2d 525.

79. --Actions concerning enlistment

Marine reservist who claimed he had enlisted because of false representations made by recruiting sergeant concerning educational opportunities had to appeal from decision of Commandant of Marine Corps to Board for Correction of Naval Records to exhaust administrative remedies before seeking review in district court. *Seepe v Department of Navy* (1975, CA6 Tenn) 518 F2d 760.

Navy petty officers seeking variable reenlistment bonus provided by 37 USCS @ 308 did not fail to exhaust administrative remedies where they presented claims to Bureau of Naval Personnel and members of Congress but did not apply for correction of military records under 10 USCS @ 1552 because they were seeking enforcement of provisions of their enlistment contracts and were not seeking pay due because of incorrect naval record entry. *Larionoff v United States* (1973, DC Dist Col) 365 F Supp 140, *remanded on other grounds* 175 App DC 32, 533 F2d 1167, 21 FR Serv 2d 902, *affd* 431 US 864, 53 L Ed 2d 48, 97 S Ct 2150 and (disagreed with on other grounds *Bishop v Committee on Professional Ethics & Conduct of Iowa State Bar Asso.* (CA8 Iowa) 686 F2d 1278, 34 FR Serv 2d 1261).

80. --Actions concerning promotions

Serviceman claiming that Officer Efficiency Report is substantively incorrect and constitutes retaliation for his civilian discrimination complaint must exhaust administrative remedies through appeal to Army Board for Correction of Military Records. *Thornton v Coffey* (1980, CA10 Okla) 618 F2d 686, 22 BNA FEP Cas 709, 22 CCH EPD P 30796.

Deferred officer is not entitled to pursue, in federal court, claim of irreparable harm to career through deferral of promotion until he pursues remedies through Army Board for Correction of Military Records. *Hadley v Secretary of Army* (1979, DC Dist Col) 479 F Supp 189.

National Guard officer's 42 USCS @ 1983 claim alleging violation of due process in non promotion decision is dismissed for failure to exhaust administrative remedy of appeal to Army Board for correction of military records, because importance of policy of judicial deference to military outweighs policy behind non-exhaustion. *Furman v Edwards* (1987, DC Vt) 657 F Supp 1243.

81. Miscellaneous

In civil rights action in which former National Guard officer alleged that deprivation of procedural due process led to his wrongful conviction for

cheating on examination and compelled resignation of his commission in State National Guard, fact that Adjutant General of National Guard was state officer did not eliminate requirement that plaintiff exhaust administrative remedies by applying to Army Board for Correction of Military Records prior to bringing suit against state officer under 42 USCS @ 1983. *Sanders v McCrady* (1976, CA4 SC) 537 F2d 1199.

Action by Coast Guard officer seeking to have time spent as cadet at Coast Guard Academy declared as creditable service for retirement purposes will be dismissed, where he failed to exhaust administrative remedies by applying to Coast Guard's Board for Correction of Military Records to have records corrected to reflect his active service creditable for retirement purposes commenced on date of entry into Academy, rather than date he was commissioned as Ensign. *Linfors v United States* (1982, CA11 Fla) 673 F2d 332.

District court was without jurisdiction to issue preliminary injunction preventing Navy from ordering Naval Reserve Medical Corps physician to active duty where physician was unable to show that he had exhausted available intraservice corrective remedies under grievance procedures established by Department of Navy pursuant to authorization of 10 USCS @ 1552. *Silverman v Middendorf* (1976, SD NY) 422 F Supp 471, affd without op (CA2 NY) 553 F2d 94.

Procedurally correct reevaluation of decision to separate man from Active Guard/Reserve status of National Guard is ordered by federal district court, even though he has not sought review of his separation by Army Board for Correction of Military Records, because man is member of state National Guard and federal board lacks power under 10 USCS @ 1552 to order reevaluation by state National Guard body. *Karr v Carper* (1993, DC Del) 818 F Supp 687.

D. Limitation of Actions

82. Generally

Fact that Board made cursory review of petitioner's records did not make otherwise untimely application for review of discharge reviewable. *Ballenger v Marsh* (1983, CA8 Mo) 708 F2d 349.

Correction Board did not abuse its discretion in enforcing statute of limitations under 10 USCS @ 1552(b) where application for relief was submitted more than 12 years after applicable statute of limitations had run and applicant alleged no facts which would show it was in interest of justice to waive timeliness requirement. *Evans v Marsh* (1988, CA5 La) 835 F2d 609.

Finding that claims for correction of records is barred by statute of limitations is arbitrary and capricious where board fails to address when claimant discovered alleged errors. *Ridgely v Marsh* (1989, App DC) 866 F2d 1526.

Board and district court properly dismissed former servicemember's claim where he offered no explanation for waiting approximately 8 years after he knew of trial counsel's alleged error in failing to have victim testify at court-martial. *Kendall v Army Bd. for Correction of Military Records* (1993, App DC) 996 F2d 362.

Tolling provision at 50 USCS Appx @ 525 suspends Board for Correction of Military Record's three-year statute of limitations during servicemember's period of active service; tolling provision is unambiguous, unequivocal, and unlimited. *Detweiler v Pena* (1994, App DC) 38 F3d 591.

Questions of whether it is in interests of justice to waive 3-year limit do not fall into area where there are particular matters of agency expertise or internal agency or military management decisions and are therefore reviewable for abuse of discretion. *Mullen v United States* (1989) 17 Cl Ct 578.

Former officer's action for disability pay is not barred by 6-year statute

of limitations in 28 USCS @ 2501, where action is based on arbitrary and capricious refusal of Air Force to review and correct military record in regard to amount and permanent nature of injuries sustained on active duty. Uhley v United States (1954) 128 Ct Cl 608, 121 F Supp 674.

In action for disability retired pay, statute of limitations runs from time of final action by Secretary of War and not from date of separation. Furlong v United States (1957) 138 Ct Cl 843, 152 F Supp 238.

Claims to recover retired pay, right to which accrued more than 6 years prior to filing of petition in each case, on theory that within 6 years of filing of petition Board for Correction of Naval Records corrected plaintiffs' records to show that they were entitled to pay they claimed for period in question, were barred by the 6 year statute of limitations. Haislip v United States (1961) 152 Ct Cl 339, 296 F2d 469.

Officer's suit in Court of Claims based on alleged arbitrary action of Correction Board is barred by statute of limitations, where officer accepts unconditional separation from service following Retiring Board's decision that he is not disabled but recommending re-evaluation in 6 months, and officer does not seek re-evaluation until some 11 years later when he applies to Correction Board; because plaintiff had Retiring Board, his claim is based on final action of that board and not on later action of Correction Board whether arbitrary or not. Friedman v United States (1962) 159 Ct Cl 1, 310 F2d 381, cert den 373 US 932, 10 L Ed 2d 691, 83 S Ct 1540.

Serviceman's suit for pay and allowances from time of allegedly invalid discharge under other than honorable conditions, which would include indirect attack on discharge itself, is barred where 6-year limitation period of 28 USCS @ 2501 has expired. Mathis v United States (1968) 183 Ct Cl 145, 391 F2d 938, vacated on other grounds on reh 183 Ct Cl 150, 394 F2d 519, later app 190 Ct Cl 925, 421 F2d 703.

Coast Guard officers challenging their past promotion passovers cannot rely on tolling provision of 50 USCS Appx @ 525, where officers--facing discharge due to passovers based on officer efficiency reports received between 1982 and 1985--seek review of reports before Board for Correction of Military Records well beyond 3-year limitation stated at 10 USCS @ 1552(b), because @ 525 general tolling period for active military service was certainly not intended to apply to legislation intended to provide for prompt civilian review of military disputes, as such application would render 3-year statutory limitations period virtually meaningless. Allen v Card (1992, DC Dist Col) 799 F Supp 158.

First "final" decision of Coast Guard Board of Correction of Military Records is reinstated, where (1) selection board decided not to promote Coast Guard officer on basis of several less than outstanding evaluations, (2) Board timely reversed nonpromotion decision on basis of officer's commander's reevaluations and explanation that commander had misunderstood evaluation system, but then (3) Board reversed itself, disallowing reevaluations out of aversion to setting precedent permitting changes to personnel records, because second final decision, more than 10 months after submission of officer's application, was untimely and unauthorized under mandatory 10-month time limit imposed by Congress in Coast Guard Authorization Act of 1989 (10 USCS @ 1552 note). Gazlay v Busey (1993, DC Dist col) 819 F Supp 29.

Statute of limitations governing court challenge to service discharge was not tolled during period plaintiff sought remedy through administrative channels, where he pursued remedy before incorrect board. June v Secretary of Navy (1982, MD Pa) 557 F Supp 144.

Servicemember's claim of involuntary discharge due to unauthorized alterations of officer effectiveness reports was not tolled for period claim was pending with corrections board; resort to such board is permissive rather than

mandatory. *D'Andrea v United States* (1993, Ct Fed Cl) 27 Fed Cl 612.

83. Accrual of claims

Former service member's wrongful discharge claim did not accrue when he discovered errors in his record as statute of limitations begins to run in wrongful discharge case on date of discharge, absent affirmative concealment of facts and service member failed to demonstrate adequately any such concealment. *Collins v United States* (1988) 14 Cl Ct 746.

Although service member experienced depression and related psychopathological symptoms throughout 1970s, it was not until 1981 that he was told by physician that he suffered from post-traumatic stress disorder, thus statute of limitations ran from time service member discovered his discharge records were in error so as to trigger accrual of claim. *Mullen v United States* (1990) 19 Cl Ct 550.

Cause of action for disability retired pay accrues when correction board arbitrarily, capriciously and contrary to law denies claim for disability retired pay. *Friedman v United States* (1958) 141 Ct Cl 239, 158 F Supp 364.

New cause of action accrues in plaintiff's favor if Secretary of Army or his Board for Correction of Military Records acts, or fails or refuses to act, arbitrarily with respect to plaintiff's request for correction of his record. *Knight v United States* (1961) 152 Ct Cl 298.

No new claim or cause of action for retired pay accrues to officer who has been denied his pay by service department's misapplication of law to facts in his record when correction board, on basis of those facts, changed his record to show entitlement to such pay but did not make any change in facts in officer's record. *Haislip v United States* (1961) 152 Ct Cl 339, 296 F2d 469.

In action to recover active duty pay and allowances, where officer has been illegally discharged and his only avenue of relief for correction of his record and receipt of backpay is resort to Correction Board, remedy is mandatory and his cause of action for backpay does not accrue until that board has corrected or refused to act. *Hamlin v United States* (1968) 183 Ct Cl 137, 391 F2d 941, later proceeding 185 Ct Cl 805.

Claim for backpay and allowances for illegal military discharge accrues at time of illegal discharge and removal and not at end of administrative proceedings relating to removal where those administrative proceedings are optional; accordingly former Army enlisted man's claim accrues at time of his discharge and not from time of denial of review of his appeal by Army Discharge Review Board, or rejection of his avocation by Army Correction Board, without hearing, since resort to those administrative agencies is permissive and not mandatory. *Mathis v United States* (1968) 183 Ct Cl 145, 391 F2d 938, vacated on other grounds on reh 183 Ct Cl 150, 394 F2d 519, later app 190 Ct Cl 925, 421 F2d 703.

Claim based upon presumption of death from unexplained absence does not accrue until claimants have decree of death since such decree fixes date of death and right to recover might actually expire before claimant can successfully prosecute lawsuit to enforce right. *Midgett v United States* (1979) 221 Ct Cl 171, 603 F2d 835.

Former Marine's action to compel Secretary of Navy and Board for Correction of Naval Records to upgrade his 1948 dishonorable discharge, on grounds of lack of effective representation by counsel at court-martial, is not barred by statute of limitations where Board considered and denied plaintiff's request in 1979, since whether or not 6-year statute of limitations for civil actions against government applies to corrective actions of this sort, plaintiff's cause of action for corrective relief accrued at date of Board's decision in 1979, not at date of discharge in 1948. *Kaiser v Secretary of Navy* (1981, DC Colo) 525

F Supp 1226 (disapproved *Walters v Secretary of Defense*, 233 App DC 148, 725 F2d 107, reh den, en banc 237 App DC 333, 737 F2d 1038) and (disapproved *Geyen v Marsh* (CA5 La) 775 F2d 1303).

Former Army personnel discharged other than honorably are denied upgrades on their discharges, even though they argue that 10 USCS @ 1552(b) 3-year statute of limitations should begin to run only when administrative remedies have been exhausted, because determination of Army Board for Correction of Military Records that statutory time clock began to tick at time of discharge was neither arbitrary, capricious, nor contrary to law. *Ortiz v Secretary of Defense* (1993, DC Dist Col) 842 F Supp 7.

With respect to claims for annuities (survivor benefit plan annuities and minimum income widow annuities) by surviving spouses of deceased members of uniformed services, where member elected not to participate in annuity program but government failed to notify spouse of that fact (effect of which is to invalidate non-participation election), 31 USCS @ 3702(b), which limits General Accounting Office's jurisdiction to consider claims to those that are filed within six years after they arise, operates as statute of limitations, such that surviving spouse must claim benefits within six years of member's death (or when all events have transpired necessary to file claim) or be forever barred from doing so. *Application of Barring Act to Annuity Claims* (1992) 71 Comp Gen 398.

84. Continuing claims doctrine

Claim for retirement pay based on statute giving right to special computation of retired pay to those who qualify thereunder without requiring interposition of any board is continuing claim and all periodic pay claims accruing within 6 years prior to filing of petition are not time barred. *Guyler v United States* (1963) 161 Ct Cl 159, 314 F2d 506.

Claim for backpay and allowances is not continuing claim, in sense that it does not continue to exist throughout serviceman's period of enlistment. *Mathis v United States* (1968) 183 Ct Cl 145, 391 F2d 938, vacated on other grounds on reh 183 Ct Cl 150, 394 F2d 519, later app 190 Ct Cl 925, 421 F2d 703.

Air Force nurse's 1980 action for correction of military records to show continuous active duty during 9 year period of separation following her discharge for pregnancy in 1965 and award of backpay resulting from correction is time barred by 6 year statute of limitations, since cause of action arose when plaintiff was discharged in 1965 and her interim resort to permissive administrative procedures before Air Force Board for Correction of Military Records in lieu of court action, resulting in grant of constructive active duty for period of separation but no backpay, which she declined to request, does not operate to constitute new cause of action or continuing claim under "half-a-loaf" doctrine, as Board granted all relief requested by plaintiff. *Bonen v United States* (1981) 229 Ct Cl 144, 666 F2d 536, cert den 456 US 991, 73 L Ed 2d 1286, 102 S Ct 2273.

85. Laches

Plaintiff's request for judicial review of dishonorable discharge will not be granted where request comes 17 years after discharge and plaintiff has not pursued administrative remedies under 10 USCS @@ 1552 and 1553. *Davis v Secretary of Army* (1971, CA5 Ga) 440 F2d 817.

Former Marine's action to compel Secretary of Navy and Board for Correction of Naval Records to upgrade his 1948 dishonorable discharge, on grounds of lack of effective representation by counsel at court-martial, is not barred for laches, since Board waived that defense by considering, implicitly in interest of justice, plaintiff's petition in 1979, far after 3 year limit of 10 USCS @ 1552(b) had passed. *Kaiser v Secretary of Navy* (1981, DC Colo) 525 F Supp

10 USCS @ 1552 (1998)

1226 (disapproved on other grounds *Walters v Secretary of Defense*, 233 App DC 148, 725 F2d 107, reh den, en banc 237 App DC 333, 737 F2d 1038) and (disapproved on other grounds *Geyen v Marsh* (CA5 La) 775 F2d 1303).

shall be elected as school board member(s).

(5) Each candidate for school board membership must be nominated in writing by at least one member of the electorate to be represented by the candidate. Votes may be cast at the time of election for write-in candidates who have not filed a nomination petition if the write-in candidates otherwise are qualified to serve in the positions sought.

(6) The election process shall provide staggered terms for board members; e.g., on the last day of the last month of each year, the term for some board members will expire.

(7) The DoD DDESS Superintendent, in consultation with the school board, shall be responsible for developing the plans for nominating school board members and conducting the school board election and the special election process. The DoD DDESS Superintendent shall announce election results within 7 working days of the election.

PART 70—DISCHARGE REVIEW BOARD (DRB) PROCEDURES AND STANDARDS

Sec.

- 70.1 Reissuance and purpose.
- 70.2 Applicability.
- 70.3 Definitions.
- 70.4 Responsibilities.
- 70.5 Procedures.
- 70.6 Information requirements.
- 70.7 Effective date and implementation.
- 70.8 Discharge review procedures.
- 70.9 Discharge review standards.
- 70.10 Complaints concerning decisional documents and index entries.
- 70.11 DoD semiannual report.

AUTHORITY: 10 U.S.C. 1553 and 38 U.S.C. 101 and 3103, as amended.

SOURCE: 47 FR 37785, Aug. 26, 1982, unless otherwise noted.

§ 70.1 Reissuance and purpose.

This part is reissued and:

(a) Establishes uniform policies, procedures, and standards for the review of discharges or dismissals under 10 U.S.C. 1553.

(b) Provides guidelines for discharge review by application or on motion of a DRB, and the conduct of discharge reviews and standards to be applied in

such reviews which are designed to ensure historically consistent uniformity in execution of this function, as required under Pub. L. 95-126.

(c) Assigns responsibility for administering the program.

(d) Makes provisions for public inspection, copying, and distribution of DRB documents through the Armed Forces Discharge Review/Correction Board Reading Room.

(e) Establishes procedures for the preparation of decisional documents and index entries.

(f) Provides guidance for processing complaints concerning decisional documents and index entries.

§ 70.2 Applicability.

The provisions of this part 70 apply to the Office of the Secretary of Defense (OSD) and the Military Departments. The terms, "Military Services," and "Armed Forces," as used herein, refer to the Army, Navy, Air Force and Marine Corps.

§ 70.3 Definitions.

(a) *Applicant*. A former member of the Armed Forces who has been discharged or dismissed administratively in accordance with Military Department regulations or by sentence of a court-martial (other than a general court-martial) and under statutory regulatory provisions whose application is accepted by the DRB concerned or whose case is heard on the DRB's own motion. If the former member is deceased or incompetent, the term "applicant" includes the surviving spouse, next-of-kin, or legal representative who is acting on behalf of the former member. When the term "applicant" is used in §§ 70.8 through 70.10, it includes the applicant's counsel or representative, except that the counsel or representative may not submit an application for review, waive the applicant's right to be present at a hearing, or terminate a review without providing the DRB an appropriate power of attorney or other written consent of the applicant.

(b) *Complainant*. A former member of the Armed Forces (or the former member's counsel) who submits a complaint under § 70.10 with respect to the decisional document issued in the

former member's own case; or a former member of the Armed Forces (or the former member's counsel) who submits a complaint under § 70.10 stating that correction of the decisional document will assist the former member in preparing for an administrative or judicial proceeding in which the former member's own discharge will be at issue.

(c) *Counsel or Representative*. An individual or agency designated by the applicant who agrees to represent the applicant in a case before the DRB. It includes, but is not limited to: a lawyer who is a member of the bar of a Federal court or of the highest court of a State; an accredited representative designated by an organization recognized by the Administrator of Veterans Affairs; a representative from a State agency concerned with veterans affairs; and representatives from private organizations or local government agencies.

(d) *Discharge*. A general term used in this Directive that includes dismissal and separation or release from active or inactive military status, and actions that accomplish a complete severance of all military status. This term also includes the assignment of a reason for such discharge and characterization of service (32 CFR part 41).

(e) *Discharge Review*. The process by which the reason for separation, the procedures followed in accomplishing separation, and the characterization of service are evaluated. This includes determinations made under the provisions of 38 U.S.C. 3103(e)(2).

(f) *Discharge Review Board (DRB)*. An administrative board constituted by the Secretary of the Military Department concerned and vested with discretionary authority to review discharges and dismissals under the provisions of 10 U.S.C. 1553. It may be configured as one main element or two or more elements as designated by the Secretary concerned.

(g) *DRB Panel*. An element of a DRB, consisting of five members, authorized by the Secretary concerned to review discharges and dismissals.

(h) *DRB Traveling or Regional Panel*. A DRB panel that conducts discharge reviews in a location outside the National Capital Region (NCR).

(i) *Hearing*. A review involving an appearance before the DRB by the applicant or on the applicant's behalf by a counsel or representative.

(j) *Hearing Examination*. The process by which a designated officer of a DRB prepares a presentation for consideration by a DRB in accordance with regulations prescribed by the Secretary concerned.

(k) *National Capital Region (NCR)*. The District of Columbia; Prince Georges and Montgomery Counties in Maryland; Arlington, Fairfax, Loudoun, and Prince William Counties in Virginia; and all cities and towns included within the outer boundaries of the foregoing counties.

(l) *President, DRB*. A person designated by the Secretary concerned and responsible for the supervision of the discharge review function and other duties as assigned.

§ 70.4 Responsibilities.

(a) The *Secretaries of the Military Departments* have the authority for final decision and the responsibility for the operation for their respective discharge review programs under 10 U.S.C. 1553.

(b) The *Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics) (ASD(MRA&L))* shall:

(1) Resolve all issues concerning DRBs that cannot be resolved among the Military Departments.

(2) Ensure uniformity among the Military Departments in the rights afforded applicants in discharge reviews.

(3) Modify or supplement the enclosures to this part.

(4) Maintain the index of decisions and provide for timely modification of index categories to reflect changes in discharge review policies, procedures, and standards issued by the OSD and the Military Departments.

(c) The *Secretary of the Army*, as the designated administrative focal point for DRB matters, shall:

(1) Effect necessary coordination with other governmental agencies regarding continuing applicability of this part and resolve administrative procedures relating thereto.

(2) Review suggested modifications to this part, including implementing documents; monitor the implementing

documents of the Military Departments; resolve differences, when practicable; recommend specific changes; provide supporting rationale to the ASD(MRA&L) for decision; and include appropriate documentation through the Office of the ASD(MRA&L) and the OSD Federal Register liaison officer to effect publication in the FEDERAL REGISTER.

(3) Maintain the DD Form 293, "Application for Review of Discharge or Separation from the Armed Forces of the United States," and republish as necessary with appropriate coordination of the other Military Departments and the Office of Management and Budget.

(4) Respond to all inquiries from private individuals, organizations, or public officials with regard to DRB matters. When the specific Military Service can be identified, refer such correspondence to the appropriate DRB for response or designate an appropriate activity to perform this task.

(5) Provide overall guidance and supervision to the Armed Forces Discharge Review/Correction Board Reading Room with staff augmentation, as required, by the Departments of the Navy and Air Force.

(6) Ensure that notice of the location, hours of operation, and similar types of information regarding the Reading Room is published in the FEDERAL REGISTER.

§ 70.5 Procedures.

(a) Discharge review procedures are prescribed in § 70.8.

(b) Discharge Review Standards are prescribed in § 70.9 and constitute the basic guidelines for the determination whether to grant or deny relief in a discharge review.

(c) Complaint Procedures about decisional documents are prescribed in § 70.10.

§ 70.6 Information requirements.

(a) *Reporting requirements.* (1) The reporting requirement prescribed in § 70.8(n) is assigned Report Control Symbol DD-M(SA)1489.

(2) All reports must be consistent with DoD Directive 5000.11, "Data Elements and Data Codes Standardization Program," December 7, 1964.

(b) *Use of standard data elements.* The data requirements prescribed by this part shall be consistent with DoD 5000.12-M, "DoD Manual for Standard Data Elements," December 1981. Any reference to a date should appear as (YYMMDD), while any name entry should appear as (Last name, first name, middle initial).

§ 70.7 Effective date and implementation.

This part is effective immediately for the purpose of preparing implementing documents. DoD Directive 1332.28, March 29, 1978, is officially canceled, effective November 27, 1982. This part applies to all discharge review proceedings conducted on or after November 27, 1982. § 70.10 applies to all complaint proceedings conducted on or after September 28, 1982. Final action on complaints shall not be taken until September 28, 1982, unless earlier corrective action is requested expressly by the applicant (or the applicant's counsel) whose case is the subject of the decisional document. If earlier corrective action is requested, it shall be taken in accordance with § 70.10.

§ 70.8 Discharge review procedures.

(a) *Application for review*—(1) *General.* Applications shall be submitted to the appropriate DRB on DD Form 293, "Application for Review of Discharge or Separation from the Armed Forces of the United States," with such other statements, affidavits, or documentation as desired. It is to the applicant's advantage to submit such documents with the application or within 60 days thereafter in order to permit a thorough screening of the case. The DD Form 293 is available at most DoD installations and regional offices of the Veterans Administration, or by writing to: DA Military Review Boards Agency, Attention: SFBA (Reading Room), Room 1E520, The Pentagon, Washington, DC 20310.

(2) *Timing.* A motion or request for review must be made within 15 years after the date of discharge or dismissal.

(3) *Applicant's responsibilities.* An applicant may request a change in the character of or reason for discharge (or both).

(i) *Character of discharge.* Block 7 of DD Form 293 provides an applicant an opportunity to request a specific change in character of discharge (for example, General Discharge to Honorable Discharge; Other than Honorable Discharge to General or Honorable Discharge). Only a person separated on or after 1 October 1982 while in an entry level status may request a change from Other than Honorable Discharge to Entry Level Separation. A request for review from an applicant who does not have an Honorable Discharge shall be treated as a request for a change to an Honorable Discharge unless the applicant requests a specific change to another character of discharge.

(ii) *Reason for discharge.* Block 7 of DD Form 293 provides an applicant an opportunity to request a specific change in the reason for discharge. If an applicant does not request a specific change in the reason for discharge, the DRB shall presume that the request for review does not involve a request for change in the reason for discharge. Under its responsibility to examine the propriety and equity of an applicant's discharge, the DRB shall change the reason for discharge if such a change is warranted.

(iii) The applicant must ensure that issues submitted to the DRB are consistent with the request for change in discharge set forth in block 7 of the DD Form 293. If an ambiguity is created by a difference between an applicant's issue and the request in block 7, the DRB shall respond to the issue in the context of the action requested in block 7. In the case of a hearing, the DRB shall attempt to resolve the ambiguity under paragraph (a)(5) of this section.

(4) *Request for consideration of specific issues.* An applicant may request the DRB to consider specific issues which, in the opinion of the applicant, form a basis for changing the character of or reason for discharge, or both. In addition to the guidance set forth in this section, applicants should consult the other sections in this part (particularly paragraphs (c), (d), and (e) of this section and §§ 70.9 and 70.10 before submitting issues for consideration by the DRB.

(i) *Submission of issues on DD Form 293.* Issues must be provided to the DRB on DD Form 293 before the DRB closes the review process for deliberation.

(A) *Issues must be clear and specific.* An issue must be stated clearly and specifically in order to enable the DRB to understand the nature of the issue and its relationship to the applicant's discharge.

(B) *Separate listing of issues.* Each issue submitted by an applicant should be listed separately. Submission of a separate statement for each issue provides the best means of ensuring that the full import of the issue is conveyed to the DRB.

(C) *Use of DD Form 293.* DD Form 293 provides applicants with a standard format for submitting issues to the DRB, and its use:

(1) Provides a means for an applicant to set forth clearly and specifically those matters that, in the opinion of the applicant, provide a basis for changing the discharge;

(2) Assists the DRB in focusing on those matters considered to be important by an applicant;

(3) Assists the DRB in distinguishing between a matter submitted by an applicant in the expectation that it will be treated as a decisional issue under paragraph (e) of this section, and those matters submitted simply as background or supporting materials;

(4) Provides the applicant with greater rights in the event that the applicant later submits a complaint under § 70.10(d)(1)(iii) concerning the decisional document;

(5) Reduces the potential for disagreement as to the content of an applicant's issue.

(D) *Incorporation by reference.* If the applicant makes an additional written submission, such as a brief, in support of the application, the applicant may incorporate by reference specific issues set forth in the written submission in accordance with the guidance on DD Form 293. The reference shall be specific enough for the DRB to identify clearly the matter being submitted as an issue. At a minimum, it shall identify the page, paragraph, and sentence incorporated. Because it is to the applicant's benefit to bring such issues to

the DRB's attention as early as possible in the review, applicants who submit a brief are strongly urged to set forth all such issues as a separate item at the beginning of the brief. If it reasonably appears that the applicant inadvertently has failed expressly to incorporate an issue which the applicant clearly identifies as an issue to be addressed by the DRB, the DRB shall respond to such an issue under paragraphs (d) and (e) of this section.

(E) *Effective date of the new Form DD 293.* With respect to applications received before November 27, 1982, the DRB shall consider issues clearly and specifically stated in accordance with the rules in effect at the time of submission. With respect to applications received on or after November 27, 1982, if the applicant submits an obsolete DD Form 293, the DRB shall accept the application, but shall provide the applicant with a copy of the new form and advise the applicant that it will only respond to issues submitted on the new form in accordance with this part.

(ii) *Relationship of issues to character of or reason for discharge.* If the application applies to both character of and reason for discharge, the applicant is encouraged, but not required, to identify the issue as applying to the character of or reason for discharge (or both). Unless the issue is directed at the reason for discharge expressly or by necessary implication, the DRB will presume that it applies solely to the character of discharge.

(iii) *Relationship of issues to the standards for discharge review.* The DRB reviews discharges on the basis of issues of propriety and equity. The standards used by the DRB are set forth in §70.9. The applicant is encouraged to review those standards before submitting any issue upon which the applicant believes a change in discharge should be based.

(A) *Issues concerning the equity of the discharge.* An issue of equity is a matter that involves a determination whether a discharge should be changed under the equity standards of §70.9. This includes any issue, submitted by the applicant in accordance with paragraph (a)(4)(i) of this section, that is addressed to the discretionary authority of the DRB.

(B) *Issues concerning the propriety of a discharge.* An issue of propriety is a matter that involves a determination whether a discharge should be changed under the propriety standards of §70.9. This includes an applicant's issue, submitted in accordance with paragraph (a)(4)(i) of this section, in which the applicant's position is that the discharge must be changed because of an error in the discharge pertaining to a regulation, statute, constitutional provision, or other source of law (including a matter that requires a determination whether, under the circumstances of the case, action by military authorities was arbitrary, capricious, or an abuse of discretion). Although a numerical reference to the regulation or other sources of law alleged to have been violated is not necessarily required, the context of the regulation or a description of the procedures alleged to have been violated normally must be set forth in order to inform the DRB adequately of the basis for the applicant's position.

(C) *The applicant's identification of an issue.* The applicant is encouraged, but not required, to identify an issue as pertaining to the propriety or the equity to the discharge. This will assist the DRB in assessing the relationship of the issue to propriety or equity under paragraph (e)(1)(ii) of this section.

(iv) *Citation of matter from decisions.* The primary function of the DRB involves the exercise of discretion on a case-by-case basis. See §70.9(b)(3). Applicants are not required to cite prior decisions as the basis for a change in discharge. If the applicant wishes to bring the DRB's attention to a prior decision as background or illustrative material, the citation should be placed in a brief or other supporting documents. If, however, it is the applicant's intention to submit an issue that sets forth specific principles and facts from a specific cited decision, the following requirements apply with respect to applications received on or after November 27, 1982.

(A) The issue must be set forth or expressly incorporated in the "Applicant's Issue" portion of DD Form 293.

(B) If an applicant's issue cites a prior decision (of the DRB, another

Board, an agency, or a court), the applicant shall describe the specific principles and facts that are contained in the prior decision and explain the relevance of cited matter to the applicant's case.

(C) To ensure timely consideration of principles cited from unpublished opinions (including decisions maintained by the Armed Forces Discharge Review Board/Corrective Board Reading Room), applicants must provide the DRB with copies of such decisions or of the relevant portion of the treatise, manual, or similar source in which the principles were discussed. At the applicant's request, such materials will be returned.

(D) If the applicant fails to comply with the requirements in paragraphs (a)(4)(iv) (A), (B), and (C), the decisional document shall note the defect, and shall respond to the issue without regard to the citation.

(5) *Identification by the DRB of issues submitted by an applicant.* The applicant's issues shall be identified in accordance with this section after a review of the materials noted under paragraph (c)(4), is made.

(i) *Issues on DD Form 293.* The DRB shall consider all items submitted as issues by an applicant on DD Form 293 (or incorporated therein) in accordance with paragraph (a)(4)(i). With respect to applications submitted before November 27, 1982, the DRB shall consider all issues clearly and specifically stated in accordance with the rules in effect at the time of the submission.

(ii) *Amendment of issues.* The DRB shall not request or instruct an applicant to amend or withdraw any matter submitted by the applicant. Any amendment or withdrawal of an issue by an applicant shall be confirmed in writing by the applicant. Nothing in this provision:

(A) Limits the DRB's authority to question an applicant as to the meaning of such matter;

(B) Precludes the DRB from developing decisional issues based upon such questions;

(C) Prevents the applicant from amending or withdrawing such matter any time before the DRB closes the review process for deliberation; or

(D) Prevents the DRB from presenting an applicant with a list of proposed decisional issues and written information concerning the right of the applicant to add to, amend, or withdraw the applicant's submission. The written information will state that the applicant's decision to take such action (or decline to do so) will not be used against the applicant in the consideration of the case.

(iii) *Additional issues identified during a hearing.* The following additional procedure shall be used during a hearing in order to promote the DRB's understanding of an applicant's presentation. If, before closing the case for deliberation, the DRB believes that an applicant has presented an issue not listed on DD Form 293, the DRB may so inform the applicant, and the applicant may submit the issue in writing or add additional written issues at that time. This does not preclude the DRB from developing its own decisional issues.

(6) *Notification of possible bar to benefits.* Written notification shall be made to each applicant whose record indicates a reason for discharge that bars receipt of benefits under 38 U.S.C. 3103(a). This notification will advise the applicant that separate action by the Board for Correction of Military or Naval Records or the Veterans Administration may confer eligibility for VA benefits. Regarding the bar to benefits based upon the 180 days consecutive unauthorized absence, the following applies:

(i) Such absence must have been included as part of the basis for the applicant's discharge under other than honorable conditions.

(ii) Such absence is computed without regard to the applicant's normal or adjusted expiration of term of service.

(b) *Conduct of reviews.* (1) *Members.* As designated by the Secretary concerned, the DRB and its panels, if any, shall consist of five members. One member of the DRB shall be designated as the president and may serve as a presiding officer. Other officers may be designated to serve as presiding officers for DRB panels under regulations prescribed by the Secretary concerned.

(2) *Locations.* Reviews by a DRB will be conducted in the NCR and such

other locations as designated by the Secretary concerned.

(3) *Types of review.* An applicant, upon request, is entitled to:

(i) *Record review.* A review of the application, available service records, and additional documents (if any) submitted by the applicant.

(ii) *Hearing.* A review involving an appearance before the DRB by the applicant or counsel or representative (or both).

(4) *Applicant's expenses.* Unless otherwise specified by law or regulation, expenses incurred by the applicant, witnesses, counsel or representative will not be paid by the Department of Defense.

(5) *Withdrawal of application.* An applicant shall be permitted to withdraw an application without prejudice at any time before the scheduled review.

(6) *Failure to appear at a hearing or respond to a scheduling notice.* (i) Except as otherwise authorized by the Secretary concerned, further opportunity for a hearing shall not be made available in the following circumstances to an applicant who has requested a hearing:

(A) When the applicant has been sent a letter containing the month and location of a proposed hearing and fails to make a timely response; or

(B) When the applicant, after being notified by letter of the time and place of the hearing, fails to appear at the appointed time, either in person or by representative, without having made a prior, timely request for a continuance, postponement, or withdrawal.

(ii) In such cases, the applicant shall be deemed to have waived the right to a hearing, and the DRB shall complete its review of the discharge. Further request for a hearing shall not be granted unless the applicant can demonstrate that the failure to appear or respond was due to circumstances beyond the applicant's control.

(7) *Continuance and postponements.* (i) A continuance of a discharge review hearing may be authorized by the president of the DRB or presiding officer of the panel concerned, provided that such continuance is of reasonable duration and is essential to achieving a full and fair hearing. When a proposal for continuance is indefinite, the pending

application shall be returned to the applicant with the option to resubmit when the case is fully ready for review.

(ii) Postponements of scheduled reviews normally shall not be permitted other than for demonstrated good and sufficient reason set forth by the applicant in a timely manner, or for the convenience of the government.

(8) *Reconsideration.* A discharge review shall not be subject to reconsideration except:

(i) When the only previous consideration of the case was on the motion of the DRB;

(ii) When the original discharge review did not involve a hearing and a hearing is now desired, and the provisions of paragraph (b)(6) of this section do not apply;

(iii) When changes in discharge policy are announced after an earlier review of an applicant's discharge, and the new policy is made expressly retroactive;

(iv) When the DRB determines that policies and procedures under which the applicant was discharged differ in material respects from policies and procedures currently applicable on a Service-wide basis to discharges of the type under consideration, provided that such changes in policies or procedures represent a substantial enhancement of the rights afforded a respondent in such proceedings;

(v) When an individual is to be represented by a counsel or representative, and was not so represented in any previous consideration of the case by the DRB;

(vi) When the case was not previously considered under uniform standards published pursuant to Pub. L. 95-126 and such application is made within 15 years after the date of discharge; or

(vii) On the basis of presentation of new, substantial, relevant evidence not available to the applicant at the time of the original review. The decision whether evidence offered by an applicant in support of a request for reconsideration is in fact new, substantial, relevant, and was not available to the applicant at the time of the original review will be based on a comparison of such evidence with the evidence considered in the previous discharge review. If this comparison shows that the

evidence submitted would have had a probable effect on matters concerning the propriety or equity of the discharge, the request for reconsideration shall be granted.

(9) *Availability of records and documents.* (i) Before applying for discharge review, potential applicants or their designated representatives may obtain copies of their military personnel records by submitting a General Services Administration Standard Form 180, "Request Pertaining to Military Records," to the National Personnel Records Center (NPRC), 9700 Page Boulevard, St. Louis, MO 62132. Once the application for discharge review (DD Form 293) is submitted, an applicant's military records are forwarded to the DRBs where they cannot be reproduced. Submission of a request for an applicant's military records, including a request under the Freedom of Information Act (32 CFR part 286) or Privacy Act (32 CFR part 286a) after the DD Form 293 has been submitted, shall result automatically in the temporary suspension of processing of the application for discharge review until the requested records are sent to an appropriate location for copying, are copied, and are returned to the headquarters of the DRB. Processing of the application shall then be resumed at whatever stage of the discharge review process is practicable. Applicants are encouraged to submit any request for their military records before applying for discharge review rather than after submitting DD Form 293, to avoid delays in processing of applications and scheduling of reviews. Applicants and their counsel also may examine their military personnel records at the site of their scheduled review before the hearing. DRBs shall notify applicants of the dates the records are available for examination in their standard scheduling information.

(ii) If the DRB is not authorized to provide copies of documents that are under the cognizance of another government department, office, or activity, applications for such information must be made by the applicant to the cognizant authority. The DRB shall advise the applicant of the mailing address of the government department,

office, or activity to which the request should be submitted.

(iii) If the official records relevant to the discharge review are not available at the agency having custody of the records, the applicant shall be so notified and requested to provide such information and documents as may be desired in support of the request for discharge review. A period of not less than 30 days shall be allowed for such documents to be submitted. At the expiration of this period, the review may be conducted with information available to the DRB.

(iv) A DRB may take steps to obtain additional evidence that is relevant to the discharge under consideration beyond that found in the official military records or submitted by the applicant, if a review of available evidence suggests that it would be incomplete without the additional information, or when the applicant presents testimony or documents that require additional information to evaluate properly. Such information shall be made available to the applicant, upon request, with appropriate modifications regarding classified material.

(A) In any case heard on request of an applicant, the DRB shall provide the applicant and counsel or representative, if any, at a reasonable time before initiating the decision process, a notice of the availability of all regulations and documents to be considered in the discharge review, except for documents in the official personnel or medical records and any documents submitted by the applicant. The DRB shall also notify the applicant or counsel or representative:

(1) Of the right to examine such documents or to be provided with copies of the documents upon request;

(2) Of the date by which such requests must be received; and

(3) Of the opportunity to respond within a reasonable period of time to be set by the DRB.

(B) When necessary to acquaint the applicant with the substance of a classified document, the classifying authority, on the request of the DRB, shall prepare a summary of or an extract from the document, deleting all references to sources of information and other matters, the disclosure of

which, in the opinion of the classifying authority, would be detrimental to the national security interests of the United States. Should preparation of such summary be deemed impracticable by the classifying authority, information from the classified sources shall not be considered by the DRB in its review of the case.

(v) Regulations of a Military Department may be obtained at many installations under the jurisdiction of the Military Department concerned or by writing to the following address: DA Military Review Boards Agency, Attention: SFBA (Reading Room), room 1E520, Washington, DC 20310.

(10) *Recorder/Secretary or Assistant.* Such a person shall be designated to assist in the functioning of each DRB in accordance with the procedures prescribed by the Secretary of the Military Department concerned.

(11) *Hearings.* Hearings (including hearing examinations) that are conducted shall recognize the rights of the individual to privacy. Accordingly, presence at hearings of individuals other than those required shall be limited to persons authorized by the Secretary concerned or expressly requested by the applicant, subject to reasonable limitations based upon available space. If, in the opinion of the presiding officer, the presence of other individuals could be prejudicial to the interests of the applicant or the government, hearings may be held in closed session.

(12) *Evidence and testimony.* (i) The DRB may consider any evidence obtained in accordance with this part.

(ii) Formal rules of evidence shall not be applied in DRB proceedings. The presiding officer shall rule on matters of procedure and shall ensure that reasonable bounds of relevancy and materiality are maintained in the taking of evidence and presentation of witnesses.

(iii) Applicants undergoing hearings shall be permitted to make sworn or unsworn statements, if they so desire, or to introduce witnesses, documents, or other information on their behalf, at no expense to the Department of Defense.

(iv) Applicants may also make oral or written arguments personally or through counsel or representatives.

(v) Applicants who present sworn or unsworn statements and witnesses may be questioned by the DRB. All testimony shall be taken under oath or affirmation unless the applicant specifically requests to make an unsworn statement.

(vi) There is a presumption of regularity in the conduct of governmental affairs. This presumption can be applied in any review unless there is substantial credible evidence to rebut the presumption.

(c) *Decision process.* (1) The DRB or the DRB panel, as appropriate, shall meet in plenary session to review discharges and exercise its discretion on a case-by-case basis in applying the standards set forth in § 70.9.

(2) The presiding officer is responsible for the conduct of the discharge review. The presiding officer shall convene, recess, and adjourn the DRB panel as appropriate and shall maintain an atmosphere of dignity and decorum at all times.

(3) Each DRB member shall act under oath or affirmation requiring careful, objective consideration of the application. DRB members are responsible for eliciting all facts necessary for a full and fair hearing. They shall consider all information presented to them by the applicant. In addition, they shall consider available Military Service and health records, together with other records that may be in the files of the Military Department concerned and relevant to the issues before the DRB, and any other evidence obtained in accordance with this part.

(4) The DRB shall identify and address issues after a review of the following material obtained and presented in accordance with this part and the implementing instructions of the DRB: Available official records, documentary evidence submitted by or on behalf of an applicant, presentation of a hearing examination, testimony by or on behalf of an applicant, oral or written arguments presented by or on behalf of an applicant, and any other relevant evidence.

(5) If an applicant who has requested a hearing does not respond to a notification letter or does not appear for a

scheduled hearing, the DRB may complete the review on the basis of material previously submitted.

(6) *Application of standards.* (i) When a DRB determines that an applicant's discharge was improper (§ 70.9(b)), the DRB will determine which reason for discharge should have been assigned before the discharge authority, including the Service regulations governing reasons for discharge at the time the applicant was discharged. Unless it is also determined that the discharge was inequitable (§ 70.9(c)), the provisions as to characterization in the regulation under which the applicant should have been discharged will be considered in determining whether further relief is warranted.

(ii) When the DRB determines that an applicant's discharge was inequitable (see § 70.9(c)), any change will be based on the evaluation of the applicant's overall record of service and relevant regulations of the Military Service of which the applicant was a member.

(7) Voting shall be conducted in closed session, a majority of the five members' votes constituting the DRB decision. Voting procedures shall be prescribed by the Secretary of the Military Department concerned.

(8) Details of closed session deliberations of a DRB are privileged information and shall not be divulged.

(9) There is no requirement for a statement of minority views in the event of a split vote. The minority, however, may submit a brief statement of its views under procedures established by the Secretary concerned.

(10) DRBs may request advisory opinions from staff officers of their Military Departments. These opinions are advisory in nature and are not binding on the DRB in its decision-making process.

(11) The preliminary determinations required by 38 U.S.C. 3103(e) shall be made upon majority vote of the DRB concerned on an expedited basis. Such determination shall be based upon the standards set forth in § 70.9 of this part.

(12) *The DRB shall:* (i) Address items submitted as issues by the applicant under paragraph (d) of this section;

(ii) Address decisional issues under paragraph (e) of this section; and

(iii) Prepare a decisional document in accordance with paragraph (h) of this section.

(d) *Response to items submitted as issues by the applicant—(1) General guidance.* (i) If an issue submitted by an applicant contains two or more clearly separate issues, the DRB should respond to each issue under the guidance of this paragraph as if it had been set forth separately by the applicant.

(ii) If an applicant uses a "building block" approach (that is, setting forth a series of conclusions on issues that lead to a single conclusion purportedly warranting a change in the applicant's discharge), normally there should be a separate response to each issue.

(iii) Nothing in this paragraph precludes the DRB from making a single response to multiple issues when such action would enhance the clarity of the decisional document, but such response must reflect an adequate response to each separate issue.

(2) *Decisional issues.* An item submitted as an issue by an applicant in accordance with this part shall be addressed as a decisional issue under paragraph (e), in the following circumstances:

(i) When the DRB decides that a change in discharge should be granted, and the DRB bases its decision in whole or in part on the applicant's issue; or

(ii) When the DRB does not provide the applicant with the full change in discharge requested, and the decision is based in whole or in part on the DRB's disagreement on the merits with an issue submitted by the applicant.

(3) *Response to items not addressed as decisional issues.* (i) If the applicant receives the full change in discharge requested (or a more favorable change), that fact shall be noted and the basis shall be addressed as a decisional issue. No further response is required to other issues submitted by the applicant.

(ii) If the applicant does not receive the full change in discharge requested with respect to either the character of or reason for discharge (or both), the DRB shall address the items submitted by the applicant under paragraph (e) of

this section (decisional issues) unless one of the following responses is applicable:

(A) *Duplicate issues.* The DRB may state that there is a full response to the issue submitted by the applicant under a specified decisional issue. This response may be used only when one issue clearly duplicates another or the issue clearly requires discussion in conjunction with another issue.

(B) *Citations without principles and facts.* The DRB may state that the applicant's issue, which consists of a citation to a decision without setting forth any principles and facts from the decision that the applicant states are relevant to the applicant's case, does not comply with the requirements of paragraph (a)(4)(iv)(A).

(C) *Unclear issues.* The DRB may state that it cannot respond to an item submitted by the applicant as an issue because the meaning of the item is unclear. An issue is unclear if it cannot be understood by a reasonable person familiar with the discharge review process after a review of the materials considered under paragraph (c)(4) of this section.

(D) *Nonspecific issues.* The DRB may state that it cannot respond to an item submitted by the applicant as an issue because it is not specific. A submission is considered not specific if a reasonable person familiar with the discharge review process after a review of the materials considered under paragraph (c)(4) of this section, cannot determine the relationship between the applicant's submission and the particular circumstances of the case. This response may be used only if the submission is expressed in such general terms that no other response is applicable. For example, if the DRB disagrees with the applicant as to the relevance of matters set forth in the submission, the DRB normally will set forth the nature of the disagreement under the guidance in paragraph (e) of this section, with respect to decisional issues, or it will reject the applicant's position on the basis of paragraphs (d)(3)(ii)(A) or (d)(3)(ii)(B) of this section. If the applicant's submission is so general that none of those provisions is applicable, then the DRB may state that it cannot

respond because the item is not specific.

(e) *Decisional issues.* (1) *General.* Under the guidance in this section, the decisional document shall discuss the issues that provide a basis for the decision whether there should be a change in the character of or reason for discharge. In order to enhance clarity, the DRB should not address matters other than issues relied upon in the decision or raised by the applicant.

(i) *Partial change.* When the decision changes a discharge, but does not provide the applicant with the full change in discharge requested, the decisional document shall address both the issues upon which change is granted and the issues upon which the DRB denies the full change requested.

(ii) *Relationship of issue to character of or reason for discharge.* Generally, the decisional document should specify whether a decisional issue applies to the character of or reason for discharge (or both), but it is not required to do so.

(iii) *Relationship of an issue to propriety or equity.* (A) If an applicant identifies an issue as pertaining to both propriety and equity, the DRB will consider it under both standards.

(B) If an applicant identifies an issue as pertaining to the propriety of the discharge (for example, by citing a propriety standard or otherwise claiming that a change in discharge is required as a matter of law), the DRB shall consider the issue solely as a matter of propriety. Except as provided in paragraph (e)(1)(iii)(D) of this section, the DRB is not required to consider such an issue under the equity standards.

(C) If the applicant's issue contends that the DRB is required as a matter of law to follow a prior decision by setting forth an issue of propriety from the prior decision and describing its relationship to the applicant's case, the issue shall be considered under the propriety standards and addressed under paragraph (e)(2) or (e)(3) of this section.

(D) If the applicant's issue sets forth principles of equity contained in a prior DRB decision, describes the relationship to the applicant's case, and contends that the DRB is required as a matter of law to follow the prior case, the decisional document shall note

that the DRB is not bound by its discretionary decisions in prior cases under the standards in §70.9. However, the principles cited by the applicant, and the description of the relationship of the principles to the applicant's case, shall be considered under the equity standards and addressed under paragraph (e)(5) or (e)(6) of this section.

(E) If the applicant's issue cannot be identified as a matter of propriety or equity, the DRB shall address it as an issue of equity.

(2) *Change of discharge: issues of propriety.* If a change in the discharge is warranted under the propriety standards in §70.9 the decisional document shall state that conclusion and list the errors of expressly retroactive changes in policy that provide a basis for the conclusion. The decisional document shall cite the facts in the record that demonstrate the relevance of the error or change in policy to the applicant's case. If the change in discharge does not constitute the full change requested by the applicant, the reasons for not granting the full change shall be addressed under the guidance in paragraph (e)(3) or (e)(6) of this section.

(3) *Denial of the full change requested: issues of propriety.* (i) If the decision rejects the applicant's position on an issue of propriety, or if it is otherwise decided on the basis of an issue of propriety that the full change in discharge requested by the applicant is not warranted, the decisional document shall note that conclusion.

(ii) The decisional document shall list reasons for its conclusion on each issue of propriety under the following guidance:

(A) If a reason is based in whole or in part upon a regulation, statute, constitutional provision, judicial determination, or other source of law, the DRB shall cite the pertinent source of law and the facts in the record that demonstrate the relevance of the source of law to the particular circumstances in the case.

(B) If a reason is based in whole or in part on a determination as to the occurrence or nonoccurrence of an event or circumstance, including a factor required by applicable Service regulations to be considered for determina-

tion of the character of and reason for the applicant's discharge, the DRB shall make a finding of fact for each such event or circumstance.

(1) For each such finding, the decisional document shall list the specific source of the information relied upon. This may include the presumption of regularity in appropriate cases. If the information is listed in the service record section of the decisional document, a citation is not required.

(2) If a finding of fact is made after consideration of contradictory evidence in the record (including information cited by the applicant or otherwise identified by members of the DRB), the decisional document shall set forth the conflicting evidence and explain why the information relied upon was more persuasive than the information that was rejected. If the presumption of regularity is cited as the basis for rejecting such information, the decisional document shall set forth the basis for relying on the presumption of regularity and explain why the contradictory evidence was insufficient to overcome the presumption. In an appropriate case, the explanation as to why the contradictory evidence was insufficient to overcome the presumption of regularity may consist of a statement that the applicant failed to provide sufficient corroborating evidence, or that the DRB did not find the applicant's testimony to be sufficiently credible to overcome the presumption.

(C) If the DRB disagrees with the position of the applicant on an issue of propriety, the following guidance applies in addition to the guidance in paragraphs (e)(3)(ii) (A) and (B) of this section:

(1) The DRB may reject the applicant's position by explaining why it disagrees with the principles set forth in the applicant's issue (including principles derived from cases cited by the applicant in accordance with paragraph (e)(4)(iv) of this section).

(2) The DRB may reject the applicant's position by explaining why the principles set forth in the applicant's issue (including principles derived from cases cited by the applicant in accordance with paragraph (a)(4)(iv) of this section) are not relevant to the applicant's case.

(3) The DRB may reject an applicant's position by stating that the applicant's issue of propriety is not a matter upon which the DRB grants a change in discharge, and by providing an explanation for this position. When the applicant indicates that the issue is to be considered in conjunction with one or more other specified issues, the explanation will address all such specified issues.

(4) The DRB may reject the applicant's position on the grounds that other specified factors in the case preclude granting relief, regardless of whether the DRB agreed with the applicant's position.

(5) If the applicant takes the position that the discharge must be changed because of an alleged error in a record associated with the discharge, and the record has not been corrected by the organization with primary responsibility for corrective action, the DRB may respond that it will presume the validity of the record in the absence of such corrective action. If the organization empowered to correct the record is within the Department of Defense, the DRB should provide the applicant with a brief description of the procedures for requesting correction of the record. If the DRB on its own motion cites this issue as a decisional issue on the basis of equity, it shall address the issue under paragraph (d)(5) or (d)(6) of this section.

(6) When an applicant's issue contains a general allegation that a certain course of action violated his or her constitutional rights, the DRB may respond in appropriate cases by noting that the action was consistent with statutory or regulatory authority, and by citing the presumption of constitutionality that attaches to statutes and regulations. If, on the other hand, the applicant makes a specific challenge to the constitutionality of the action by challenging the application of a statute or regulation in a particular set of circumstances, it is not sufficient to respond solely by citing the presumption of constitutionality of the statute or regulation when the applicant is not challenging the constitutionality of the statute or regulation. Instead, the response must address the specific circumstances of the case.

(4) *Denial of the full change in discharge requested when propriety is not at issue.* If the applicant has not submitted an issue of propriety and the DRB has not otherwise relied upon an issue of propriety to change the discharge, the decisional document shall contain a statement to that effect. The DRB is not required to provide any further discussion as to the propriety of the discharge.

(5) *Change of discharge: issues of equity.* If the DRB concludes that a change in the discharge is warranted, under the equity standards in § 70.9 the decisional document shall list each issue of equity upon which this conclusion is based. The DRB shall cite the facts in the record that demonstrate the relevance of the issue to the applicant's case. If the change in discharge does not constitute the full change requested by the applicant, the reasons for not giving the full change requested shall be discussed under the guidance in paragraph (e)(6) of this section.

(6) *Denial of the full change in discharge requested: issues of equity.* (i) If the DRB rejects the applicant's position on an issue of equity, or if the decision otherwise provides less than the full change in discharge requested by the applicant, the decisional document shall note that conclusion.

(ii) The DRB shall list reasons for its conclusion on each issue of equity under the following guidance:

(A) If a reason is based in whole or in part upon a regulation, statute, constitutional provision, judicial determination, or other source of law, the DRB shall cite the pertinent source of law and the facts in the record that demonstrate the relevance of the source of law to the exercise of discretion on the issue of equity in the applicant's case.

(B) If a reason is based in whole or in part on a determination as to the occurrence or nonoccurrence of an event or circumstance, including a factor required by applicable Service regulations to be considered for determination of the character of and reason for the applicant's discharge, the DRB shall make a finding of fact for each such event or circumstance.

(1) For each such finding, the decisional document shall list the specific source of the information relied upon. This may include the presumption of regularity in appropriate cases. If the information is listed in the service record section of the decisional document, a citation is not required.

(2) If a finding of fact is made after consideration of contradictory evidence in the record (including information cited by the applicant or otherwise identified by members of the DRB), the decisional document shall set forth the conflicting evidence and explain why the information relied upon was more persuasive than the information that was rejected. If the presumption of regularity is cited as the basis for rejecting such information, the decisional document shall set forth the basis for relying on the presumption of regularity and explain why the contradictory evidence was insufficient to overcome the presumption. In an appropriate case, the explanation as to why the contradictory evidence was insufficient to overcome the presumption of regularity may consist of a statement that the applicant failed to provide sufficient corroborating evidence, or that the DRB did not find the applicant's testimony to be sufficiently credible to overcome the presumption.

(C) If the DRB disagrees with the position of the applicant on an issue of equity, the following guidance applies in addition to the guidance in paragraphs (e)(6)(ii) (A) and (B) of this section:

(1) The DRB may reject the applicant's position by explaining why it disagrees with the principles set forth in the applicant's issue (including principles derived from cases cited by the applicant in accordance with paragraph (a)(4)(iv) of this section).

(2) The DRB may reject the applicant's position by explaining why the principles set forth in the applicant's issue (including principles derived from cases cited by the applicant) are not relevant to the applicant's case.

(3) The DRB may reject an applicant's position by explaining why the applicant's issue is not a matter upon which the DRB grants a change in discharge as a matter of equity. When the applicant indicates that the issue is to

be considered in conjunction with other specified issues, the explanation will address all such specified issues.

(4) The DRB may reject the applicant's position on the grounds that other specified factors in the case preclude granting relief, regardless of whether the DRB agreed with the applicant's position.

(5) If the applicant takes the position that the discharge should be changed as a matter of equity because of an alleged error in a record associated with the discharge, and the record has not been corrected by the organization with primary responsibility for corrective action, the DRB may respond that it will presume the validity of the record in the absence of such corrective action. However, the DRB will consider whether it should exercise its equitable powers to change the discharge on the basis of the alleged error. If it declines to do so, it shall explain why the applicant's position did not provide a sufficient basis for the change in the discharge requested by the applicant.

(D) When the DRB concludes that aggravating factors outweigh mitigating factors, the DRB must set forth reasons such as the seriousness of the offense, specific circumstances surrounding the offense, number of offenses, lack of mitigating circumstances, or similar factors. The DRB is not required, however, to explain why it relied on any such factors unless the applicability or weight of such a factor is expressly raised as an issue by the applicant.

(E) If the applicant has not submitted any issues and the DRB has not otherwise relied upon an issue of equity for a change in discharge, the decisional document shall contain a statement to that effect, and shall note that the major factors upon which the discharge was based are set forth in the service record portion of the decisional document.

(F) *The recommendation of the DRB President—(1) General.* The president of the DRB may forward cases for consideration by the Secretarial Reviewing Authority (SRA) under rules established by the Secretary concerned. There is no requirement that the President submit a recommendation when a case is forwarded to the SRA. If the

president makes a recommendation with respect to the character of or reason for discharge, however, the recommendation shall be prepared under the guidance in paragraph (f)(2) of this section.

(2) *Format for recommendation.* If a recommendation is provided, it shall contain the president's views whether there should be a change in the character of or reason for discharge (or both). If the president recommends such a change, the particular change to be made shall be specified. The recommendation shall set forth the president's position on decisional issues and issues submitted by the applicant under the following guidance:

(i) *Adoption of the DRB's decisional document.* The recommendation may state that the president has adopted the decisional document prepared by the majority. The president shall ensure that the decisional document meets the requirements of this section.

(ii) *Adoption of the specific statements from the majority.* If the President adopts the views of the majority only in part, the recommendation shall cite the specific matter adopted from the majority. If the president modifies a statement submitted by the majority, the recommendation shall set forth the modification.

(iii) *Response to issues not included in matter adopted from the majority.* The recommendation shall set forth the following if not adopted in whole or in part from the majority:

(A) The issues on which the president's recommendation is based. Each such decisional issue shall be addressed by the president under paragraph (e) of this section.

(B) The president's response to items submitted as issues by the applicant under paragraph (d) of this section.

(C) Reasons for rejecting the conclusions of the majority with respect to decisional issues which, if resolved in the applicant's favor, would have resulted in greater relief for the applicant than that afforded by the president's recommendation. Such issues shall be addressed under the principles in paragraph (e) of this section.

(g) *Secretarial reviewing authority (SRA)*—(1) *Review by the SRA.* The Secretarial Reviewing Authority (SRA) is

the Secretary concerned or the official to whom Secretary's discharge review authority has been delegated.

(i) The SRA may review the following types of cases before issuance of the final notification of a decision:

(A) Any specific case in which the SRA has an interest.

(B) Any specific case that the president of the DRB believes is of significant interest to the SRA.

(ii) Cases reviewed by the SRA shall be considered under the standards set forth in §70.9.

(2) *Processing the decisional document.*

(i) The decisional document shall be transmitted by the DRB president under paragraph (e) of this section.

(ii) The following guidance applies to cases that have been forwarded to the SRA except for cases reviewed on the DRB's own motion without the participation of the applicant or the applicant's counsel:

(A) The applicant and counsel or representative, if any, shall be provided with a copy of the proposed decisional document, including the DRB president's recommendation to the SRA, if any. Classified information shall be summarized.

(B) The applicant shall be provided with a reasonable period of time, but not less than 25 days, to submit to the SRA a rebuttal. An issue in rebuttal consists of a clear and specific statement by the applicant in support of or in opposition to the statements of the DRB or DRB president on decisional issues and other clear and specific issues that were submitted by the applicant in accordance with paragraph (a)(4)(i) of this section. The rebuttal shall be based solely on matters in the record before when the DRB closed the case for deliberation or in the president's recommendation.

(3) *Review of the decisional document.* If corrections in the decisional document are required, the decisional document shall be returned to the DRB for corrective action. The corrected decisional document shall be sent to the applicant (and counsel, if any), but a further opportunity for rebuttal is not required unless the correction produces a different result or includes a substantial change in the discussion by

the DRB (or DRB president) of the issues raised by the majority or the applicant.

(4) *The Addendum of the SRA.* The decision of the SRA shall be in writing and shall be appended as an addendum to the decisional document under the guidance in this subsection.

(i) *The SRA's decision.* The addendum shall set forth the SRA's decision whether there will be a change in the character of or reason for discharge (or both); if the SRA concludes that a change is warranted, the particular change to be made shall be specified. If the SRA adopts the decision recommended by the DRB or the DRB president, the decisional document shall contain a reference to the matter adopted.

(ii) *Discussion of issues.* In support of the SRA's decision, the addendum shall set forth the SRA's position on decisional issues, items submitted as issues by an applicant in accordance with paragraph (a)(4)(i) of this section, and issues raised by the DRB and the DRB president in accordance with the following guidance:

(A) *Adoption of the DRB president's recommendation.* The addendum may state that the SRA has adopted the DRB president's recommendation.

(B) *Adoption of the DRB's proposed decisional document.* The addendum may state that the SRA has adopted the proposed decisional document prepared by the DRB.

(C) *Adoption of specific statements from the majority or the DRB president.* If the SRA adopts the views of the DRB or the DRB president only in part, the addendum shall cite the specific statements adopted. If the SRA modifies a statement submitted by the DRB or the DRB president, the addendum shall set forth the modification.

(D) *Response to issues not included in matter adopted from the DRB or the DRB president.* The addendum shall set forth the following if not adopted in whole or in part from the DRB or the DRB president:

(i) A list of the issues on which the SRA's decision is based. Each such decisional issue shall be addressed by the SRA under paragraph (e) of this section. This includes reasons for rejecting the conclusion of the DRB or

the DRB president with respect to decisional issues which, if resolved in the applicant's favor, would have resulted in change to the discharge more favorable to the applicant than that afforded by the SRA's decision. Such issues shall be addressed under the principles in paragraph (e) of this section.

(2) The SRA's response to items submitted as issues by the applicant under paragraph (d) of this section.

(iii) *Response to the rebuttal.* (A) If the SRA grants the full change in discharge requested by the applicant (or a more favorable change), that fact shall be noted, the decisional issues shall be addressed under paragraph (e) of this section, and no further response to the rebuttal is required.

(B) If the SRA does not grant the full change in discharge requested by the applicant (or a more favorable change), the addendum shall list each issue in rebuttal submitted by an applicant in accordance with this section, and shall set forth the response of the SRA under the following guidance:

(i) If the SRA rejects an issue in rebuttal, the SRA may respond in accordance with the principles in paragraph (e) of this section.

(2) If the matter adopted by the SRA provides a basis for the SRA's rejection of the rebuttal material, the SRA may note that fact and cite the specific matter adopted that responds to the issue in rebuttal.

(3) If the matter submitted by the applicant does not meet the requirements for rebuttal material in paragraph (b)(2)(ii)(B) of this section.

(iv) *Index entries.* Appropriate index entries shall be prepared for the SRA's actions for matters that are not adopted from the DRB's proposed decisional document.

(h) *The decisional document.* A decisional document shall be prepared for each review. At a minimum, this document shall contain:

(1) The circumstances and character of the applicant's service as extracted from available service records, including health records, and information provided by other Government authorities or the applicant, such as, but not limited to:

(i) Information concerning the discharge at issue in the review, including:

- (A) Date (YYMMDD) of discharge.
- (B) Character of discharge.
- (C) Reason for discharge.
- (D) The specific regulatory authority under which the discharge was issued.
- (ii) Date (YYMMDD) of enlistment.
- (iii) Period of enlistment.
- (iv) Age at enlistment.
- (v) Length of service.
- (vi) Periods of unauthorized absence.
- (vii) Conduct and efficiency ratings (numerical or narrative).
- (viii) Highest rank received.
- (ix) Awards and decorations.
- (x) Educational level.
- (xi) Aptitude test scores.
- (xii) Incidents of punishment pursuant to Article 15, Uniform Code of Military Justice (including nature and date (YYMMDD) of offense or punishment).
- (xiii) Convictions by court-martial.
- (xiv) Prior military service and type of discharge received.

(2) A list of the type of documents submitted by or on behalf of the applicant (including a written brief, letters of recommendation, affidavits concerning the circumstances of the discharge, or other documentary evidence), if any.

(3) A statement whether the applicant testified, and a list of the type of witnesses, if any, who testified on behalf of the applicant.

(4) A notation whether the application pertained to the character of discharge, the reason for discharge, or both.

(5) The DRB's conclusions on the following:

- (i) Whether the character of or reason for discharge should be changed.
- (ii) The specific changes to be made, if any.

(6) A list of the items submitted as issues on DD Form 293 or expressly incorporated therein and such other items submitted as issues by the applicant that are identified as inadvertently omitted under paragraph (a)(4)(i)(D) of this section. If the issues are listed verbatim on DD Form 293, a copy of the relevant portion of the Form may be attached. Issues that have been withdrawn or modified with the consent of the applicant need not be listed.

(7) The response to the items submitted as issues by the applicant under the guidance in paragraph (d) of this section.

(8) A list of decisional issues and a discussion of such issues under the guidance in paragraph (e) of this section.

(9) Minority views, if any, when authorized under rules of the Military Department concerned.

(10) The recommendation of the DRB president when required by paragraph (f) of this section.

(11) The addendum of the SRA when required by paragraph (g) of this section.

(12) Advisory opinions, including those containing factual information, when such opinions have been relied upon for final decision or have been accepted as a basis for rejecting any of the applicant's issues. Such advisory opinions or relevant portions thereof that are not fully set forth in the discussion of decisional issues or otherwise in response to items submitted as issues by the application shall be incorporated by reference. A copy of opinions incorporated by reference shall be appended to the decision and included in the record of proceedings.

(13) A record of the voting, including:

(i) The number of votes for the DRB's decision and the number of votes in the minority, if any.

(ii) The DRB member's names (last name, first name, M.I.) and votes. The copy provided to the applicant may substitute a statement that the names and votes will be made available to the applicant at the applicant's request.

(14) Index entries for each decisional issue under appropriate categories listed in the index of decisions.

(15) An authentication of the document by an appropriate official.

(i) *Issuance of decisions following discharge review.* The applicant and counsel or representative, if any, shall be provided with a copy of the decisional document and of any further action in review. The applicant (and counsel, if any) shall be notified of the availability of the complaint process under § 70.10. Final notification of decisions shall be issued to the applicant with a copy to the counsel or representative,

if any, and to the Military Service concerned.

(1) Notification to applicants, with copies to counsel or representatives, shall normally be made through the U.S. Postal Service. Such notification shall consist of a notification of decision, together with a copy of the decisional document.

(2) Notification to the Military Services shall be for the purpose of appropriate action and inclusion of review matter in personnel records. Such notification shall bear appropriate certification of completeness and accuracy.

(3) Actions on review by superior authority, when occurring, shall be provided to the applicant and counsel or representative in the same manner as the notification of the review decision.

(j) *Record of DRB proceedings.* (1) When the proceedings in any review have been concluded, a record thereof will be prepared. Records may include written records, electromagnetic records, videotape recordings, or a combination thereof.

(2) At a minimum, the record will include the following:

- (i) The application for review;
- (ii) A record of the testimony in verbatim, summarized, or recorded form at the option of the DRB concerned;
- (iii) Documentary evidence or copies thereof, considered by the DRB other than the Military Service record;
- (iv) Briefs and arguments submitted by or on behalf of the applicant;
- (v) Advisory opinions considered by the DRB, if any;
- (vi) The findings, conclusions, and reasons developed by the DRB;
- (vii) Notification of the DRB's decision to the cognizant custodian of the applicant's records, or reference to the notification document;
- (viii) Minority reports, if any;
- (ix) A copy of the decisional document.

(k) *Final disposition of the Record of Proceedings.* The original record of proceedings and all appendices thereto shall in all cases be incorporated in the Military Service record of the applicant and the Military Service record shall be returned to the custody of the appropriate records holding facility. If a portion of the original record of the proceedings cannot be stored with the

Military Service record, the Military Service record shall contain a notation as to the place where the record is stored. Other copies shall be filed and disposed of in accordance with appropriate Military Service regulations.

(1) *Availability of Discharge Review Board documents for inspection and copying.* (1) A copy of the decisional document prepared in accordance with paragraph (d) of this section shall be made available for public inspection and copying promptly after a notice of final decision is sent to the applicant.

(2) To prevent a clearly unwarranted invasion of personal privacy, identifying details of the applicant and other persons will be deleted from documents made available for public inspection and copying.

(i) Names, addresses, social security numbers, and Military Service numbers must be deleted. Written justification shall be made for all other deletions and shall be available for public inspection.

(ii) Each DRB shall ensure that there is a means for relating a decisional document number to the name of the applicant to permit retrieval of the applicant's records when required in processing a complaint under § 70.10.

(3) Any other privileged or classified material contained in or appended to any documents required by this part to be furnished the applicant and counsel or representative or made available for public inspection and copying may be deleted therefrom only if a written statement of the basis for the deletions is provided the applicant and counsel or representative and made available for public inspection. It is not intended that the statement be so detailed as to reveal the nature of the withheld material.

(4) DRB documents made available for public inspection and copying shall be located in the Armed Forces Discharge Review/Correction Board Reading Room. The documents shall be indexed in a usable and concise form so as to enable the public, and those who represent applicants before the DRBs, to isolate from all these decisions that are indexed, those cases that may be similar to an applicant's case and that indicate the circumstances under or reasons for (or both) which the DRB or

the Secretary concerned granted or denied relief.

(i) The reading file index shall include, in addition to any other items determined by the DRB, the case number, the date, character of, reason and authority for the discharge. It shall also include the decisions of the DRB and reviewing authority, if any, and the issues addressed in the statement of findings, conclusions, and reasons.

(ii) The index shall be maintained at selected permanent locations throughout the United States. This ensures reasonable availability to applicants at least 30 days before a traveling panel review. A list of these locations shall be published in the FEDERAL REGISTER by the Department of the Army. The index shall also be made available at sites selected for traveling panels or hearing examinations for such periods as the DRB or a hearing examiner is present and in operation. An applicant who has requested a traveling panel review or a hearing examination shall be advised in the notice of such review of the permanent index locations.

(iii) The Armed Forces Discharge Review/Correction Board Reading Room shall publish indexes quarterly for all DRBs. All DRBs shall be responsible for timely submission to the Reading Room of individual case information required for update of the indexes. In addition, all DRBs shall be responsible for submission of new index categories based upon published changes in policy, procedures, or standards. These indexes shall be available for public inspection or purchase (or both) at the Reading Room. When the DRB has accepted an application, information concerning the availability of the index shall be provided in the DRB's response to the application.

(iv) Copies of decisional documents will be provided to individuals or organizations outside the NCR in response to written requests for such documents. Although the Reading Room shall try to make timely responses to such requests, certain factors such as the length of a request, the volume of other pending requests, and the impact of other responsibilities of the staff assigned to such duties may cause some delays. A fee may be charged for such documents under appropriate DoD and

Department of the Army directives and regulations. The manual that accompanies the index of decisions shall notify the public that if an applicant indicates that a review is scheduled for a specific date, an effort will be made to provide requested decisional documents before that date. The individual or organization will be advised if that cannot be accomplished.

(v) Correspondence relating to matters under the cognizance of the Reading Room (including requests for purchase of indexes) shall be addressed to: DA Military Review Boards Agency, Attention: SFBA (Reading Room), Room 1E520, The Pentagon, Washington, DC 20310.

(m) *Privacy Act information.* Information protected under the Privacy Act is involved in the discharge review functions. The provisions of part 286a of this title shall be observed throughout the processing of a request for review of discharge or dismissal.

(n) *Information requirement.* Each Military Department shall provide the Deputy Assistant Secretary of Defense (Military Personnel and Force Management) DASD (MP&FM), Office of the ASD (MRA&L), with a semiannual report of discharge review actions in accordance with § 70.11.

[47 FR 37785, Aug. 26, 1982, as amended at 48 FR 9855, Mar. 9, 1983; 48 FR 35644, Aug. 5, 1983]

§ 70.9 Discharge review standards.

(a) *Objective of review.* The objective of a discharge review is to examine the propriety and equity of the applicant's discharge and to effect changes, if necessary. The standards of review and the underlying factors that aid in determining whether the standards are met shall be historically consistent with criteria for determining honorable service. No factors shall be established that require automatic change or denial of a change in discharge. Neither a DRB nor the Secretary of the Military Department concerned shall be bound by any methodology of weighting of the factors in reaching a determination. In each case, the DRB or the Secretary of the Military Department concerned shall give full, fair, and impartial considerations to all applicable factors before reaching a decision. An

applicant may not receive a less favorable discharge than that issued at the time of separation. This does not preclude correction of clerical errors.

(b) *Propriety.* (1) A discharge shall be deemed proper unless, in the course of discharge review, it is determined that:

(i) There exists an error of fact, law, procedure, or discretion associated with the discharge at the time of issuance; and that the rights of the applicant were prejudiced thereby (such error shall constitute prejudicial error if there is substantial doubt that the discharge would have remained the same if the error had not been made); or

(ii) A change in policy by the Military Service of which the applicant was a member, made expressly retroactive to the type of discharge under consideration, requires a change in the discharge.

(2) When a record associated with the discharge at the time of issuance involves a matter in which the primary responsibility for corrective action rests with another organization (for example, another Board, agency, or court), the DRB will recognize an error only to the extent that the error has been corrected by the organization with primary responsibility for correcting the record.

(3) The primary function of the DRB is to exercise its discretion on issues of equity by reviewing the individual merits of each application on a case-by-case basis. Prior decisions in which the DRB exercised its discretion to change a discharge based on issues of equity (including the factors cited in such decisions or the weight given to factors in such decisions) do not bind the DRB in its review of subsequent cases because no two cases present the same issues of equity.

(4) The following applies to applicants who received less than fully Honorable administrative discharges because of their civilian misconduct while in an inactive reserve component and who were discharged or had their discharge reviewed on or after April 20, 1971: the DRB shall either recharacterize the discharge to Honorable without any additional proceedings or additional proceedings shall be conducted in accordance with the Court's Order of

December 3, 1981, in *Wood v. Secretary of Defense* to determine whether proper grounds exist for the issuance of a less than Honorable discharge, taking into account that;

(i) An Other than Honorable (formerly undesirable) Discharge for an inactive reservist can only be based upon civilian misconduct found to have affected directly the performance of military duties;

(ii) A General Discharge for an inactive reservist can only be based upon civilian misconduct found to have had an adverse impact on the overall effectiveness of the military, including military morale and efficiency.

(c) *Equity.* A discharge shall be deemed to be equitable unless:

(1) In the course of a discharge review, it is determined that the policies and procedures under which the applicant was discharged differ in material respects from policies and procedures currently applicable on a Service-wide basis to discharges of the type under consideration provided that:

(i) Current policies or procedures represent a substantial enhancement of the rights afforded a respondent in such proceedings; and

(ii) There is substantial doubt that the applicant would have received the same discharge if relevant current policies and procedures had been available to the applicant at the time of the discharge proceedings under consideration.

(2) At the time of issuance, the discharge was inconsistent with standards of discipline in the Military Service of which the applicant was a member.

(3) In the course of a discharge review, it is determined that relief is warranted based upon consideration of the applicant's service record and other evidence presented to the DRB viewed in conjunction with the factors listed in this section and the regulations under which the applicant was discharged, even though the discharge was determined to have been otherwise equitable and proper at the time of issuance. Areas of consideration include, but are not limited to:

(i) Quality of service, as evidenced by factors such as:

(A) Service history, including date of enlistment, period of enlistment, highest rank achieved, conduct or efficiency ratings (numerical or narrative);

(B) Awards and decorations;

(C) Letters of commendation or reprimand;

(D) Combat service;

(E) Wounds received in action;

(F) Records of promotions and demotions;

(G) Level of responsibility at which the applicant served;

(H) Other acts of merit that may not have resulted in a formal recognition through an award or commendation;

(I) Length of service during the service period which is the subject of the discharge review;

(J) Prior military service and type of discharge received or outstanding postservice conduct to the extent that such matters provide a basis for a more thorough understanding of the performance of the applicant during the period of service which is the subject of the discharge review;

(K) Convictions by court-martial;

(L) Records of nonjudicial punishment;

(M) Convictions by civil authorities while a member of the Service, reflected in the discharge proceedings or otherwise noted in military service records;

(N) Records of periods of unauthorized absence;

(O) Records relating to a discharge instead of court-martial.

(ii) Capability to serve, as evidenced by factors such as:

(A) *Total capabilities*. This includes an evaluation of matters, such as age, educational level, and aptitude scores. Consideration may also be given whether the individual met normal military standards of acceptability for military service and similar indicators of an individual's ability to serve satisfactorily, as well as ability to adjust to military service.

(B) *Family and Personal Problems*. This includes matters in extenuation or mitigation of the reason for discharge that may have affected the applicant's ability to serve satisfactorily.

(C) *Arbitrary or capricious action*. This includes actions by individuals in au-

thority that constitute a clear abuse of such authority and that, although not amounting to prejudicial error, may have contributed to the decision to discharge or to the characterization of service.

(D) *Discrimination*. This includes unauthorized acts as documented by records or other evidence.

§ 70.10 Complaints concerning decisional documents and index entries.

(a) *General*. (1) The procedures in this section—are established for the sole purpose of ensuring that decisional documents and index entries issued by the DRBs of the Military Departments comply with the decisional document and index entry principles of this part.

(2) This section may be modified or supplemented by the DASD(MP&FM).

(3) The following persons may submit complaints:

(i) A former member of the Armed Forces (or the former member's counsel) with respect to the decisional document issued in the former member's own case; and

(ii) A former member of the Armed Forces (or the former member's counsel) who states that correction of the decisional document will assist the former member in preparing for an administrative or judicial proceeding in which the former member's own discharge will be at issue.

(4) The Department of Defense is committed to processing of complaints within the priorities and processing goals set forth in paragraph (d)(1)(iii) of this section. This commitment, however, is conditioned upon reasonable use of the complaint process under the following considerations. The DRBs were established for the benefit of former members of the Armed Forces. The complaint process can aid such persons most effectively if it is used by former members of the Armed Forces when necessary to obtain correction of their own decisional documents or to prepare for discharge reviews. If a substantial number of complaints submitted by others interferes with the ability of the DRBs to process applications for discharge review in a timely fashion, the Department of Defense will adjust the processing goals to ensure that

the system operates to the primary advantage of applicants.

(5) The DASD(MP&FM) is the final authority with respect to action on such correspondence.

(b) *The Joint Service Review Activity (JSRA)*. A three member JSRA consisting of one judge advocate from each Military Department shall advise the DASD(MP&FM). The operations of the JSRA shall be coordinated by a full-time administrative director, who shall serve as recorder during meetings of the JSRA. The members and the administrative director shall serve at the direction of the DASD(MP&FM).

(c) *Classification and control of correspondence*—(1) *Address of the JSRA*. Correspondence with the OSD concerning decisional documents or index entries issued by the DRBs shall be addressed as follows: Joint Service Review Activity, OASD(MRA&L) (MP&FM), Washington, DC 20301.

(2) *Docketing*. All such correspondence shall be controlled by the administrative director through the use of a uniform docketing procedure.

(3) *Classification*. Correspondence shall be reviewed by the administrative director and categorized either as a complaint or an inquiry in accordance with the following:

(i) *Complaints*. A complaint is any correspondence in which it is alleged that a decisional document issued by a DRB or SRA contains a specifically identified violation of the Stipulation of Dismissal, Settlement Agreement, or related Orders in the *Urban Law* case or the decisional document or index entry principles of this Directive. A complainant who alleges error with respect to a decisional document issued to another person is encouraged to set forth specifically the grounds for determining that a reasonable person familiar with the discharge review process cannot understand the basis for the decision. See paragraph (d)(1)(i)(B) of this section.

(ii) *Inquiries*. An inquiry is any correspondence other than a complaint.

(d) *Review of complaints*. (1) *Guidance*. The following guidance applies to review of complaints:

(i) *Standards*. Complaints shall be considered under the following standards:

(A) *The applicant's case*. A complaint by an applicant with respect to the decisional document issued in the applicant's own discharge review shall be considered under the Stipulation of Dismissal in the *Urban Law* case and other decisional document requirements applicable at the time the document was issued, including those contained in the Settlement Agreement and related Orders, subject to any limitations set forth therein with respect to dates of applicability. If the authority empowered to take corrective action has a reasonable doubt whether a decisional document meets applicable requirements of the *Urban Law* case or other applicable rules, the complaint shall be resolved in the applicant's favor.

(B) *Other cases*. With respect to all other complaints, the standard shall be whether a reasonable person familiar with the discharge review process can understand the basis for the decision, including the disposition of issues raised by the applicant. This standard is designed to ensure that the complaint process is not burdened with the need to correct minor errors in the preparation of decisional documents.

(ii) *Use of DD Form 293*. With respect to any decisional document issued on or after November 27, 1982, a complaint alleging failure of the DRB to address adequately matter not submitted on DD Form 293 or expressly incorporated therein will be resolved in the complainant's favor only if the failure to address the issue was arbitrary, capricious, or an abuse of discretion.

(iii) *Scope of review*. When a complaint concerns a specific issue in the applicant's own discharge review, the complaint review process shall involve a review of all the evidence that was before the DRB or SRA, including the testimony and written submissions of the applicant, to determine whether the issue was submitted, and if so, whether it was addressed adequately with respect to the Stipulation of Dismissal, Settlement Agreement, or related Orders in the *Urban Law* case and other applicable provisions of this Directive. With respect to all other complaints about specific issues, the complaint review process may be based

CHAPTER I—OFFICE OF THE SECRETARY OF DEFENSE

(Parts 1 to 190)

EDITORIAL NOTE: Cross reference to the Department of Defense Federal Acquisition Regulations, see 48 CFR chapter 2.

SUBCHAPTER A—ACQUISITION

<i>Part</i>		<i>Page</i>
1	[Reserved]	
2	Pilot program policy	11
3-20	[Reserved]	

SUBCHAPTER B—DOD GRANTS REGULATIONS

23	Grants and agreements—military recruiting on campus	14
25	Governmentwide debarment and suspension (non-procurement) and governmentwide requirements for drug-free workplace (grants)	15
28	New restrictions on lobbying	35
33	Uniform administrative requirements for grants and cooperative agreements to State and local governments	46

SUBCHAPTER C—PERSONNEL, MILITARY AND CIVILIAN

40	Standards of conduct cross-references	74
40a	Defense contracting: reporting procedures on defense related employment	75
41	Enlisted administrative separations	84
42	Interception of wire and oral communications for law enforcement purposes	105
43	Personal commercial solicitation on DoD installations	116
44	Screening the Ready Reserve	123
45	Certificate of release or discharge from active duty (DD Form 214/5 Series)	127

Part		Page
46	Federal voting assistance program	142
47	Active duty service for civilian or contractual groups	145
48	Retired serviceman's family protection plan	150
51	The Department of Defense Military Equal Opportunity Program	160
53	Wearing of the uniform	164
54	Allotments for child and spousal support	165
55	Physical examinations and annual certificates of physical condition	169
56	Nondiscrimination on the basis of handicap in programs and activities assisted or conducted by the Department of Defense	170
57	Provision of early intervention and special education services to eligible DOD dependents in overseas areas	190
58	Human Immunodeficiency Virus (HIV-1)	211
59	Voluntary military pay allotments	218
61	Medical malpractice claims against military and civilian personnel of the Armed Forces	221
62	Alcohol and drug abuse by DoD personnel	221
62b	Drunk and drugged driving by DoD personnel	224
63	Former spouse payments from retired pay	233
64	Management and mobilization of regular and reserve retired military members	240
65	Accession of chaplains for the military services	244
67	Educational requirements for appointment of reserve component officers to a grade above first lieutenant or lieutenant (junior grade)	248
68	Provision of free public education for eligible children pursuant to section 6, Public Law 81-874	249
69	School boards for Department of Defense domestic dependent elementary and secondary schools	256
70	Discharge review board (DRB) procedures and standards	260
71	Eligibility requirements for education of minor dependents in overseas areas	295
72	Voluntary education programs in overseas areas	300
73	Training simulators and devices	302
74	Appointment of doctors of osteopathy as medical officers	305
75	Conscientious objectors	306
76	Mobilization of the Ready Reserve	314
77	Program to encourage public and community service	320
78	Voluntary State tax withholding from retired pay	330

Part		Page
79	Contributions to State retirement programs for National Guard technicians	333
80	Provision of early intervention services to eligible infants and toddlers with disabilities and their families, and special education children with disabilities within the section 6 school arrangements	335
81	Paternity claims and adoption proceedings involving members and former members of the Armed Forces	358
83	Standards of conduct	360
84	Joint ethics regulation	361
85	Health promotion	422
86	Criminal history background checks on individuals in child care services	426
88	Transition assistance for military personnel	437
89	Civilian pay allotments	440
93	Acceptance of service of process; release of official information in litigation; and testimony by NSA personnel as witnesses	445
94	Naturalization of aliens serving in the Armed Forces of the United States and of alien spouses and/or alien adopted children of military and civilian personnel ordered overseas	449
96	Acquisition and use of criminal history record information by the military services	453
97	Release of official information in litigation and testimony by DoD personnel as witnesses	454
98	Defense hotline program	458
99	Procedures for States and localities to request indemnification	470
100	Unsatisfactory performance of ready reserve obligation	471
101	Participation in Reserve training programs	476
102	Uniform Reserve, training and retirement categories	479
103	Enlistment, appointment, and assignment of individuals in Reserve components	497
105	Employment and volunteer work of spouses of military personnel	498
107	Personal services authority for direct health care providers	500
110	Standardized rates of subsistence allowance and commutation instead of uniforms for members of the Senior Reserve Officers' Training Corps	501
111	Reserve Officers' Training Corps program for secondary educational institutions	508

Part		Page
112	Indebtedness of military personnel	514
113	Indebtedness procedures of military personnel	517
114	Reserve components common personnel data system (RCCPDS)	534
115	Assignment to and transfer between Reserve categories, and discharge from Reserve status	575
132	Initial active duty for training in Reserve components	577
142	Copyrighted sound and video recordings	579
143	DoD policy on organizations that seek to represent or organize members of the Armed Forces in negotiation or collective bargaining	580
144	Service by members of the Armed Forces on State and local juries	583
145	Cooperation with the Office of Special Counsel of the Merit Systems Protection Board	584
146	Compliance of DoD members, employees, and family members outside the United States with court orders	590

SUBCHAPTER D—REGULATIONS PERTAINING TO MILITARY JUSTICE

150	Courts of criminal appeals rules of practice and procedure	593
151	Status of forces policies and information	601
152	Review of the manual for courts-martial	607

SUBCHAPTER E—SECURITY

154	Department of Defense personnel security program regulation	610
155	Defense industrial personnel security clearance program	673
156	Department of defense personnel security program (DoDPSP)	681
157	Dissemination of DoD technical information	683
158	Guidelines for systematic declassification review of classified information in permanently valuable DoD records	687
159	DoD information security program	694
159a	Information security program regulation	696

SUBCHAPTER F—DEFENSE CONTRACTING

160	Defense acquisition regulatory system	771
162	Productivity Enhancing Capital Investment (PECI)	773

Part		Page
165	Recoupment of nonrecurring costs on sales of U.S. items	777
168a	National defense science and engineering graduate fellowships	781
169	Commercial activities program	782
169a	Commercial activities program procedures	786
172	Disposition of proceeds from DoD sales of surplus personal property	828
173	Competitive information certificate and profit reduction clause	834

SUBCHAPTER G—CLOSURES AND REALIGNMENT

174	Revitalizing base closure communities	838
175	Revitalizing base closure communities-base closure community assistance	839
176	Revitalizing base closure communities and community assistance—Community redevelopment and homeless assistance	851

SUBCHAPTER H—CIVIL DEFENSE

185	Military support to civil authorities (MSCA)	861
186	The DoD Explosives Safety Board	872

SUBCHAPTERS I-K [RESERVED]

SUBCHAPTER L—ENVIRONMENT

187	Environmental effects abroad of major Department of Defense actions	876
188	Environmental effects in the United States of DoD actions	885
189	Mineral exploration and extraction on DoD lands ..	891
190	Natural Resources Management Program	893

CHAPTER VI—DEPARTMENT OF THE NAVY

SUBCHAPTER A—UNITED STATES NAVY REGULATIONS AND OFFICIAL RECORDS

Part		Page
700	United States Navy regulations	9
701	Availability of Department of the Navy records and publication of Department of the Navy documents affecting the public	39
705	Public affairs regulations	121

SUBCHAPTER B—NAVIGATION

706	Certifications and exemptions under the International Regulations for Preventing Collisions at Sea, 1972	159
707	Special rules with respect to additional station and signal lights	174

SUBCHAPTER C—PERSONNEL

716	Death gratuity	176
718	Missing Persons Act	181
719	Regulations supplementing the manual for courts-martial	184
720	Delivery of personnel; service of process and subpoenas; production of official records	197
721	Standards of conduct	214
722	Reporting procedures on defense related employment	240
723	Board for Correction of Naval Records	243
724	Naval Discharge Review Board	249
725	Release of official information for litigation purposes and testimony by Department of the Navy personnel	283
726	Payments of amounts due mentally incompetent members of the Naval service	297
727	Legal assistance	299
728	Medical and dental care for eligible persons at Navy medical department facilities	304
732	Nonnaval medical and dental care	368

	... to and support of dependents; paternity complaints	
	... of pay of Naval military and civilian personnel for collection of child support and alimony	
735	Reporting births and deaths in cooperation with other agencies	
SUBCHAPTER D—PROCUREMENT, PROPERTY, PATENTS, AND CONTRACTS		
736	Disposition of property	391
744	Policies and procedures for the protection of proprietary rights in technical information proposed for release to foreign governments	395
746	Licensing of government inventions in the custody of the Department of the Navy	396
SUBCHAPTER E—CLAIMS		
750	General claims regulations	402
751	Personnel claims regulations	426
752	Admiralty claims	455
755	Claims for injuries to property under Article 139 of the Uniform Code of Military Justice	458
756	Nonappropriated-fund claims regulations	461
757	Affirmative claims regulations	463
SUBCHAPTER F—ISLANDS UNDER NAVY JURISDICTION		
761	Naval Defensive Sea Areas; Naval Airspace Reservations, areas under Navy administration, and the Trust Territory of the Pacific Islands	472
762	Midway Islands Code	484
763	Rules governing public access	501
SUBCHAPTER G—MISCELLANEOUS RULES		
765	Rules applicable to the public	504
766	Use of Department of the Navy aviation facilities by civil aircraft	508
767-769	[Reserved]	
770	Rules limiting public access to particular installations	518
771-774	[Reserved]	
775	Procedures for implementing the National Environmental Policy Act	528
776	Professional conduct of attorneys practicing under the supervision of the judge advocate general	537
777-799	[Reserved]	

CROSS REFERENCES: Panama Canal: See 35 CFR chapter I.
National Oceanic and Atmospheric Administration, Department of Commerce: See 15 CFR chapter IX.
Coast Guard, Department of Transportation: See 33 CFR chapter I; 46 CFR chapter I.
Office of the Secretary of Defense: See 32 CFR chapter I.
Department of the Army: See 32 CFR chapter V.
Navigation and Navigable Waters (Anchorage Bridge, Danger Zone, Navigation, and Oil Pollution Regulations, etc.): See 33 CFR chapters I and II.
Selective Service System: See 32 CFR chapter XVI.
Department of Veterans Affairs: See 38 CFR chapter I.

APPENDIX B TO PART 47—THE DOD CIVILIAN/MILITARY SERVICE REVIEW BOARD AND THE ADVISORY PANEL

A. Organization and Management

1. The board shall consist of a president selected from the Department of the Air Force and one representative each from the OSD, the Department of the Army, the Department of the Navy, the Department of the Air Force, and the U.S. Coast Guard (when the group claims active Coast Guard service). Each member shall have one vote except that the president shall vote only to break a tie. The board's decision is determined by majority vote. The president and two voting members shall constitute a quorum.

2. The advisory panel shall act as a nonvoting adjunct to the board. It shall consist of historians selected by the Secretaries of the Military Departments and, if required, by the Secretary of Transportation. The respective Military Departments and the DOT shall ensure that the advisory panel is provided with administrative and legal support.

B. Functions

1. The board shall meet in executive session at the call of the president, and shall limit its reviews to the following:

- Written submissions by an applicant on behalf of a civilian or contractual group. Presentations to the board are not allowed.
- Written report(s) prepared by the advisory panel.
- Any other relevant written information available.
- Factors established in this part for determining AD service.

2. The board shall return to the applicant any application that does not meet the eligibility criteria established in §47.4(a). The board only needs to state the reasons why the group is ineligible for consideration under this part.

3. If the board determines that an application is eligible for consideration under §47.4(a), the board shall provide, to the Secretary of the Air Force, a recommendation on the AD service determination for the group and the rationale for that recommendation that shall include, but not be limited to, a discussion of the factors listed in §47.4.

a. No factors shall be established that require automatic recognition. Neither the board nor the Secretary of the Air Force shall be bound by any method in reaching a decision.

b. Prior group determinations made under Public Law 95-202 do not bind the board or the Secretary of the Air Force. The board and the Secretary of the Air Force fully and impartially shall consider each group on its own merit in relation to the factors listed in section D. of this Directive.

PART 48—RETIRED SERVICEMAN'S FAMILY PROTECTION PLAN

Subpart A—General Information

- Sec.
48.101 Purpose.
48.102 Definitions.

Subpart B—Election of Options

- 48.201 Options.
48.202 Limitation on number of annuities.
48.203 Election of options.
48.204 Change or revocation of election.
48.205 Election form.
48.206 Information regarding elections.

Subpart C—Designation of Beneficiaries

- 48.301 Designation.
48.302 Substantiating evidence regarding dependency and age of dependents.
48.303 Condition affecting entitlement of widow or widower.

Subpart D—Reduction of Retired Pay

- 48.401 Computation of reduction.
48.402 Effective date of reduction.
48.403 Payment of nonwithheld reduction of retired pay.
48.404 Ages to be used.
48.405 Action upon removal from temporary disability retired list.
48.406 Withdrawal and reduction of percentage or amount of participation.

Subpart E—Annuity

- 48.501 General information.
48.502 Effective date of annuity.
48.503 Claims for annuity payments.
48.504 Payment to children.
48.505 Establishing eligibility of annuitants.
48.506 Recovery of erroneous annuity payments.
48.507 Restriction on participation.
48.508 Certain 100 percent disability retirements.

Subpart F—Miscellaneous

- 48.601 Annual report.
48.602 Organization.
48.603 Correction of administrative deficiencies.
48.604 Transition and protective clauses.

AUTHORITY: Sec. 1444, 70A Stat. 111; 10 U.S.C. 1444.

SOURCE: 34 FR 12092, July 18, 1969, unless otherwise noted.

Subpart A—General Information

§48.101 Purpose.

The purpose of the Retired Serviceman's Family Protection Plan is to permit each member of the uniformed services to elect to receive a reduced amount of any retired pay which may be awarded him as a result of service in his uniformed service in order to provide an annuity payable after his death (while entitled to retired pay) to his widow, child, or children, subject to certain limitations specified in the law and elaborated in the regulations in this part.

§48.102 Definitions.

(a) The terms *Plan* or *RSFPP* as hereinafter used means the Retired Serviceman's Family Protection Plan (formerly called the Uniformed Services Contingency Option Act).

(b) The term *uniformed services* means the Army, Navy, Air Force, Marine Corps, Coast Guard, Commissioned Corps of Environmental Science Services Administration, and Commissioned Corps of Public Health Service.

(c) The term *member* means a commissioned officer, commissioned warrant officer, warrant officer, nurse, flight officer, or a person in an enlisted grade (including an aviation cadet) of any of the uniformed services, and a person in any of these categories who is entitled to or is in receipt of retired pay, except persons excluded in title 10, U.S. Code, section 1431(a), as amended.

(d) The term *widow* includes *widower* and refers to the lawful spouse of the member on the date of retirement with pay.

(e) The term *child* means, in all cases, a member's child, who is living on the date of retirement of the member with pay and who meets the following requirements:

- (1) A legitimate child under 18 years of age and unmarried.
- (2) A stepchild, under 18 years of age and unmarried, who is in fact dependent on the member for support (see paragraphs (f) and (g) of this section).
- (3) A legally adopted child, under 18 years of age and unmarried.
- (4) A child, as defined above, who is 18 or more years of age and unmarried, and who is incapable of self-support be-

cause of being mentally defective or physically incapacitated if that condition existed prior to reaching age 18.

(5) A child as defined above, who is at least 18, but under 23 years of age and unmarried, who is pursuing a full-time course of study or training in a high school, trade school, technical or vocational institute, junior college, college, university, or comparable recognized educational institution. (Applicable only in the case of members who retired on or after Nov. 1, 1968).

(6) A child loses his eligibility for an annuity under this part if he is adopted by a third person before the parent-member's death. His eligibility is not affected if he is adopted by a third person after the parent-member's death (36 Comp. Gen. 325).

(f) The term *stepchild* means a child of a member's spouse by a former marriage. The stepchild relationship terminates upon the divorce of the parent spouse, but not upon the death of the parent spouse.

(g) The term *in fact dependent* means that the stepchild must be dependent on the member for over half of his or her support.

(h) The term *retirement* means retirement with eligibility to receive retired pay.

(i) The term *retired pay* includes retired, retirement, equivalent and retainer pay awarded as a result of service in the uniformed services.

(j) The term *reduced retired pay* means the retired pay remaining after the cost of participation in RSFPP has been subtracted.

(k) The term *department concerned* means (1) the Department of the Army with respect to the Army, (2) the Department of the Navy with respect to the Navy and Marine Corps, (3) the Department of the Air Force with respect to the Air Force, (4) the Department of Transportation with respect to the Coast Guard, (5) the Department of Commerce with respect to the Environmental Science Services Administration, and (6) the Department of Health, Education, and Welfare with respect to the Public Health Service.

(l) The term *dependent* means the prospective annuitants described in paragraphs (d) and (e) of this section.

(m) The term *Board of Actuaries* means the Government Actuary in the Department of the Treasury, the Chief Actuary of the Social Security Administration, and a member of the Society of Actuaries appointed by the President to advise the Secretary of Defense on the administration of the Plan.

(n) The term *Joint Board* means representatives of the uniformed services appointed under the provisions of §48.602.

(o) The term *years of service* means years of service creditable in the computation of basic pay.

(p) The term *election* means the choice of options made by the member under the RSFPP. This term includes a modification of a previous election or an election submitted after a revocation of a previous option(s) elected.

(q) The term *elections in effect* means valid elections existing on the day of retirement.

(r) A recognized educational institution is defined as a high school, trade school, technical or vocational institute, junior college, college, university, or comparable recognized educational institution which meets one or more of the following criteria:

(1) It is operated or directly supported by the United States, or a State, or local governmental agency.

(2) It is accredited by a nationally recognized or State recognized accrediting agency.

(3) It is approved as an educational institution by a State or local governmental agency.

(4) Its credits are accepted for transfer (or for admission) by three or more accredited schools on the same basis as credits from an accredited school.

Subpart B—Election of Options

§48.201 Options.

As provided in §48.203, a member may elect one or more of the following annuities. The amount must be specified at time of election, and may not be for more than 50 per centum nor less than 12½ per centum of his retired pay, in no case may be less than a \$25 monthly annuity be elected. If the election is made in terms of dollars, the amount may be more than 50 per centum of the retired pay that he would receive if he

were to retire at the time of election; however, if such elected amount exceeds 50 per centum of his retired pay when he does retire, it shall be reduced to an amount equal to such 50 per centum. Also, if the dollar amount elected is less than 12½ per centum of his retired pay when he does retire, it shall be increased to an amount equal to such 12½ per centum.

(a) Option 1 is an annuity payable to or on behalf of his widow, the annuity to terminate upon her death or remarriage.

(b) Option 2 is an annuity payable to or on behalf of his surviving child or children as defined in §48.102, the annuity to terminate when there ceases to be at least one such surviving child eligible to receive the annuity. Each payment under such annuity shall be paid in equal shares to or on behalf of the surviving children remaining eligible at the time the payment is due. A member who had this option in effect on the date of retirement, and who retired on or after November 1, 1968, may apply to the Secretary concerned to have a child (other than a child described in §48.102(e)(4)) who is at least 18 but less than 23 years of age considered not to be an eligible beneficiary under this paragraph (b) or §48.202. Normally such applications will be approved.

(c) Option 3 is an annuity to or on behalf of his widow and surviving child or children. Such annuity shall be paid to the widow until death or remarriage, and thereafter each payment under such annuity shall be paid in equal shares to or on behalf of the surviving children remaining eligible at the time the payment is due. A member may provide for allocating, during the period of the surviving spouse's eligibility, a part of the annuity under this subpart B for payment to those of his surviving children who are not children of that spouse. The sum allotted will not exceed the equitable share for which such children would be eligible after the death of the widow.

(d) When no eligible beneficiary remains to benefit from the option elected, the member's retired pay will be restored (except as provided in §48.604 for certain members retired before Aug. 13, 1968). All elections on file on

Aug. 13, 1968, for members not entitled to receive retired pay will be considered to include the restoration feature with attendant cost factors being applied at time of retirement. For the purpose of this paragraph, a child (other than a child described in §48.102(e)(4)) who is at least 18 but less than 23 years of age, and is not pursuing a course of study as defined in §48.102(e)(5), shall be considered an eligible beneficiary unless an approved application by the member pursuant to §48.201(b) that such a child is not to be considered an eligible beneficiary is in effect (for members who retire on or after Nov. 1, 1968).

§48.202 Limitation on number of annuities.

When a member desires to provide both the annuity provided by Option 1 and Option 2, he may elect amounts that, in total, meet the limitations specified in §48.201. The cost of each annuity, and the amount of each annuity shall be determined separately. A member may not elect the combination of Options 1 and 3 or Options 2 and 3 in any case. The combined amount of the annuities may not be more than 50 per centum nor less than 12½ per centum of his retired pay. In no case may less than a \$25 per month combined annuity be provided.

§48.203 Election of options.

(a) A member who has completed less than 19 years of service as defined in §48.102(o) may elect to receive a reduced amount of retired pay in order to provide one or more of the annuities as specified in §§48.201 and 48.202, payable after his death while entitled to retired pay to or on behalf of his surviving widow, child, or children. To be effective, the election by such a member must be dated, signed, witnessed, and delivered to appropriate service officials, or postmarked not later than midnight on the day in which he completes 19 years of service. Such an election will become effective immediately upon subsequent retirement. The latest election, change, or revocation made in accordance with this subsection will, if otherwise valid, be the effective election, unless superseded by a change as

provided in paragraph (b) of this section.

(b) Except as provided in paragraph (c) of this section, a member who fails or declines to make an election before completion of 19 years of service may make an election after that time. However, unless the election is made at least 2 years prior to the date the member becomes entitled to receive retired pay, it will not be effective. The same applies to subsequent changes or revocations made prior to retirement.

(c) If an election, revocation, or change was made prior to August 13, 1968, the 19-year and 2-year provisions are automatically in effect on August 13, 1968, for members who were not entitled to retired pay on such date, unless the member applies under §48.604(d) to remain under the provisions of the law prior to August 13, 1968. In this case the "18 years of service" and "3 years prior to receipt of retired pay" rules will apply.

(d) A member retired for physical disability on or after November 1, 1968 who is awarded retired pay prior to completion of 19 years of service may make an election which is subject to the restrictions set forth in §48.507. The election by such member shall be made before the first day for which he is entitled to retired pay. Elections made under this paragraph prior to November 1, 1968, must be made by the member retiring for physical disability prior to completing 18 years.

(e) If, because of military operations, a member is assigned to an isolated station, or is missing, interned in a neutral country, captured by a hostile force, or beleaguered or besieged, and for that reason is unable to make an election before completing 19 years of service, he may make the election within 1 year after he ceases to be assigned to that station or returns to the jurisdiction of his service as the case may be, and such election shall become effective immediately upon subsequent retirement.

(f) A member to whom retired pay is granted retroactively, and who is otherwise eligible to make an election, may make the election within 90 days after receiving notice that such pay has been granted him.

(g) Whenever a member is determined to be mentally incompetent by medical officers of the uniformed services or of the Veterans Administration, or is adjudged mentally incompetent by a court of competent jurisdiction and because of such mental incompetency is incapable of making any election within the time limitations prescribed by the Plan, the Secretary of the Department concerned may make the appropriate election on behalf of such member upon request of the spouse, or if there be no spouse, by or on behalf of the child or children of such member. If such member is subsequently determined to be mentally competent by the Veterans Administration or a court of competent jurisdiction, he may, within 180 days after such determination or judgment, change or revoke the election made on his behalf. In such a case, the change or revocation will be effective on the date of the member's request for such change or revocation. Deductions previously made shall not be refunded.

(h) All elections on file on August 13, 1968, for members not entitled to receive retired pay shall be subject to the provisions of this section unless the member makes the application specified in § 48.604(d).

(i) A person who was a former member of the armed forces on November 1, 1953, and who is granted retired pay after that date, may, at the time he is granted that pay, make an election as provided in § 48.201.

§ 48.204 Change or revocation of election.

(a) A change of election is a change in the amount of the annuity or annuities under any option, or a change in any option or options selected. A revocation is a cancellation of a previous election and constitutes a withdrawal from coverage under the Plan.

(b) A member may change or revoke his election as often as he desires prior to the completion of 19 years of service. Such a change or revocation must be dated, signed, witnessed, and delivered to appropriate service officials, or postmarked not later than midnight on the day in which the member completes 19 years of service. The latest election, change, or revocation which is submit-

ted in accordance with this subsection will be effective at retirement.

(c) A member who desires to make an election or change or revoke his election after he has completed 19 years of service may do so prior to his retirement. However, such an election, change or revocation will be effective only if at least 2 years elapse between the date of the election, change, or revocation and the date of eligibility to receive retired pay.

(d) A revocation will not prohibit the filing of a new election at a later date which will become valid under applicable validation provisions.

(e) A member may, on or after November 1, 1968, at any time prior to his retirement, change or revoke his election (provided the change does not increase the amount of the annuity elected) to reflect a change in the marital or dependency status of the member or of his family caused by death, divorce, annulment, remarriage, or acquisition of a child, if such change or revocation is made within 2 years of such change in status.

(f) Notification of a change in family status is not a change of election.

(g) All changes and revocations on file on August 13, 1968, for members not entitled to retired pay shall be subject to the provisions of this section unless the member makes the application specified in § 48.604(d).

§ 48.205 Election form.

The form for making election after October 31, 1968, is prescribed as Election of Options, Retired Serviceman's Family Protection Plan, DD Form 1688.¹ It will be submitted as directed herein. All copies will be signed; and any otherwise complete, signed copy, when properly submitted, may be used to substantiate the fact of election, modification, revocation, or change in family status.

§ 48.206 Information regarding elections.

(a) All members of the Reserve component who will have accumulated sufficient service to be eligible for retired

¹ Filed as part of the original document. Copies may be obtained from Military Personnel Office.

pay at age 60, will be counseled on the Plan before reaching their 57th birth dates in order to insure that valid elections can be made prior to their 58th birth dates. An election, modification, or revocation submitted subsequent to attaining age 58 will be valid only if it is made and submitted at least 2 years prior to the first date for which retired pay is granted.

(b) It is the responsibility of the department concerned to provide election forms and to promulgate information concerning the benefits of the Plan to all members so as to allow a timely election.

(c) Members retiring for physical disability prior to the completion of 19 years of service will, prior to retirement, be counseled and furnished information concerning the operation of the Plan.

Subpart C—Designation of Beneficiaries

§ 48.301 Designation.

(a) All legal beneficiaries described in § 48.102 must be named at the date of retirement pursuant to the option elected. Although a member without dependents may make an election, it will not be effective unless he has eligible dependents at the time of his retirement.

(b) When a change in family status occurs prior to retirement which would effect a change as provided in § 48.204(e), new DD Form 1688, Election of Options, Retired Servicemen's Family Protection Plan, should be filed to evidence such change.

§ 48.302 Substantiating evidence regarding dependency and age of dependents.

At the time of submitting the election, or prior to retirement, the member must indicate his wife's and youngest child birth date as applicable to the option elected. At or before the time of his retirement, he must submit proof of final dissolution of prior marriages, if any, both for himself and his spouse. The age of the dependents must be substantiated by a birth certificate or other competent evidence. The birth

¹ See footnote 1 to § 48.205.

date of a member must be verified by his service record. All required substantiating evidence must be at the disbursing office which would normally pay the member retired pay or retainer pay immediately following retirement so as to permit the establishment of accurate pay accounts and to prevent the creation of indebtedness or overpayments.

§ 48.303 Condition affecting entitlement of widow or widower.

A member may have a different lawful spouse at the time of retirement from the lawful spouse he had at the time of election. The lawful spouse at the time of retirement is the spouse eligible for an annuity at the time of member's death. Divorce of the member will remove the former spouse as a prospective annuitant.

Subpart D—Reduction of Retired Pay

§ 48.401 Computation of reduction.

(a) The reduction to be made in the retired pay of a member who has made an election shall be computed by the uniformed service concerned in each individual case, based upon tables of factors prepared by the Board of Actuaries. The computation shall be based upon the applicable table in effect on the date of retirement.

(b) An adjustment may be made in the reduction of retired pay upon the finding of an administrative error or a mistake of fact (see § 48.603).

(c) If a member elects to be covered by option 3, and on the date he is awarded retired pay has no children eligible to receive the annuity, or has only a child or children aged 18-22 (other than a child described in § 48.102(e)(4) and elects, at retirement, that such child or children shall not be considered to be eligible beneficiaries, he shall have his costs computed as though he had elected option 1. If he elects option 3, and on the date he is awarded retired pay has no wife eligible for the annuity, he shall have his costs computed as though he had elected option 2.

(d) If a member elects option 3, and after he becomes entitled to retired pay, there is no eligible spouse because

of death or divorce, upon the retired member's application, no deductions from his retired pay shall be made after the last day of the month in which there ceases to be an eligible spouse. Children otherwise eligible will continue to be eligible for the annuity in event of the member's death. No amounts by which the member's retired pay is reduced before that date may be refunded to or credited on behalf of that person.

(e) The amount of reduction in retired pay and the annuity payable established for each individual at the time of his retirement shall remain unaltered except as provided in § 48.203(g), paragraphs (b) and (d) of this section, and § 48.406, regardless of future pay increases or decreases.

§ 48.402 Effective date of reduction.

The effective date of reduction in retired pay will be the effective date of retirement with pay. The reduction in retired pay will be terminated on the date the member ceases to be entitled to retired pay or on the first day of the month following that in which there is no eligible beneficiary (for exception to this rule see § 48.604).

§ 48.403 Payment of nonwithheld reduction of retired pay.

(a) A member of a uniformed service who is entitled to retired pay and has made an election shall, during any period in which he is not receiving retired pay (including periods of active duty), deposit the amount which would have been withheld from his retired pay had he been receiving that pay.

(b) Such deposit will be payable to Treasurer of the United States and shall be forwarded monthly to the disbursing office which would normally pay the member his retired pay.

(c) The disbursing office will in all cases inform the member of the amount to be deposited and when such deposits are to be made.

(d) In the event deposits are not made within 30 days of the due date, the disbursing office will inform the member concerned that he is delinquent from such due date and thereafter his designated beneficiaries will not be eligible for the annuity provided under the Plan until the arrears have

been paid. The notification of delinquency will advise the member that 15 additional days have been granted to him in which to remit his deposit, and that if the arrears are not deposited within that period, the member will be charged interest to include the first day of delinquency. In no case will the expiration date of the 15 days exceed a date later than 45 days from the date the deposit was due. The interest will be computed monthly and the rate will be that used in computing the cost tables in effect on the date of the member's retirement. If such member later becomes in receipt of retired pay, any arrears with compound interest will be withheld.

§ 48.404 Ages to be used.

Ages to be used for calculating reductions of retired pay will be the ages of the member and his eligible dependents on their nearest birth dates as of the date of the member's retirement.

§ 48.405 Action upon removal from temporary disability retired list.

(a) Any member on the temporary disability retired list established pursuant to title 10, United States Code, chapter 61, who has elected to receive reduced retired pay in order to provide one or more of the annuities specified in the Plan, and who is subsequently removed from the list due to any reason other than permanent retirement, shall have refunded to him a sum which represents the difference between the amount by which his retired pay has been reduced and the cost of an amount of term insurance which is equal to the protection provided his dependents during the period he was on the temporary disability retired list.

(b) If the member concerned is returned to active duty, his election as previously made will continue or he may change or revoke the election as provided in § 48.204.

(c) Time creditable for the purpose of the two year interval required to make a change, revocation or new election valid includes service before, during, and after temporary disability retirement. (See §§ 48.203 and 48.204 and Comptroller Decision B-144158, Dec. 23, 1960.) Active duty after removal from a

temporary disability retired list is a necessity in such a case.

§ 48.406 Withdrawal and reduction of percentage or amount of participation.

A retired member who is participating in the Plan may revoke his election and withdraw from participation, or he may reduce the amount of the survivor annuity; however, an approved withdrawal or reduction will not be effective earlier than the first day of the seventh month beginning after the date his application is received by the Finance Center controlling his pay record. (For special rules covering participating members retired before Aug. 13, 1968, without option 4, see § 48.604.) No application for reduction will be approved which requests a change in options. A request to reduce an annuity or to withdraw from the Plan is irrevocable, and a retired member who withdraws may never again participate in the Plan. Approval of a request for a reduction will not be made when such reduction results in an annuity of less than 12½ per centum of the member's retired pay or less than a \$25 monthly annuity. The new cost, after such reduction in survivor annuity, will be computed from the applicable cost table at the time of retirement. No amounts by which a member's retired pay is reduced may be refunded to, or credited on behalf of, the member by virtue of an application made by him under this section.

Subpart E—Annuity

§ 48.501 General information.

Except as provided in § 48.506(a), no annuity payable under the Plan shall be assignable, or subject to execution, levy, attachment, garnishment, or other legal process. Annuities payable under this Plan shall be in addition to any pensions or other payments to which the beneficiaries may now or hereafter be entitled under other provisions of law (except as provided in § 48.507), and may not be considered as income under any law administered by the Veterans Administration, except for the purpose of title 38 U.S. Code, section 415(g) and chapter 15.

§ 48.502 Effective date of annuity.

All annuities payable under this Plan except those payable to beneficiaries described in § 48.102(e)(5) shall accrue from the first day of the month in which the retired member dies and shall be due and payable not later than the 15th day of each month following that month and in equal monthly installments thereafter, except that no annuity shall accrue or be paid for the month in which entitlement to that annuity terminates.

§ 48.503 Claims for annuity payments.

Upon official notification of the death of a retired member who has elected under the Plan, the department concerned shall forward to the eligible surviving beneficiaries the necessary information and forms (DD Form 768, Application for Annuity Under Retired Serviceman's Family Protection Plan) for making application for annuity payments. Such information shall include the place to which the application should be forwarded and to which questions regarding annuity payments should be addressed.

§ 48.504 Payment to children.

(a) Annuities for a child or children will be paid to the child's guardian, or if there is no guardian, to the person(s) who has care, custody, and control of the child or children.

(b) Annuities payable to or on behalf of an eligible child as defined in § 48.102(e)(5) accrue as of the first day of the month in which—

(1) The member (upon whose retired pay the annuity is based) dies if the eligible child's 18th birthday occurs in the same or a preceding month, or

(2) The 18th birthday of an eligible child occurs if the member (upon whose retired pay the annuity is based) died in a preceding month, or

(3) A child first becomes (or again becomes) eligible, if that eligible child's 18th birthday and the death of the member (upon whose retired pay the annuity is based) both occurred in a preceding month or months. An eligible child under this paragraph might become ineligible at age 18 and again become eligible by furnishing proof of pursuit of a full time course of study or training as enumerated in § 48.102(e)(5).

§ 48.505 Establishing eligibility of annuitants.

(a) Eligibility for the annuity will be established by such evidence as may be required by the department concerned.

(b) If a child as defined in § 48.102(e)(4) is a designated annuitant, the department concerned shall require proof that the incapacity for self-support existed prior to the child's reaching age 18. Proof that continued incapacitation exists will be required every 2 years after the child passes the age of 18 years, except in a case where medical prognosis indicates recovery is impossible.

(c) If a child as defined in § 48.102(e)(5) is a designated annuitant, as specified in § 48.504(b), the department concerned shall require proof from the institution at least semiannually that the child is pursuing a full-time course of training as prescribed. For the purpose of proving eligibility, a child is considered to be pursuing a full-time course of study or training during an interval between school periods that does not exceed 150 days if he has demonstrated to the satisfaction of the department concerned that he has a bona fide intention of commencing, resuming, or continuing to pursue a full-time course of study or training in a recognized educational institution immediately after that interval.

§ 48.506 Recovery of erroneous annuity payments.

(a) The Secretary of the Department concerned is empowered to use any means provided by law to recover amounts of annuities erroneously paid to any individual under the Plan. He may authorize such recovery by adjustment in subsequent payments to which the individual is entitled.

(b) There need be no recovery when in the judgment of the Secretary of the Department concerned and the Comptroller General of the United States, the individual to whom the erroneous payment was made is without fault and recovery would be contrary to the purpose of the Plan or would be against equity and good conscience.

§ 48.507 Restriction on participation.

(a) If a person who has made an election under the Plan retires with a

physical disability before the completion of 19 years of service and then dies in retirement, his widow and eligible children can receive monthly survivor annuities only if they are not eligible for Dependency and Indemnity Compensation payments from the Veterans Administration. If either the widow or children are eligible for dependency and indemnity compensation payments, then payment of annuities under the Plan may not be made to any member of the family. If the retired member's death was not service connected and his widow or children are not eligible for payments from the Veterans Administration, they may receive the provided annuity payments under the Plan.

(b) If the beneficiaries on whose behalf the election was made are restricted as in paragraph (a) of this section, from receiving annuities, the amounts withheld from the elector's retired pay as a result of the election will be refunded to the beneficiaries, less the amount of any annuity paid, and without interest.

(c) Upon notification of the death of the member in such a case, the department concerned will take the following actions:

(1) Notify the Central Office of the Veterans Administration of the death of the member and request that the department concerned be advised if an award is made under chapter 11 or 13, title 38 U.S. Code.

(2) Request the Central Office of the Veterans Administration to forward to the eligible widow and/or children an application form for survivor benefits under chapter 11 or 13, title 38 U.S. Code, with instructions for completion and submission.

§ 48.508 Certain 100 percent disability retirement.

An election filed on or after August 13, 1968 is not effective if the member dies within 30 days following retirement from a disability of 100 percent (under the standard schedule of rating disabilities in use by the Veterans Administration) for which he was retired under chapter 61, title 10 U.S. Code, unless—

(a) Such disability was the result of injury or disease received in line of

duty as a direct result of armed conflict, or

(b) His widow or children are not entitled to dependency and indemnity compensation under chapter 13, title 38 U.S. Code.

Subpart F—Miscellaneous**§ 48.601 Annual report.**

Information and data for the preparation of the annual report of the Board of Actuaries will be compiled by the Office of the Secretary of Defense after promulgation of appropriate instructions to each of the uniformed services. These instructions will be in consonance with Executive Order 10499 directing the Secretary of Defense to administer the provisions of the law.

§ 48.602 Organization.

(a) The Joint Board for the Retired Serviceman's Family Protection Plan shall consist of a principal and alternate member for each of the uniformed services appointed by the Department Secretary concerned. Alternate members will be authorized to act in the absence of the principal. The Board shall meet on call of the Chairman. A quorum shall consist of representatives of at least four of the participating services.

(b) The Board shall establish procedures for the orderly conduct of business to be approved by the Assistant Secretary of Defense (Manpower and Reserve Affairs).

(c) The duties of the Board will include but not be limited to the following:

(1) Making recommendations to the Secretary of Defense for:

(i) Changes to the Executive order delegating to him functions conferred on the President by law,

(ii) Changes to these regulations,

(iii) Changes to the law, and

(iv) Measures to insure uniform operating policies.

(2) Promulgating tables of annuity costs as prescribed by the Board of Actuaries.

(3) Promulgating cost of term insurance as required in § 48.405.

(d) The Chairmanship of the Joint Board will be designated by the Assist-

ant Secretary of Defense (Manpower and Reserve Affairs).

§ 48.603 Correction of administrative deficiencies.

(a) The Secretary of the Department concerned may correct any election or any change or revocation of an election when he considers it necessary to correct an administrative error. Information on such corrections shall be compiled by each department for inclusion in the report prescribed by § 48.601.

(b) Except when procured by fraud, a correction under the section is final and conclusive on all officers of the United States.

(c) Information on all corrections to elections under this Plan which are made under title 10, section 1552, United States Code, shall be compiled and this information forwarded to the Board of Actuaries for an actuarial analysis.

§ 48.604 Transition and protective clauses.

(a) A retired member who is participating in the Plan without inclusion of former option 4, which provided for restoration of retired pay when no eligible beneficiary remained in his election, may before September 1, 1969, elect to have that option included in his election. The election to include such option 4 becomes effective on the first day of the month following the month in which that election was made. The retired member must on or before the effective date agree to pay to the Treasury both the total additional amount to cover the option had it been effective when he retired, and the interest which would have accrued on the additional amount up to the effective date of the new option 4. No such additional amount (except interest) shall accrue for months after the first month for which the individual had no eligible beneficiary. However, if undue hardship or financial burden would result, payments may be made in from 2 to 12 monthly installments when the monthly amount involved is \$25 or less, or in from 2 to 36 installments when the monthly amounts involved exceed \$25. No amounts by which a member's retired pay was reduced may be refunded to, or credited on behalf of, the retired

member by virtue of an application made by him under this section. A retired member who does not make the additional election provided under this section within the time limits will not be allowed to reduce an annuity or withdraw from participation in the Plan as provided by § 48.406.

(b) Members who have elected and are not yet retired will automatically participate under the provisions of § 48.201.

(c) Elections in effect on August 13, 1968, will remain under the cost tables applicable on the date of the member's retirement.

(d) Any member who has filed an election, modification, or revocation prior to August 13, 1968, may before September 1, 1969, submit a written application to the Secretary concerned requesting that such election, modification, or revocation remain under the time-of-election provisions of the law applicable on the date it was filed.

PART 51—THE DEPARTMENT OF DEFENSE MILITARY EQUAL OPPORTUNITY PROGRAM

Sec.

51.1 Purpose.

51.2 Applicability and scope.

51.3 Definitions.

51.4 Policy.

51.5 Responsibilities.

51.6 Information requirements.

APPENDIX A TO PART 51—MILITARY EQUAL OPPORTUNITY REPORTING REQUIREMENTS

APPENDIX B TO PART 51—ORGANIZATIONS AND FUNCTIONS

AUTHORITY: Pub. L. 92-261, sec. 301, 80 Stat. 379 (5 U.S.C. 301, 10 U.S.C. 133).

SOURCE: 54 FR 46227, Nov. 2, 1989, unless otherwise noted.

§ 51.1 Purpose.

This part:

(a) Regulates the Department of Defense Military Equal Opportunity (EO) Program and assigns responsibilities for ensuring DoD-wide compliance with the broad program objectives outlined in DoD Human Goals Charter, March 21, 1988.

(b) Provides for education and training in EO and human relations.

(c) Prescribes the functions of the Defense Equal Opportunity Council

(DEOC), the Defense Equal Opportunity Management Institute (DEOMI), and the Board of Visitors (BOV) to DEOMI.

§ 51.2 Applicability and scope.

This part:

(a) Applies to all military members of the Office of the Secretary of Defense (OSD), the Military Departments (including their National Guard and Reserve components), the Joint Staff, the Unified and Specified Commands, the Defense Agencies, and the DoD Field Activities (hereafter referred to collectively as "DoD Components"). The term "Military Services," as used herein, refers to the Army, Navy, Air Force, and Marine Corps.

(b) Applies to DoD contracted organizations that provide services to military personnel and their families.

(c) Does not apply to civilian personnel, except as noted in paragraph (b) of this section.

§ 51.3 Definitions.

Affirmative Action. Methods used to achieve the objectives of the EO program. Processes, activities, and systems designed to identify, eliminate, prevent, and work to overcome the effects of discriminatory treatment as it affects the upward mobility and quality of life for DoD personnel.

Discrimination. Illegal treatment of a person or group based on handicap, race, color, national origin, age, religion, or gender.

DoD Military Equal Opportunity (EO) Program. The DoD-wide military program of equal opportunity that is accomplished through efforts by DoD Components. It provides an environment in which every member of the total force is ensured an opportunity to rise to as high a level of responsibility as possible in the military profession, dependent only on merit, fitness, and capability.

Equal Opportunity (EO). The right of all persons to participate in and benefit from programs and activities for which they are qualified. These programs and activities shall be free from social, personal, or institutional barriers that prevent people from rising to as high a

level of responsibility as possible. Persons shall be evaluated only on individual merit, fitness, and capability, regardless of race, color, gender, national origin, age, or handicap except as prescribed by statute, or DoD/Service policy.

Ethnic Group. A segment of the population that possesses common characteristics and a cultural heritage based to some degree on the following:

(a) Common geographic origin;

(b) Race;

(c) Language or dialect;

(d) Religious faith or faiths;

(e) Shared traditions, values, or symbols;

(f) Literature, folklore, or music;

(g) An internal sense of distinctiveness; and/or

(h) An external perception of distinctiveness.

Ethnic and Racial Categories. The basic racial and ethnic categories for DoD reporting are defined as follows:

(a) **American Indian or Alaskan Native.** A person having origins in the original peoples of North America.

(b) **Asian or Pacific Islander.** A person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands. This area includes China, India, Japan, Korea, the Philippine Islands, and Samoa.

(c) **Black (Not of Hispanic Origin).** A person having origins in any of the original peoples of Africa.

(d) **Hispanic.** A person having origins in any of the original peoples of Mexico, Puerto Rico, Cuba, or Central or South America, or of other Spanish cultures, regardless of race.

(e) **White (Not of Hispanic Origin).** A person having origins in any of the original peoples of Europe, North Africa, or the Middle East.

National origin. An individual's or ancestor's place of origin. Also applies to a person who has the physical, cultural, or linguistic characteristics of a national group.

Race. A division of humans identified by the possession of traits that are transmissible by descent and that are sufficient to characterize as a distinctive human type.

Religion. A personal set or institutionalized system of attitudes, moral

or ethical beliefs, and practices that are held with the strength of traditional religious views, characterized by ardor and faith, and generally evidenced through specific religious observances.

Sexual Harassment. A form of sex discrimination that involves unwelcomed sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

(a) Submission to or rejection of such conduct is made either explicitly or implicitly a term or condition of a person's job, pay, or career, or

(b) Submission to or rejection of such conduct by a person is used as a basis for career or employment decisions affecting that person, or

(c) Such conduct interferes with an individual's performance or creates an intimidating, hostile, or offensive environment.

Any person in a supervisory or command position who uses or condones implicit or explicit sexual behavior to control, influence, or affect the career, pay, or job of a military member or civilian employee is engaging in sexual harassment. Similarly, any military member or civilian employee who makes deliberate or repeated unwelcomed verbal comments, gestures, or physical contact of a sexual nature is also engaging in sexual harassment.

§ 51.4 Policy.

It is DoD policy to:

(a) Support the military EO program as an integral element in total force readiness, as defined in the Secretary of Defense Memorandum and enforce at all levels of activity the EO provisions of this part in developing operating EO policies and programs.

(b) Use the chain of command to promote, support, and enforce the military EO program. The chain of command is the primary and preferred channel for correcting discriminatory practices and for ensuring that human relations and EO matters are enacted.

(c) Ensure the Military Services (to include the Reserve components) maintain military EO and affirmative action programs. Discrimination that adversely affects persons or groups based on race, color, religion, gender, age, or



DEPARTMENT OF THE NAVY
OFFICE OF THE SECRETARY
1000 NAVY PENTAGON
WASHINGTON, D.C. 20350-1000

SECNAVINST 5420.193
BCNR
19 November 1997

SECNAV INSTRUCTION 5420.193

From: Secretary of the Navy
To: All Ships and Stations

Subj: BOARD FOR CORRECTION OF NAVAL RECORDS

Ref: (a) 10 U.S.C. § 1552
(b) U.S. Navy Regulations, 1990, Article 0324
(c) 10 U.S.C. § 5016
(d) SECNAVINST 5211.5D, DON Privacy Act Program
(e) 10 U.S.C. § 1034
(f) DOD Directive 7050.6, Military Whistleblower Protection of 12 Aug 95 (NOTAL)
(g) SECNAVINST 5370.7A, Military Whistleblower Protection of 27 Sep 94

Encl: (1) Procedures of the Board for Correction of Naval Records
(2) DD 149, Application for Correction of Military Record Under the Provisions of title 10, U.S.C. Section 1552
(3) Applicant's Guide

1. Purpose. To establish procedures for making application and the consideration of applications for correction of military records of current and former members of the Navy and Marine Corps by the Secretary of the Navy acting through the Board for Correction of Naval Records (BCNR) under reference (a).

2. Cancellation. NAVSO P-473 of 28 November 1977. All other regulations and memoranda providing guidance on policies or procedures of BCNR, and delegations of authority inconsistent with this instruction, are cancelled.

3. Action

a. BCNR shall consider and either take corrective action on the Secretary's behalf, when authorized, or make appropriate recommendations to the Secretary regarding applications for the correction of military records following the procedures in enclosure (1).

b. The Assistant Secretary of the Navy (Manpower and Reserve Affairs), under references (b) and (c), has been assigned the responsibility for the overall supervision of BCNR and is

19 NOV 1997

delegated authority to take final action on BCNR cases forwarded for review.

c. The Executive Director, BCNR shall administer and oversee the operation of BCNR. The Executive Director shall be subject to the supervision and administrative control of the Assistant Secretary of the Navy (Manpower and Reserve Affairs).

d. Department of the Navy facilities of all commands, bureaus, offices, and boards shall be made available to BCNR to assist it, upon request, in the performance of its duties consistent with applicable statutes and regulations. Requests for records and/or advisory opinions should under normal circumstances be acted upon within 60 days of receipt of BCNR's request.

4. Execution of BCNR Decisions. The Chief of Naval Operations and the Commandant of the Marine Corps shall ensure that action is taken to make the military record corrections directed by the Secretary or BCNR. The applicant and Executive Director will be advised of the action taken.

5. Administrative Correction of Personnel Records. To enhance efficiency and minimize requirements for BCNR actions where possible, the Chief of Naval Operations and the Commandant of the Marine Corps will ensure that obvious clerical or administrative errors are corrected locally under the authority of reference (d) to the extent permitted by law and regulation.

6. Changes in Procedures. BCNR may recommend changes to enclosure (1). Changes must be approved by the Secretary of the Navy and the Secretary of Defense. Enclosure (1) and all approved changes thereto will be published in the Federal Register.

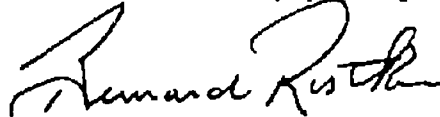
7. Application. Applications to BCNR for correction of naval records must be submitted on DD 149, Application for Correction of Military Record, or exact facsimile. Enclosure (2) is a copy of DD 149. Enclosure (3) provides information to prospective applicants regarding the procedures governing the submission and processing of applications. In processing applications alleging violations of reference (e) there will be strict compliance with the provisions of references (f) and (g).

19 NOV 1997

8. Report and Form

a. The reporting requirements contained in enclosure (1) are exempt from reports control by SECNAVINST 5214.2B

b. Due to low usage DD 149 (Sep 97), Application for Correction of Military Records Under the Provisions of title 10, U.S.C., Section 1552, provided as enclosure (2), may be locally reproduced.



BERNARD ROSTKER
Assistant Secretary of the Navy
(Manpower and Reserve Affairs)

Distribution:

SNDL Parts 1 and 2

MARCORPS Codes PCN 7100000000 and 71000000100

BUPERS (Pers-3)
(100 copies)

SECNAV/OPNAV DIRECTIVES CONTROL OFFICE
WASHINGTON NAVY YARD BUILDING 200
901 M STREET SE
WASHINGTON DC 20374-5074 (30 copies)

Order from:
Naval Inventory Control Point
Cog "I" Material
700 Robbins Avenue
Philadelphia PA 19111-5098

Stocked: (200 copies)

19 NOV 1997

PROCEDURES
OF
THE BOARD FOR
CORRECTION OF NAVAL RECORDS

ESTABLISHED TO REVIEW

NAVAL RECORDS UNDER

10 U.S.C. 1552

(Codified as 32 CFR 723)

Revised 24 February 1997

Enclosure (1)

19 NOV 1997

PROCEDURES

Section 1. GENERAL PROVISIONS

2. ESTABLISHMENT, FUNCTION AND JURISDICTION OF THE BOARD
 - a. Establishment and Composition
 - b. Function
 - c. Jurisdiction
3. APPLICATION FOR CORRECTION
 - a. General Requirements
 - b. Time Limit for Filing Applications
 - c. Acceptance of Applications
 - d. Other Proceedings Not Stayed
 - e. Consideration of Application
4. APPEARANCE BEFORE THE BOARD: NOTICE; COUNSEL; WITNESSES; ACCESS TO RECORDS
 - a. General
 - b. Notice
 - c. Counsel
 - d. Witnesses
 - e. Access to Records
5. HEARING
 - a. Convening of Board
 - b. Conduct of Hearing
 - c. Continuance
6. ACTION BY THE BOARD
 - a. Deliberations, Findings, Conclusions and Recommendations
 - b. Minority Report
 - c. Record of Proceedings
 - d. Withdrawal
 - e. Delegation of Authority to Correct Certain Naval Records
7. ACTION BY THE SECRETARY
 - a. General
 - b. Military Whistleblower Protection Act

Enclosure (1)

19 NOV 1997

- 8. STAFF ACTION
 - a. Transmittal of Final Decisions Granting Relief
 - b. Transmittal of Final Decisions Denying Relief
- 9. RECONSIDERATION
- 10. SETTLEMENT OF CLAIMS
 - a. Authority
 - b. Application for Settlement
 - c. Settlement
 - d. Report of Settlement
- 11. MISCELLANEOUS
 - a. Expenses
 - b. Indexing of Decisions

Enclosure (1)

19 NOV 1937

Section 1. GENERAL PROVISIONS

These regulations establish procedures for correction of naval and marine records by the Secretary of the Navy acting through the Board for Correction of Naval Records (BCNR or the Board) to remedy error or injustice. It describes how to apply for correction of naval and marine records and how the BCNR considers applications. It defines the Board's authority to act on applications. It directs collecting and maintaining information subject to the Privacy Act of 1974 authorized by 10 U.S.C. 1034 and 1552.

Section 2. ESTABLISHMENT, FUNCTION AND JURISDICTION OF THE BOARD

a. ESTABLISHMENT AND COMPOSITION

Under the foregoing statutory authority, the Board for Correction of Naval Records is established by the Secretary of the Navy. The Board consists of civilians of the executive part of the Department of the Navy in such number, not less than three, as may be appointed by the Secretary and who shall serve at the pleasure of the Secretary. Three members present shall constitute a quorum of the Board. The Secretary of the Navy will designate one member as Chair. In the absence or incapacity of the Chair, an Acting Chair chosen by the Executive Director shall act as Chair for all purposes.

b. FUNCTION

The Board is not an investigative body. Its function is to consider applications properly before it for the purpose of determining the existence of error or injustice in the naval records of current and former members of the Navy and Marine Corps, to make recommendations to the Secretary or to take corrective action on the Secretary's behalf when authorized.

c. JURISDICTION

The Board shall have jurisdiction to review and determine all matters properly brought before it, consistent with existing law.

Enclosure (1)

19 NOV 1997

Section 3. APPLICATION FOR CORRECTION

a. GENERAL REQUIREMENTS

(1) The application for correction must be submitted on DD 149 (Application for Correction of Military Record) or exact facsimile thereof, and should be addressed to: Board for Correction of Naval Records, Department of the Navy, 2 Navy Annex, Washington, DC 203705100. Forms and other explanatory matter may be obtained from the Board upon request.

(2) Except as provided in paragraph (3) of this section, the application shall be signed by the person requesting corrective action with respect to his/her record and will either be sworn to or will contain a provision to the effect that the statements submitted in the application are made with full knowledge of the penalty provided by law for making a false statement or claim. (18 U.S.C. § 287 and § 1001).

(3) When the record in question is that of a person who is incapable of making application, or whose whereabouts is unknown, or when such person is deceased, the application may be made by a spouse, parent, heir, or legal representative. Proof of proper interest shall be submitted with the application.

b. TIME LIMIT FOR FILING APPLICATION. Applications for correction of a record must be filed within 3 years after discovery of the alleged error or injustice. Failure to file within the time prescribed may be excused by the Board if it finds it would be in the interest of justice to do so. If the application is filed more than 3 years after discovery of the error or injustice, the application must set forth the reason why the Board should find it in the interest of justice to excuse the failure to file the application within the time prescribed.

c. ACCEPTANCE OF APPLICATIONS. An application will be accepted for consideration unless:

- (1) The Board lacks jurisdiction.
- (2) The Board lacks authority to grant effective relief.

Enclosure (1)

19 NOV 1997

(3) The applicant has failed to comply with the filing requirements of paragraphs a(1), a(2) or a(3) of this section.

(4) The applicant has failed to exhaust all available administrative remedies.

(5) The applicant has failed to file an application within 3 years after discovery of the alleged error or injustice and has not provided a reason or reasons why the Board should find it in the interest of justice to excuse the failure to file the application within the prescribed 3-year period.

d. OTHER PROCEEDINGS NOT STAYED. Filing an application with the Board shall not operate as a stay of any other proceedings being taken with respect to the person involved.

e. CONSIDERATION OF APPLICATION

(1) Each application accepted for consideration and all pertinent evidence of record will be reviewed by a three member panel sitting in executive session, to determine whether to authorize a hearing, recommend that the records be corrected without a hearing, or to deny the application without a hearing. This determination will be made by majority vote.

(2) The Board may deny an application in executive session if it determines that the evidence of record fails to demonstrate the existence of probable material error or injustice. The Board relies on a presumption of regularity to support the official actions of public officers and, in the absence of substantial evidence to the contrary, will presume that they have properly discharged their official duties. Applicants have the burden of overcoming this presumption but the Board will not deny an application solely because the record was made by or at the direction of the President or the Secretary in connection with proceedings other than proceedings of a board for the correction of military or naval records. Denial of an application on the grounds of insufficient evidence to demonstrate the existence of probable material error or injustice is final subject to the provisions for reconsideration contained in Section 9 of these procedures.

Enclosure (1)

19 NOV 1997

(3) When an original application or a request for further consideration of a previously denied application is denied without a hearing, the Board's determination shall be made in writing and include a brief statement of the grounds for denial.

(4) The brief statement of the grounds for denial shall include the reasons for the determination that relief should not be granted, including the applicant's claims of constitutional, statutory and/or regulatory violations that were rejected, together with all the essential facts upon which the denial is based, including, if applicable, factors required by regulation to be considered for determination of the character of and reason for discharge. Further the Board shall make a determination as to the applicability of the provisions of the Military Whistleblower Protection Act (10 U.S.C. § 1034) if it is invoked by the applicant or reasonably raised by the evidence. Attached to the statement shall be any advisory opinion considered by the Board which is not fully set out in the statement. The applicant will also be advised of reconsideration procedures.

(5) The statement of the grounds for denial, together with all attachments, shall be furnished promptly to the applicant and counsel, who shall also be informed that the name and final vote of each Board member will be furnished or made available upon request. Classified or privileged material will not be incorporated or attached to the Board statement; rather, unclassified or nonprivileged summaries of such material will be so used and written explanations for the substitution will be provided to the applicant and counsel.

Section 4. APPEARANCE BEFORE THE BOARD; NOTICE; COUNSEL;
WITNESSES; ACCESS TO RECORDS.

a. GENERAL. In each case in which the Board determines a hearing is warranted, the applicant will be entitled to appear before the Board either in person or by counsel of his/her selection or in person with counsel. Additional provisions apply to cases processed under the Military Whistleblower Protection Act (10 U.S.C. § 1034.)

b. NOTICE

(1) In each case in which a hearing is authorized, the Board's staff will transmit to the applicant a written notice

Enclosure (1)

19 NOV 1997

stating the time and place of hearing. The notice will be mailed to the applicant, at least 30 days prior to the date of hearing, except that an earlier date may be set where the applicant waives his/her right to such notice in writing.

(2) Upon receipt of the notice of hearing, the applicant will notify the Board in writing at least 15 days prior to the date set for hearing as to whether he/she will be present at the hearing and will indicate to the Board the name of counsel, if represented by counsel, and the names of such witnesses as he/she intends to call. Cases in which the applicant notifies the Board that he/she does not desire to be present at the hearing will be considered in accordance with Section 5b(2).

c. COUNSEL. As used in these regulations, the term "counsel" will be construed to include members in good standing of the federal bar or the bar of any state, accredited representatives of veterans' organizations recognized by the Secretary of Veterans Affairs under 38 U.S.C. § 3402, or such other persons who, in the opinion of the Board, are considered to be competent to present equitably and comprehensively the request of the applicant for correction, unless barred by law. Representation by counsel will be at no cost to the government.

d. WITNESSES. The applicant will be permitted to present witnesses in his/her behalf at hearings before the Board. It will be the responsibility of the applicant to notify his/her witnesses and to arrange for their appearance at the time and place set for hearing. Appearance of witnesses will be at no cost to the government.

e. ACCESS TO RECORDS

(1) It is the applicant's responsibility to procure such evidence not contained in the official records of the Department of the Navy as he/she desires to present in support of his/her case.

(2) Classified or privileged information may be released to applicants only by proper authorities in accordance with applicable regulations.

Enclosure (1)

19 NOV 1997

(3) Nothing in these regulations authorizes the furnishing of copies of official records by the Board. Requests for copies of official records should be submitted in accordance with regulations governing the release of information. The Board can provide a requester with information regarding procedures for requesting copies of these records from the appropriate retention agency.

Section 5. HEARING

a. CONVENING OF BOARD. The Board will convene, recess and adjourn at the call of the Chair or Acting Chair.

b. CONDUCT OF HEARING

(1) The hearing shall be conducted by the Chair or Acting Chair, and shall be subject to his/her rulings so as to ensure a full and fair hearing. The Board shall not be limited by legal rules of evidence but shall maintain reasonable bounds of competency, relevancy, and materiality.

(2) If the applicant, after being duly notified, indicates to the Board that he/she does not desire to be present or to be represented by counsel at the hearing, the Board will consider the case on the basis of all the material before it, including, but not limited to, the application for correction filed by the applicant, any documentary evidence filed in support of such application, any brief submitted by or in behalf of the applicant, and all available pertinent records.

(3) If the applicant, after being duly notified, indicates to the Board that he/she will be present or be represented by counsel at the hearing, and without good cause and timely notice to the Board, the applicant or representative fails to appear at the time and place set for the hearing or fails to provide the notice required by Section 4b(2) of these procedures, the Board may consider the case in accordance with the provisions of paragraph b(2) of this section, or make such other disposition of the case as is appropriate under the circumstances.

(4) All testimony before the Board shall be given under oath or affirmation. The proceedings of the Board and the testimony given before it will be recorded verbatim.

Enclosure (1)

19 NOV 1997

c. CONTINUANCE. The Board may continue a hearing on its own motion. A request for continuance by or in behalf of the applicant may be granted by the Board if a continuance appears necessary to insure a full and fair hearing.

Section 6. ACTION BY THE BOARD

a. DELIBERATIONS, FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS

(1) Only members of the Board and its staff shall be present during the deliberations of the Board.

(2) Whenever, during the course of its review of an application, it appears to the Board's satisfaction that the facts have not been fully and fairly disclosed by the records or by the testimony and other evidence before it, the Board may require the applicant or military authorities to provide such further information as it may consider essential to a complete and impartial determination of the facts and issues.

(3) Following a hearing, or where the Board determines to recommend that the record be corrected without a hearing, the Board will make written findings, conclusions and recommendations. If denial of relief is recommended following a hearing, such written findings and conclusions will include a statement of the grounds for denial as described in Section 3e(4). The name and final vote of each Board member will be recorded. A majority vote of the members present on any matter before the Board will constitute the action of the Board and shall be so recorded.

(4) Where the Board deems it necessary to submit comments or recommendations to the Secretary as to matters arising from but not directly related to the issues of any case, such comments and recommendations shall be the subject of separate communication. Additionally, in Military Whistleblower Protection Act cases, any recommendation by the Board to the Secretary that disciplinary or administrative action be taken against any Navy official based on the Board's determination that the official took reprisal action against the applicant will not be made part of the Board's record of proceedings or furnished the applicant but will be transmitted to the Secretary as a separate communication.

Enclosure (1)

19 NOV 1997

b. MINORITY REPORT. In case of a disagreement between members of the Board a minority report will be submitted, either as to the findings, conclusions or recommendation, including the reasons therefore.

c. RECORD OF PROCEEDINGS. Following a hearing, or where the Board determines to recommend that the record be corrected without a hearing, a record of proceedings will be prepared. Such record shall indicate whether or not a quorum was present, and the name and vote of each member present. The record shall include the application for relief, a verbatim transcript of any testimony, affidavits, papers and documents considered by the Board, briefs and written arguments, advisory opinions, if any, minority reports, if any, the findings, conclusions and recommendations of the Board, where appropriate, and all other papers, documents, and reports necessary to reflect a true and complete history of the proceedings.

d. WITHDRAWAL. The Board may permit an applicant to withdraw his/her application without prejudice at any time before its record of proceedings is forwarded to the Secretary.

e. DELEGATION OF AUTHORITY TO CORRECT CERTAIN NAVAL RECORDS

(1) With respect to all petitions for relief properly before it, the Board is authorized to take final corrective action on behalf of the Secretary, unless:

(a) Comments by proper naval authority are inconsistent with the Board's recommendation;

(b) The Board's recommendation is not unanimous; or

(c) It is in the category of petitions reserved for decision by the Secretary of the Navy.

(2) The following categories of petitions for relief are reserved for decision by the Secretary of the Navy:

(a) Petitions involving records previously reviewed be made part of the Board's record of proceedings or furnished the applicant but will be transmitted to the Secretary as a separate communication.

Enclosure (1)

19 NOV 1997

(b) Petitions by former commissioned officers or midshipmen to change the character of, and/or the reason for, their discharge; or,

(c) Such other petitions as, in the determination of the Office of the Secretary or the Executive Director, warrant Secretarial review.

(3) The Executive Director after ensuring compliance with the above conditions, will announce final decisions on applications decided under this section.

Section 7. ACTION BY THE SECRETARY

a. GENERAL. The record of proceedings, except in cases finalized by the Board under the authority delegated in Section 6e, and those denied by the Board without a hearing, will be forwarded to the Secretary who will direct such action as he or she determines to be appropriate, which may include the return of the record to the Board for further consideration. Those cases returned for further consideration shall be accompanied by a brief statement setting out the reasons for such action along with any specific instructions. If the Secretary's decision is to deny relief, such decision shall be in writing and, unless he or she expressly adopts in whole or in part the findings, conclusions and recommendations of the Board, or a minority report, shall include a brief statement of the grounds for denial. See Section 3e(4) of these procedures.

b. MILITARY WHISTLERBLOWER PROTECTION ACT. The Secretary will ensure that decisions in cases involving the Military Whistleblower Protection Act are issued within 180 days after receipt of the case and will, unless the full relief requested is granted, inform applicants of their right to request review of the decision by the Secretary of Defense. Applicants will also be informed:

(1) Of the name and address of the official to whom the request for review must be submitted.

(2) That the request for review must be submitted within 90 days after receipt of the decision by the Secretary of the Navy.

Enclosure (1)

19 NOV 1997

(3) That the request for review must be in writing and include:

(a) The applicant's name, address and telephone number;

(b) A copy of the application to the Board and the final decision of the Secretary of the Navy;

(c) A statement of the specific reasons the applicant is not satisfied with the decision of the Secretary of the Navy.

(4) That the request must be based on the Board record; request for review based on factual allegations or evidence not previously presented to the Board will not be considered under this paragraph but may be the basis for reconsideration by the Board under Section 9.

Section 8. STAFF ACTION

a. TRANSMITTAL OF FINAL DECISIONS GRANTING RELIEF

(1) If the final decision of the Secretary is to grant the applicant's request for relief the record of proceedings shall be returned to the Board for disposition. The Board shall transmit the finalized record of proceedings to proper naval authority for appropriate action. Similarly final decisions of the Board granting the applicant's request for relief under the authority delegated in Section 6e, shall also be forwarded to the proper naval authority for appropriate action.

(2) The Board shall transmit a copy of the record of proceedings to the proper naval authority for filing in the applicant's service record except where the effect of such action would be to nullify the relief granted. In such cases no reference to the Board's decision shall be made in the service record or files of the applicant and all copies of the record of proceedings and any related papers shall be forwarded to the Board and retained in a file maintained for this purpose.

(3) The addressees of such decisions shall report compliance therewith to the Executive Director.

Enclosure (1)

19 NOV 1997

(4) Upon receipt of the record of proceedings after final action by the Secretary, or by the Board acting under the authority contained in Section 6e, the Board shall communicate the decision to the applicant. The applicant is entitled, upon request, to receive a copy of the Board's findings, conclusions and recommendations.

b. TRANSMITTAL OF FINAL DECISIONS DENYING RELIEF. If the final decision of the Secretary or the Board is to deny relief, the following materials will be made available to the applicant:

(1) A statement of the findings, conclusions, and recommendations made by the Board and the reasons therefor;

(2) Any advisory opinions considered by the Board;

(3) Any minority reports; and

(4) Any material prepared by the Secretary as required in Section 7. Moreover, applicant shall also be informed that the name and final vote of each Board member will be furnished or made available upon request and that he/she may submit new and material evidence or other matter for further consideration.

Section 9. RECONSIDERATION. After final adjudication, further consideration will be granted only upon presentation by the applicant of new and material evidence or other matter not previously considered by the Board. New evidence is defined as evidence not previously considered by the Board and not reasonably available to the applicant at the time of the previous application. Evidence is material if it is likely to have a substantial effect on the outcome. All requests for further consideration will be initially screened by the Executive Director of the Board to determine whether new and material evidence or other matter (including, but not limited to, any factual allegations or arguments why the relief should be granted) has been submitted by the applicant. If such evidence or other matter has been submitted, the request shall be forwarded to the Board for a decision. If no such evidence or other matter has been submitted, the applicant will be informed that his/her request was not considered by the Board because it did not contain new and material evidence or other matter.

Enclosure (1)

19 NOV 1997

Section 10. SETTLEMENT OF CLAIMS

a. AUTHORITY

(1) The Department of the Navy is authorized under 10 U.S.C. § 1552 to pay claims for amounts due to applicants as a result of corrections to their naval records.

(2) The Department of the Navy is not authorized to pay any claim heretofore compensated by Congress through enactment of a private law, or to pay any amount as compensation for any benefit to which the claimant might subsequently become entitled under the laws and regulations administered by the Secretary of Veterans Affairs.

b. APPLICATION FOR SETTLEMENT

(1) Settlement and payment of claims shall be made only upon a claim of the person whose record has been corrected or legal representative, heirs at law, or beneficiaries. Such claim for settlement and payment may be filed as a separate part of the application for correction of the record.

(2) When the person whose record has been corrected is deceased, and where no demand is presented by a duly appointed legal representative of the estate, payments otherwise due shall be made to the surviving spouse, heir or beneficiaries, in the order prescribed by the law applicable to that kind of payment, or if there is no such law covering order of payment, in the order set forth in 10 U.S.C. § 2771; or as otherwise prescribed by the law applicable to that kind of payment.

(3) Upon request, the applicant or applicants shall be required to furnish requisite information to determine their status as proper parties to the claim for purposes of payment under applicable provisions of law.

c. SETTLEMENT

(1) Settlement of claims shall be upon the basis of the decision and recommendation of the Board, as approved by the Secretary or his designee. Computation of the amounts due shall be made by the appropriate disbursing activity. In no case will the amount found due exceed the amount which would otherwise have been paid or have become due under applicable laws had no error

Enclosure (1)

19 NOV 1997

or injustice occurred. Earnings received from civilian employment, self employment or any income protection plan for such employment during any period for which active duty pay and allowances are payable will be deducted from the settlement. To the extent authorized by law and regulation, amounts found due may be reduced by the amount of any existing indebtedness to the Government arising from military service.

(2) Prior to or at the time of payment, the person or persons to whom payments are to be made shall be advised by the disbursing activity of the nature and amount of the various benefits represented by the total settlement and shall be advised further that acceptance of such settlement shall constitute a complete release by the claimants involved of any claim against the United States on account of the correction of the record.

d. REPORT OF SETTLEMENT. In every case where payment is made, the amount of such payment and the names of the payee or payees shall be reported to the Executive Director.

Section 11. MISCELLANEOUS PROVISIONS

a. EXPENSES. No expenses of any nature whatsoever voluntarily incurred by the applicant, counsel, witnesses, or by any other person in the applicant's behalf, will be paid by the Government.

b. INDEXING OF DECISIONS

(1) Documents sent to each applicant and counsel in accordance with Sections 3e(5) and 8a(4), above together with the record of the votes of Board members and all other statements of findings, conclusions and recommendations made on final determination of an application by the Board or the Secretary will be indexed and promptly made available for public inspection and copying at the Armed Forces Discharge Review/Correction Boards Reading Room located on the Concourse of the Pentagon Building in Room 2E123, Washington, DC.

(2) All documents made available for public inspection and copying shall be indexed in a usable and concise form so as to enable the public to identify those cases similar in issue together with the circumstances under and/or reasons for which

Enclosure (1)

**APPLICATION FOR CORRECTION OF MILITARY RECORD
UNDER THE PROVISIONS OF TITLE 10, U.S. CODE, SECTION 1552**
(Please read instructions on reverse side BEFORE completing application.)

Form Approved
OMB No. 0704-0003
Expires Aug 31, 2000

The public reporting burden for this collection of information is estimated to average 30 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to Department of Defense, Washington Headquarters Services, Directorate for Information Operations and Reports (0704-0003), 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.
PLEASE DO NOT RETURN YOUR COMPLETED FORM TO THE ABOVE ADDRESS. RETURN COMPLETED FORM TO THE APPROPRIATE ADDRESS ON THE BACK OF THIS PAGE.

PRIVACY ACT STATEMENT

AUTHORITY: Title 10 US Code 1552, EO 9397.

ROUTINE USE(S): None.

PRINCIPAL PURPOSE: To initiate an application for correction of military record. The form is used by Board members for review of pertinent information in making a determination of relief through correction of a military record.

DISCLOSURE: Voluntary; however, failure to provide identifying information may impede processing of this application. The request for Social Security number is strictly to assure proper identification of the individual and appropriate records.

1. APPLICANT DATA

a. BRANCH OF SERVICE (X one)	☐ ARMY	☐ NAVY	☐ AIR FORCE	☐ MARINE CORPS	☐ COAST GUARD
b. NAME (Last, First, Middle Initial) (Please print)	c. PRESENT PAY GRADE	d. SERVICE NUMBER (If applicable)	e. SSN		
2. TYPE OF DISCHARGE (If by court-martial, state type of court)	3. PRESENT STATUS, IF ANY, WITH RESPECT TO THE ARMED SERVICES (Active duty, Retired, Reserve, etc.)		4. DATE OF DISCHARGE OR RELEASE FROM ACTIVE DUTY		
5. ORGANIZATION AT TIME OF ALLEGED ERROR IN RECORD		6. I DESIRE TO APPEAR BEFORE THE BOARD IN WASHINGTON, D.C. (No expense to the Government) (X one) ☐ YES ☐ NO			

7. COUNSEL (If any)

a. NAME (Last, First, Middle Initial)

b. ADDRESS (Street, Apartment Number, City, State and ZIP Code)

8. I REQUEST THE FOLLOWING CORRECTION OF ERROR OR INJUSTICE:

9. I BELIEVE THE RECORD TO BE IN ERROR OR UNJUST IN THE FOLLOWING PARTICULARS:

10. IN SUPPORT OF THIS APPLICATION I SUBMIT AS EVIDENCE THE FOLLOWING: (If Veterans Administration records are pertinent to your case, give Regional Office location and Claim Number.)

11. ALLEGED ERROR OR INJUSTICE

a. DATE OF DISCOVERY	b. IF MORE THAN THREE YEARS SINCE THE ALLEGED ERROR OR INJUSTICE WAS DISCOVERED, STATE WHY THE BOARD SHOULD FIND IT IN THE INTEREST OF JUSTICE TO CONSIDER THIS APPLICATION.
----------------------	--

12. APPLICANT MUST SIGN IN ITEM 16. IF THE RECORD IN QUESTION IS THAT OF A DECEASED OR INCOMPETENT PERSON, LEGAL PROOF OF DEATH OR INCOMPETENCY MUST ACCOMPANY APPLICATION. IF APPLICATION IS SIGNED BY OTHER THAN APPLICANT, INDICATE RELATIONSHIP OR STATUS BY MARKING APPROPRIATE BOX.

☐ SPOUSE ☐ WIDOW ☐ WIDOWER ☐ NEXT OF KIN ☐ LEGAL REPRESENTATIVE ☐ OTHER (Specify)

13. I MAKE THE FOREGOING STATEMENTS, AS PART OF MY CLAIM, WITH FULL KNOWLEDGE OF THE PENALTIES INVOLVED FOR WILLFULLY MAKING A FALSE STATEMENT OR CLAIM. U.S. Code, Title 18, Sec. 287, 1001, provides that an individual shall be fined under this title or imprisoned not more than 5 years, or both.

14. a. COMPLETE CURRENT ADDRESS, INCLUDING ZIP CODE (Applicant should forward notification of all changes of address.)		b. TELEPHONE NUMBER (Include Area Code)	DOCUMENT NUMBER (Do not write in this space.)
15. DATE SIGNED	16. SIGNATURE (Applicant must sign here.)		

INSTRUCTIONS

(All data should be typed or printed)

1. For detailed information see: Air Force Instruction 36-2603; Army Regulation 15-185; Coast Guard, Code of Federal Regulations; Title 33, Part 52; or Navy, Code of Federal Regulations; Title 32, Part 723.
2. Submit only original of this form.
3. Complete all items. If the question is not applicable, mark "None."
4. If space is insufficient, use "Remarks" or attach additional sheet.
5. Various veterans and service organizations furnish counsel without charge. These organizations prefer that arrangements for representation be made through local posts or chapters.
6. List all attachments and enclosures.
7. ITEMS 6 AND 7. Personal appearance of you and your witnesses or representation by counsel is not required to ensure full and impartial consideration of applications. Appearances and representations are permitted, at no expense to the Government, when a hearing is authorized.
8. ITEM 8. State the specific correction of record desired.
9. ITEM 9. In order to justify correction of a military record, it is necessary for you to show to the satisfaction of the Board, or it must otherwise satisfactorily appear, that the alleged entry or omission in the record was in error or unjust. Evidence may include affidavits or signed testimony of witnesses, executed under oath, and a brief of arguments supporting application. All evidence not already included in your record must be submitted by you. The responsibility for securing new evidence rests with you.
10. ITEM 11. 10 U.S.C. 1552b provides that no correction may be made unless request is made within three years after the discovery of the error or injustice, but that the Board may excuse failure to file within three years after discovery if it finds it to be in the interest of justice.

MAIL COMPLETED APPLICATIONS TO APPROPRIATE ADDRESS BELOW

ARMY (For Active Duty Personnel) Army Board for the Correction of Military Records 1941 Jefferson Davis Highway, 2nd Floor Arlington, VA 22202-4508 (For Other than Active Duty Personnel) Army Review Boards Agency Support Division, St. Louis ATTN: SFMR-RBR-SL 9700 Page Avenue St. Louis, MO 63132-5200	COAST GUARD Chairman Board for Correction of Military Records (C-60) Department of Transportation 400 7th St., SW Washington, DC 20590
NAVY AND MARINE CORPS Board for Correction of Naval Records 2 Navy Annex Washington, DC 20370-5100	AIR FORCE Board for Correction of Air Force Records SAF/MIB 550-C Street West, Suite 40 Randolph AFB, TX 78150-4742

17. REMARKS (Applicant has exhausted all administrative channels in seeking this correction and has been counseled by a representative of his/her servicing military personnel office. (Applicable only to active duty and reserve personnel.))

19 NOV 1997

AN APPLICANT'S GUIDE TO THE
BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR)

This guide explains how to apply to BCNR for a correction of your naval record and describes the basic procedures that will be used to process your application.

1. BCNR'S STATUTORY AUTHORITY. Title 10 of the United States Code, Section 1552 authorizes the Secretary of the Navy to correct a servicemember's naval record when "necessary to correct an error or remove an injustice." In exercising this authority the Secretary is required to act through a board composed of Navy civilians who initially review and evaluate an applicant's claim of error or injustice. The Navy's rules and regulations which implement the basic provisions of the statute are set forth in SECNAV Instruction 5420.193.

2. WHO MAY APPLY TO BCNR. Any current or former member of the Navy or Marine Corps may apply for a correction of his/her naval record. A servicemember's spouse, parent, heir or legal representative may also apply if the servicemember is deceased, incapacitated or his/her whereabouts is unknown.

3. WHEN TO APPLY

a. Since BCNR is the highest echelon of review within the Department of the Navy for virtually all adverse military personnel actions, an applicant must exhaust all available administrative remedies before applying to BCNR. The most common examples of these other administrative appeals are as follows:

(1) Requests for an upgrade of a discharge which is less than 15 years old and not awarded by a general court-martial must be submitted first to the Navy Discharge Review Board (NDRB) on DD 293.

(2) Requests by Marine Corps personnel for removal or change of a fitness report must be submitted first to the Performance Evaluation Review Board (PERB) at Headquarters Marine Corps in accordance with MCO 1610.11A (NOTAL).

(3) Requests for a change of a Navy reenlistment code must be submitted first to the Bureau of Naval Personnel (Pers-254). Requests involving Marine Corps reenlistment codes should be sent to Headquarters Marine Corps (Code MMER).

Enclosure (3)

19 NOV 1937

b. BCNR has a statute of limitations requiring that applications be submitted within 3 years after discovery of the error or injustice. This time limit may be excused if BCNR finds that it would serve the interest of justice to do so. Consequently if you are late you must explain why you waited for more than 3 years after discovering the error or injustice to file your application, and request a waiver of the 3-year limit using block 11b of the application form.

4. HOW TO APPLY

a. To apply to BCNR you must submit a signed DD 149 which bears the official title, APPLICATION FOR CORRECTION OF MILITARY RECORD UNDER THE PROVISIONS OF TITLE 10, U.S. CODE, SECTION 1552. You may obtain a DD 149 from most personnel or legal offices. You may also obtain a DD 149 by writing to BCNR. Your request should be addressed to: Board for Correction of Naval Records, 2 Navy Annex, Washington, D.C. 20370-5100. You may also telephone BCNR at area code (703) 614-1402 or DSN 8-224-1402 between the hours of 7:30 A.M. and 4:00 P.M. Eastern Time, Monday through Friday.

b. The instructions for completing the application appear on the reverse side of the form and are self explanatory. However a word of caution is in order. Although you may ask for the opportunity to personally appear before BCNR in order to explain your case by checking YES in block 6, you should also understand that BCNR is under no legal obligation to grant such a request and in most cases does not do so. Consequently it is important for you to give special attention to the written information requested in blocks 9 and 17 of the application. In block 9 you should clearly identify the error or injustice in your naval record and the action that you want BCNR to take to remedy the situation. In block 17 you should set forth the events that led to the error or injustice and explain why you believe the treatment you received was erroneous or unfair. If the space provided in blocks 9 and 17 is not large enough you may use a separate piece of paper and attach it to the application.

5. EVIDENCE OF ERROR OR INJUSTICE

a. An application for correction of a naval record will not be granted unless the record itself contains or the applicant provides substantial evidence which persuades BCNR that he/she was the victim of an error or injustice. Absent such evidence

Enclosure (3)

19 NOV 1997

BCNR will presume that Navy and Marine Corps authorities have properly discharged their official duties and the application will therefore be denied.

b. In order to prove that you were victim of an error or injustice you should start by providing the information called for in blocks 9 and 17 of the DD 149. See section 4b of this guide for an explanation of the information to be supplied. Additionally, attach copies of your records or other official documents that support your claim of error or injustice as well as signed statements from persons who have first hand knowledge of the events that resulted in the error or injustice.

6. ADVICE AND ASSISTANCE AVAILABLE TO APPLICANTS

a. Although most applicants represent themselves, some retain the services of a private attorney. Most often this occurs in cases having complex factual or legal issues. Should you decide to have an attorney represent you, it will be your responsibility to pay for all legal expenses and you will not be reimbursed by the Navy even if BCNR finds an error or injustice in your record.

b. Veterans' service organizations at the local, state and national level are also available for consultation and will act as your representative before BCNR. Among the many national service organizations that provide assistance are the American Legion, Veterans of Foreign Wars, Disabled American Veterans, Paralyzed Veterans of America, Vietnam Veterans of America and the Order of the Purple Heart.

c. In addition to veterans' service organizations many members of Congress have on their staffs persons who specialize in offering advice and guidance on matters affecting servicemembers and veterans, and who would be more than willing to assist you in filing an application.

d. BCNR's professional staff is also available to answer any questions you may have regarding the filing of an application. Inquiries may be made in writing or by telephone. BCNR's mailing address and telephone are listed in section 4a of this guide.

Enclosure (3)

19 NOV 1997

e. If you decide to have someone represent you, you should list that person's name, mailing address and phone number where he or she can be reached during the day in block 7 of the application form. You should also understand that it is BCNR's usual practice to deal directly with your named representative rather than with you.

7. ADVISORY OPINIONS. After receiving your application a BCNR attorney or records examiner will conduct a preliminary review of its contents to determine whether or not an advisory opinion should be obtained from other naval authorities. If an advisory opinion is furnished to BCNR recommending that your application be denied, a copy will be forwarded to you and you will have 30 days in which to respond. You may request additional time if you feel you need it. Please understand that BCNR is not obligated to follow the opinions and recommendation expressed in the advisory opinion. Rather, it will analyze the contents of the advisory opinion as it would any other evidentiary item and then make an independent determination as to whether or not your request should be granted based on the total evidence or record.

8. REACHING A DECISION. Your application will be presented to a three-member panel by a staff attorney or records examiner who will provide technical advice and explain the issues. A supervisory attorney will also be present and act as recorder. Neither you nor your named representative will be present at these proceedings which are known as "executive sessions." Following an examination of the evidence and discussion of the issues the panel will decide by majority vote whether to deny your application, recommend that it be granted in whole or in part or hold a formal hearing at which you may appear either in person, or by counsel of your selection, or in person with counsel.

a. Should the panel vote to hold a formal hearing the BCNR staff will provide you written notice of the time and place of the hearing. You will also be provided with detailed instructions as to the manner in which the hearing will be conducted.

b. If the panel votes to deny your application you will be notified in writing of the panel's decision and the reason for its action.

Enclosure (3)

19 NOV 1997

c. If the panel votes to grant complete or partial relief a written report of the panel's proceedings will be forwarded to the Secretary of the Navy or his designee for final approval. If the Secretary approves the panel's report you will be notified in writing and your record will be corrected. Additionally a copy of the report will be forwarded to finance officials who will determine if you are entitled to any monetary benefits. If the Secretary disapproves the panel's recommendation he will do so in writing and set forth the basis for his disapproval. A copy of the panel's report and the Secretary's action will be sent to you.

9. RECONSIDERATION. You are entitled to have BCNR reconsider the decision in your case upon presentation of new and material evidence or other matter not previously considered.

Enclosure (3)

87TH SECTION of Level 1 printed in FULL format.

UNITED STATES CODE SERVICE
Copyright 1998, LEXIS Law Publishing, a division of Reed Elsevier Inc.
All rights reserved.

*** THIS SECTION IS CURRENT THROUGH 105-165, APPROVED 3/20/98 ***
*** WITH A GAP OF 160 AND 164 ***

TITLE 10. ARMED FORCES
SUBTITLE C. NAVY AND MARINE CORPS
PART II. PERSONNEL
[CHAPTER 545. PROMOTIONS]

10 USCS prec @ 5751 (1998)

Preceding [@@ 5751--5758.

HISTORY; ANCILLARY LAWS AND DIRECTIVES

EXPLANATORY NOTES:

The chapter title appears in brackets as this chapter was repealed by Act Dec. 12, 1980, P.L. 96-513, Title III, Part D, @ 333, 94 Stat. 2897, Effective Sept. 15, 1981, as provided by @ 701(a) of such Act, which appears at 10 USCS 101 note.

10 USCS @ 1034 (1998) printed in FULL format.

UNITED STATES CODE SERVICE
Copyright 1998, LEXIS Law Publishing, a division of Reed Elsevier Inc.
All rights reserved.

*** THIS SECTION IS CURRENT THROUGH 105-165, APPROVED 3/20/98 ***
*** WITH A GAP OF 160 AND 164 ***

TITLE 10. ARMED FORCES
SUBTITLE A. GENERAL MILITARY LAW
PART II. PERSONNEL
CHAPTER 53. MISCELLANEOUS RIGHTS AND BENEFITS

10 USCS @ 1034 (1998)

@ 1034. Protected communications; prohibition of retaliatory personnel actions

(a) Restricting communications with Members of Congress and Inspector General prohibited.

(1) No person may restrict a member of the armed forces in communicating with a Member of Congress or an Inspector General.

(2) Paragraph (1) does not apply to a communication that is unlawful.

(b) Prohibition of retaliatory personnel actions.

(1) No person may take (or threaten to take) an unfavorable personnel action, or withhold (or threaten to withhold) a favorable personnel action, as a reprisal against a member of the armed forces for making or preparing--

(A) a communication to a Member of Congress or an Inspector General that (under subsection (a)) may not be restricted; or

(B) a communication that is described in subsection (c)(2) and that is made (or prepared to be made) to--

(i) a Member of Congress;

(ii) an Inspector General (as defined in subsection (j));

(iii) a member of a Department of Defense audit, inspection, investigation, or law enforcement organization; or

(iv) any other person or organization (including any person or organization in the chain of command) designated pursuant to regulations or other established administrative procedures for such communications.

(2) Any action prohibited by paragraph (1) (including the threat to take any action and the withholding or threat to withhold any favorable action) shall be considered for the purposes of this section to be a personnel action prohibited by this subsection.

(c) Inspector General investigation of allegations of prohibited personnel actions.

(1) If a member of the armed forces submits to the Inspector General of the Department of Defense (or the Inspector General of the Department of Transportation, in the case of a member of the Coast Guard when the Coast Guard is not operating as a service in the Navy) an allegation that a personnel action prohibited by subsection (b) has been taken (or threatened) against the member with respect to a communication described in paragraph (2), the Inspector General shall expeditiously investigate the allegation. If, in the case of an allegation submitted to the Inspector General of the Department of Defense, the Inspector General delegates the conduct of the investigation of the allegation to the inspector general of one of the armed forces, the Inspector General of the Department of Defense shall ensure that the inspector general conducting

the investigation is outside the immediate chain of command of both the member submitting the allegation and the individual or individuals alleged to have taken the retaliatory action.

(2) A communication described in this paragraph is a communication in which a member of the armed forces complains of, or discloses information that the member reasonably believes constitutes evidence of, any of the following:

(A) A violation of law or regulation, including a law or regulation prohibiting sexual harassment or unlawful discrimination.

(B) Mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

(3) The Inspector General is not required to make an investigation under paragraph (1) in the case of an allegation made more than 60 days after the date on which the member becomes aware of the personnel action that is the subject of the allegation.

(4) [Deleted]

(5)--(7) [Redesignated]

(d) Inspector General investigation of underlying allegations. Upon receiving an allegation under subsection (c), the Inspector General shall conduct a separate investigation of the information that the member making the allegation believes constitutes evidence of wrongdoing (as described in subparagraph (A) or (B) of subsection (c)(2)) if there previously has not been such an investigation or if the Inspector General determines that the original investigation was biased or otherwise inadequate.

(e) Reports on investigations.

(1) Not later than 30 days after completion of an investigation under subsection (c) or (d), the Inspector General shall submit a report on the results of the investigation to the Secretary of Defense (or to the Secretary of Transportation in the case of a member of the Coast Guard when the Coast Guard is not operating as a service in the Navy) and the member of the armed forces who made the allegation investigated.

(2) In the copy of the report submitted to the member, the Inspector General shall ensure the maximum disclosure of information possible, with the exception of information that is not required to be disclosed under section 552 of title 5.

(3) If, in the course of an investigation of an allegation under this section, the Inspector General determines that it is not possible to submit the report required by paragraph (1) within 90 days after the date of receipt of the allegation being investigated, the Inspector General shall provide to the Secretary of Defense (or to the Secretary of Transportation in the case of a member of the Coast Guard when the Coast Guard is not operating as a service in the Navy) and to the member making the allegation a notice--

(A) of that determination (including the reasons why the report may not be submitted within that time); and

(B) of the time when the report will be submitted.

(4) The report on the results of the investigation shall contain a thorough review of the facts and circumstances relevant to the allegation and the complaint or disclosure and shall include documents acquired during the course of the investigation, including summaries of interviews conducted. The report may include a recommendation as to the disposition of the complaint.

(f) Correction of records when prohibited action taken.

(1) A board for the correction of military records acting under section 1552 of this title, in resolving an application for the correction of records made

by a member or former member of the armed forces who has alleged a personnel action prohibited by subsection (b), on the request of the member or former member or otherwise, may review the matter.

(2) In resolving an application described in paragraph (1), a correction board--

(A) shall review the report of the Inspector General submitted under subsection (e)(1);

(B) may request the Inspector General to gather further evidence; and

(C) may receive oral argument, examine and cross-examine witnesses, take depositions, and, if appropriate, conduct an evidentiary hearing.

(3) If the board elects to hold an administrative hearing, the member or former member who filed the application described in paragraph (1)--

(A) may be provided with representation by a judge advocate if--

(i) the Inspector General, in the report under subsection (e)(1), finds that there is probable cause to believe that a personnel action prohibited by subsection (b) has been taken (or threatened) against the member with respect to a communication described in subsection (c)(2);

(ii) the Judge Advocate General concerned determines that the case is unusually complex or otherwise requires judge advocate assistance to ensure proper presentation of the legal issues in the case; and

(iii) the member is not represented by outside counsel chosen by the member; and

(B) may examine witnesses through deposition, serve interrogatories, and request the production of evidence, including evidence contained in the investigatory record of the Inspector General but not included in the report submitted under subsection (e)(1).

(4) The Secretary concerned shall issue a final decision with respect to an application described in paragraph (1) within 180 days after the application is filed. If the Secretary fails to issue such a final decision within that time, the member or former member shall be deemed to have exhausted the member's or former member's administrative remedies under section 1552 of this title.

(5) The Secretary concerned shall order such action, consistent with the limitations contained in sections 1552 and 1553 of this title, as is necessary to correct the record of a personnel action prohibited by subsection (b).

(6) If the Board determines that a personnel action prohibited by subsection (b) has occurred, the Board may recommend to the Secretary concerned that the Secretary take appropriate disciplinary action against the individual who committed such personnel action.

(g) Review by Secretary of Defense. Upon the completion of all administrative review under subsection (f), the member or former member of the armed forces (except for a member or former member of the Coast Guard when the Coast Guard is not operating as a service in the Navy) who made the allegation referred to in subsection (c)(1), if not satisfied with the disposition of the matter, may submit the matter to the Secretary of Defense. The Secretary shall make a decision to reverse or uphold the decision of the Secretary of the military department concerned in the matter within 90 days after receipt of such a submittal.

(h) Post-disposition interviews. After disposition of any case under this section, the Inspector General shall, whenever possible, conduct an interview with the person making the allegation to determine the views of that person on the disposition of the matter.

(i) Regulations. The Secretary of Defense, and the Secretary of

Transportation with respect to the Coast Guard when it is not operating as a service in the Navy, shall prescribe regulations to carry out this section.

(j) Definitions. In this section:

(1) The term "Member of Congress" includes any Delegate or Resident Commissioner to Congress.

(2) The term "Inspector General" means--

(A) an Inspector General appointed under the Inspector General Act of 1978 [5 USCS Appx.]; and

(B) an officer of the armed forces assigned or detailed under regulations of the Secretary concerned to serve as an Inspector General at any command level in one of the armed forces.

(3) The term "unlawful discrimination" means discrimination on the basis of race, color, religion, sex, or national origin.

HISTORY: (Aug. 10, 1956, ch 1041, @ 1, 70A Stat. 80; Oct. 19, 1984, P.L. 98-525, Title XIV, @ 1405(19)(A), (B)(i), 98 Stat. 2622.)

(As amended Sept. 29, 1988, P.L. 100-456, Div A, Title VIII, Part D, @ 846(a)(1), 102 Stat. 2027; Dec. 12, 1989, P.L. 101-225, Title II, @ 202, 103 Stat. 1910; Oct. 5, 1994, P.L. 103-337, Div A, Title V, Subtitle C, @ 531(a)-(f), 108 Stat. 2756.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
1034	50 App.:454(a) (last par.)	June 24, 1948, ch. 625, Sec. 4(a) (last par.); restated June 19, 1951, ch. 144, Sec. 1(d) (last par.), 65 Stat. 78.

The words "prevented", "directly or indirectly", "concerning any subject", "or Members", and "and safety" are omitted as surplusage. The word "unlawful" is substituted for the words "in violation of law".

Amendments:

1984. Act Oct. 19, 1984 substituted the catchline for one which read "@ 1034. Communicating with a member of Congress"; and, in the body, substituted "Member of Congress" for "member of Congress".

1988. Act Sept. 29, 1988 (applicable as provided by @ 846(d) of such Act, which appears as a note to this section) substituted this heading and section for ones which read:

"@ 1034. Communicating with a Member of Congress

"No person may restrict any member of an armed force in communicating with a Member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States.".

1989. Act Dec. 12, 1989, in subsec. (c), in para. (1), inserted "when the Coast Guard is not operating as a service in the Navy", in para. (5), inserted "(or to the Secretary of Transportation in the case of a member of the Coast Guard when the Coast Guard is not operating as a service in the Navy)", in

para. (6), in the introductory matter, inserted "(or to the Secretary of Transportation in the case of a member of the Coast Guard when the Coast Guard is not operating as a service in the Navy)"; and in subsec. (e), inserted "(except for a member or former member of the Coast Guard when the Coast Guard is not operating as a service in the Navy)".

1994. Act Oct. 5, 1994 substituted the section heading for one which read: "@ 1034. Communicating with a Member of Congress or Inspector General; prohibition of retaliatory personnel actions"; in subsec. (b), designated the sentence beginning "No person may take" as para. (1) and, in para. (1) as so designated, substituted "or preparing--" and subparas. (A) and (B) for "or preparing a communication to a Member of Congress or an Inspector General that (under subsection (a)) may not be restricted.", designated the sentence beginning "Any action prohibited" as para. (2) and, in para. (2) as so designated, substituted "paragraph (1)" for "the preceding sentence"; in subsec. (c), in the heading, substituted "allegations of prohibited personnel actions" for "certain allegations", in para. (1), added the sentence beginning "If, in the case of an allegation . . .", and substituted para. (2) for one which read:

"(2) A communication described in this paragraph is a communication to a Member of Congress or an Inspector General that (under subsection (a)) may not be restricted in which the member of the armed forces makes a complaint or discloses information that the member reasonably believes constitutes evidence of--

"(A) a violation of a law or regulation; or

"(B) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.",

redesignated subsecs. (d)-(h) as subsecs. (f)-(j), respectively; substituted new subsec. (d) for subsec. (c)(4), which read: "(4) If the Inspector General has not already done so, the Inspector General shall commence a separate investigation of the information that the member believes evidences wrongdoing as described in subparagraph (A) or (B) of paragraph (2). The Inspector General is not required to make such an investigation if the information that the member believes evidences wrongdoing relates to actions which took place during combat."; redesignated subsec. (c)(5) as subsec. (e), added the heading, designated the sentence beginning "Not later than 30 days" as para. (1) and, in para. (1) as so designated, substituted "subsection (c) or (d)" for "this subsection", substituted "the member of the armed forces who made the allegation investigated" for "the member of the armed forces concerned" and deleted "In the copy of the report submitted to the member, the Inspector General may exclude any information that would not otherwise be available to the member under section 552 of title 5." following "investigated.", and added para. (2), redesignated subsecs. (c)(6) and (7) as subsecs. (e)(3) and (4), respectively, in para. (3) as redesignated, substituted "paragraph (1)" for "paragraph (5)"; in subsec. (f) as redesignated, in paras. (2)(A), (3)(A)(i), and (3)(B), substituted "subsection (e)(1)" for "subsection (c)(5)"; in subsec. (g) as redesignated, substituted "subsection (f)" for "subsection (d)"; and, in subsec. (j) as redesignated, added para. (3).

Other provisions:

Deadline for regulations. Act Sept. 29, 1988, P.L. 100-456, Div A, Title VIII, Part D, @ 846(b), 102 Stat. 2030, provides: "The Secretary of Defense and the Secretary of Transportation shall prescribe the regulations required by subsection (g) of section 1034 of title 10, United States Code, as amended by subsection (a), not later than 180 days after the date of the enactment of this Act."

Report. Act Sept. 29, 1988, P.L. 100-456, Div A, Title VIII, Part D, @

846(c), 102 Stat. 2030, provides:

"(1) The Inspector General of the Department of Defense (and the Inspector General of the Department of Transportation with respect to the Coast Guard) shall submit to Congress a report on the activities of the Inspector General under section 1034 of title 10, United States Code, as amended by subsection (a). The report shall include, in the case of each case handled by the Inspector General under that section, a description of--

"(A) the nature of the allegation described in subsection (c) of that section;

"(B) the evaluation and recommendation of the Inspector General with respect to the allegation;

"(C) any action of the appropriate board for the correction of military records with respect to the allegation;

"(D) if the allegation is determined to be meritorious, any corrective action taken; and

"(E) the views of the member or former member of the armed forces making the allegation (determined on the basis of the interview under subsection (f) of that section) on the disposition of the case.

"(2) The Inspector General shall include with the report under this subsection copies of the individual case reports for each such allegation.

"(3) The report under this subsection shall be submitted not later than February 1, 1990."

Application of Sept. 29, 1988 amendment. Act Sept. 29, 1988, P.L. 100-456, Div A, Title VIII, Part D, @ 846(d), 102 Stat. 2030, provides: "The amendment to section 1034 of title 10, United States Code, made by subsection (a)(1), shall apply with respect to any personnel action taken (or threatened to be taken) on or after the date of the enactment of this Act as a reprisal prohibited by subsection (b) of that section."

Whistleblower protections for members of the Armed Forces. Act Dec. 5, 1991, P.L. 102-190, Div A, Title VIII, Part E, @ 843, 105 Stat. 1449, provides:

"(a) Regulations required. The Secretary of Defense shall prescribe regulations prohibiting members of the Armed Forces from taking or threatening to take any unfavorable personnel action, or withholding or threatening to withhold a favorable personnel action, as a reprisal against any member of the Armed Forces for making or preparing a lawful communication to any employee of the Department of Defense or any member of the Armed Forces who is assigned to or belongs to an organization which has as its primary responsibility audit, inspection, investigation, or enforcement of any law or regulation.

"(b) Violations by persons subject to the UCMJ. The Secretary shall provide in the regulations that a violation of the prohibition by a person subject to chapter 47 of title 10, United States Code [10 USCS @@ 801 et seq.] (the Uniform Code of Military Justice), is punishable as a violation of section 892 of such title (article 92 of the Uniform Code of Military Justice).

"(c) Deadline. The regulations required by this section shall be prescribed not later than 180 days after the date of the enactment of this Act."

Deadline for regulations; content. Act Oct. 5, 1994, P.L. 103-337, Div A, Title V, Subtitle C, @ 531(h), (i), 108 Stat. 2758, provides:

"(h) Deadline for regulations. The Secretary of Defense and the Secretary of Transportation shall prescribe regulations to implement the amendments made by this section not later than 120 days after the date of the enactment of this Act.

"(i) Content of regulations. In prescribing regulations under section 1034 of title 10, United States Code, as amended by this section, the Secretary of Defense and the Secretary of Transportation shall provide for appropriate procedural protections for the subject of any investigation carried out under

10 USCS @ 1034 (1998)

the provisions of that section, including a process for appeal and review of investigative findings.".

NOTES:

CODE OF FEDERAL REGULATIONS

Add:

33 CFR Part 53.

This section is no longer cited as authority for:

32 Part 98a

RESEARCH GUIDE

Am Jur:

53A Am Jur 2d, Military and Civil Defense @ 245.

Forms:

3 Fed Procedural Forms L Ed, Armed Forces, Civil Disturbances, and National Defense @ 5:241.

INTERPRETIVE NOTES AND DECISIONS

1. Generally
2. Construction
3. Nature and extent of control of petitioning
4. --Validity of particular regulations
5. --Right to solicit signatures
6. Particular acts and conduct of servicemen
7. Review by court

1. Generally

Right given by 10 USCS @ 1034 is absolute, within strictures specifically delineated therein. *United States v Schmidt* (1966) 16 USCMA 57, 36 CMR 213.

Purpose of military whistleblower protection statute (10 USCS @ 1034) is to provide degree of protection to military personnel who report information on improper or illegal activities by other military personnel. *Hernandez v United States* (1997) 38 Fed Cl 532.

2. Construction

In construing statute such as 10 USCS @ 1034 that touches on matters of internal discipline and morale in military, courts must be careful not to circumscribe authority of military commanders to an extent never intended by Congress. *Brown v Glines* (1980) 444 US 348, 62 L Ed 2d 540, 100 S Ct 594, on remand (CA9 Cal) 618 F2d 623.

Congress designed military whistleblower protection statute (10 USCS @ 1034) to provide channels within military through which members of armed forces could bring their grievances; thus, statute provides administrative process for handling complaints of improper retaliatory personnel actions. *Hernandez v United States* (1997) 38 Fed Cl 532.

3. Nature and extent of control of petitioning

Section 1034 ensures that individual member of armed services can write to his elected representative without sending his communication through official channels, but does not protect serviceman's circulation of collective petitions within military base. *Brown v Glines* (1980) 444 US 453, 62 L Ed 2d 607, 100 S Ct 606.

4. --Validity of particular regulations

United States Air Force regulation which requires members of Air Force to obtain command approval before circulating on Air Force base petitions to Members of Congress, is not invalid on its face as violative of 10 USCS @ 1034; @ 1034 allows member of armed services to communicate with elected representatives without sending communication through official channels, but it does not give serviceman right to circulate collective petition within military base. *Brown v Glines* (1980) 444 US 348, 62 L Ed 2d 540, 100 S Ct 594, on remand (CA9 Cal) 618 F2d 623.

Regulations of Navy and Marine Corp which require personnel on overseas base to obtain command approval before circulating, on base, petitions addressed to Members of Congress, do not violate 10 USCS @ 1034. *Secretary of Navy v Huff* (1980) 444 US 453, 62 L Ed 2d 607, 100 S Ct 606.

5. --Right to solicit signatures

Permitting individual member of armed services to submit petition directly to member of Congress serves legislative purpose of @ 1034 without unnecessarily endangering commander's ability to preserve morale and good order among his troops; unrestricted circulation of collective petitions could imperil discipline. *Brown v Glines*, (1980) 444 US 348, 62 L Ed 2d 540, 100 S Ct 594, on remand (CA9 Cal) 618 F2d 623.

6. Particular acts and conduct of servicemen

In combat zone, commander's decision proscribing distribution of literature and solicitation of signatures in protest of presence of military was proper where such activity would pose danger to discipline and morale, contents of petition could have been discussed at informal group meetings, and those who supported petition could have communicated sentiments by letter to Congress. *Carlson v Schlesinger* (1975) 167 App DC 325, 511 F2d 1327.

Activities of captain in air force reserve in circulating petitions on base complaining about air force grooming standards, without first obtaining command approval, did not come within protection of @ 1034. *Brown v Glines*, 444 US 348, 62 L Ed 2d 540, 100 S Ct 594, on remand (CA9 Cal) 618 F2d 623).

7. Review by court

Statute prohibiting reprisal against servicemember for communicating with Member of Congress or Inspector General does not provide servicemember with private cause of action. *Acquisto v United States* (1995, CA8 Neb) 70 F3d 1010.

In case involving Air Force regulations governing servicemen's right of petition and possession and distribution of written or printed materials, latitude to be permitted in prescribing regulations varies with magnitude of governmental or military interest involved, so court in exercising its power of review must make threshold determination as to military interest at stake before proceeding to apply test of balancing individual liberties against public interest in accommodating legitimate military needs. *Glines v Wade* (1975, ND Cal) 401 F Supp 127, affd in part and vacated in part on other grounds (CA9 Cal) 586 F2d 675, revd on other grounds 444 US 348, 62 L Ed 2d 540, 100 S Ct 594, on remand (CA9 Cal) 618 F2d 623.

Military whistleblower protection statute (10 USCS @ 1034), which provides strictly administrative remedies, does not afford plaintiffs private cause of action, and is not money-mandating statute that would allow plaintiffs to obtain jurisdiction in Court of Federal Claims. *Hernandez v United States* (1997) 38 Fed Cl 532.

10 USCS @ 5016 (1998) printed in FULL format.

UNITED STATES CODE SERVICE
Copyright 1998, LEXIS Law Publishing, a division of Reed Elsevier Inc.
All rights reserved.

*** THIS SECTION IS CURRENT THROUGH 105-165, APPROVED 3/20/98 ***
*** WITH A GAP OF 160 AND 164 ***

TITLE 10. ARMED FORCES
SUBTITLE C. NAVY AND MARINE CORPS
PART I. ORGANIZATION
CHAPTER 503. DEPARTMENT OF THE NAVY

10 USCS @ 5016 (1998)

@ 5016. Assistant Secretaries of the Navy

(a) There are four Assistant Secretaries of the Navy. They shall be appointed from civilian life by the President, by and with the advice and consent of the Senate.

(b)(1) The Assistant Secretaries shall perform such duties and exercise such powers as the Secretary of the Navy may prescribe.

(2) One of the Assistant Secretaries shall be the Assistant Secretary of the Navy for Manpower and Reserve Affairs. He shall have as his principal duty the overall supervision of manpower and reserve component affairs of the Department of the Navy.

(3) One of the Assistant Secretaries shall be the Assistant Secretary of the Navy for Financial Management. The Assistant Secretary shall have as his principal responsibility the exercise of the comptroller functions of the Department of the Navy, including financial management functions. The Assistant Secretary shall be responsible for all financial management activities and operations of the Department of the Navy and shall advise the Secretary of the Navy on financial management.

HISTORY: (Added Oct. 1, 1986, P.L. 99-433, Title V, Part B, @ 511(c)(4) in part, 100 Stat. 1047; Sept. 29, 1988, P.L. 100-456, Div A, Title VII, Part A, @ 702(b) [(1)], 102 Stat. 1994.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

EXPLANATORY NOTES:

The bracketed "(1)" is inserted in the authority citation for @ 702(b) of Act Sept. 29, 1988 as the probable intention of Congress because subsec. (b) of such @ 702 contains paras. (2) and (3).

AMENDMENTS:

1988. Act Sept. 29, 1988 (effective 1/20/89 as provided by @ 702(e)(1) of such Act, which appears as 10 USCS @ 3016 note), in subsec. (b), added para. (3).

OTHER PROVISIONS:

Order of succession to the office of Secretary. For the order of succession in the event of the death, disability, or absence of the Secretary, see Ex.

10 USCS @ 5016 (1998)

Or. No. 10820 of May 18, 1959, 24 Fed. Reg. 4045, which appears as 5 USCS @ 3347 note.

NOTES:

CROSS REFERENCES

Compensation of Assistant Secretaries, 5 USCS @ 5315.
Sucession to duties of Secretary, 10 USCS @ 5036.

RESEARCH GUIDE

AM JUR:

53 Am Jur 2d, Military, and Civil Defense @ 17.

DEPARTMENT OF THE NAVY
Office of the Secretary
Washington, DC 20350-1000

SECNAVINST 5420.135D
NCPB
27 March 1992

SECNAV INSTRUCTION 5420.135D

From: Secretary of the Navy
To: All Ships and Stations

Subj: NAVAL COUNCIL OF PERSONNEL
BOARDS

Ref: (a) SECNAVINST 5430.7L (NOTAL)
(b) Chapter 61, Title 10, U.S. Code,
(Secs 1201-1221)
(c) SECNAVINST 1850.4C (NOTAL)
(d) Title 10, U.S. Code, Sec 1553
(e) SECNAVINST 5420.174C (NOTAL)
(f) SECNAVINST 5815.3G
(g) Title 10, U.S. Code, Secs 953, 954
(h) Title 10, U.S. Code, Sec 952

1. **Purpose.** To state the mission, duties and responsibilities of the Naval Council of Personnel Boards (NCPB).

2. **Cancellation.** SECNAVINST 5420.135C.

3. **Organization.** The NCPB is an administrative activity within the Department of the Navy (DON) assigned by reference (a) to the Assistant Secretary of the Navy (Manpower and Reserve Affairs) (ASN(M&RA)) for supervision and support. It is comprised of the Physical Evaluation Board, the Naval Discharge Review Board, the Naval Complaints Review Board and the Naval Clemency and Parole Board. The Director shall be a senior line/unrestricted officer (O6 or above) permanently assigned to the Council whose immediate office is designated a staff field office of the ASN(M&RA). The Director and

R) Deputy Director billets will be alternately, but not simultaneously, held by Navy and Marine Corps officers. The Director is responsible for all matters pertaining to the Council and its constituent elements, and shall be the direct channel between the ASN(M&RA) and the constituent elements. In the event of the absence or incapacity of the Director, the Deputy Director shall assume the duties and responsibilities of Director.

4. **Mission.** The mission of the NCPB shall be as follows: to administer and supervise assigned boards.

5. **Duties and Responsibilities.** The Director shall have the authority to detail to membership on component boards officers permanently assigned to the NCPB or otherwise made available, and to request necessary alternate officer membership, as required, from the DON. The Director is further authorized to establish an ad hoc board within the Council to review any case referred to the Council by the ASN (M&RA) which does not fall directly within the purview of any component boards comprising the NCPB. In brief, the boards function as follows:

a. **Physical Evaluation Board (PEB).** The PEB administers disability evaluations within the (R) DON under reference (b) and other applicable provisions of law and regulation. It is comprised of the Records Review Panels; Hearing Panels at Bethesda, MD and San Diego, CA; and the Disability Evaluation System Counselors located at selected major medical centers. The Panels of the PEB consider evidence concerning disabilities of personnel and, the President, PEB, acting for the ASN(M&RA), orders an appropriate disposition in each case. The PEB is governed and organized by reference (c).

b. **Naval Discharge Review Board (NDRB).** The NDRB, following references (d) and (e), reviews the characterization of service and reason for discharge or dismissal of former members of the Navy and Marine Corps (except those discharged by reason of sentence of general court-martial), and has the authority to change, correct or modify any discharge or dismissal. The Board has no authority to revoke a discharge or dismissal; reinstate a person in the military service subsequent to discharge or dismissal; recall a former member to active duty; conduct proceedings under procedures prescribing the conduct of administrative discharge boards; change reenlistment codes; make recommendations for reenlistment to permit entry in the naval service or any other



0579LD0558660

branch of the Armed Forces; cancel or void enlistment contracts; change, correct, or modify any document other than discharge documents; change the reason for discharge from, or to, physical disability; or determine eligibility for veterans benefits.

c. Naval Complaints Review Board

(NCRB). The NCRB reviews those complaints, pertaining to NDRB decisions, properly referred A) by the Joint Services Review Activity. Additionally, the Board, by separate tasking, is responsible for ensuring compliance with the stipulation in reference (e) by providing oversight supervision in the preparation of decisional documents of the NDRB.

d. Naval Clemency and Parole Board

(NC&PB). The NC&PB reviews and grants or denies clemency in those Navy and Marine Corps cases referred to it for clemency review and, when requested, provides advisory opinions to the Commandant of the Coast Guard regarding the appropriateness of clemency as it pertains to Coast Guard personnel serving sentences of confinement in naval facilities as provided by references (f) and (g); reviews and grants or denies parole in those Navy, Marine Corps, and Coast Guard cases referred to it for parole review as provided by references (f) and (h); and reviews policy and procedures in clemency and parole matters for appropriate action by the Secretary of the Navy in accordance with reference (f).

6. Action. The Director shall issue such instructions as are necessary to further define and implement the organization and mission of the NCPB.

H. LAWRENCE GARRETT, III
Secretary of the Navy

Distribution:

SNDL Parts 1 and 2
MARCORPS Code PCN 72000009700

SECNAV/OPNAV Directives Control Office
Washington Navy Yard, Building 200
Washington, DC 20374-5074 (20 copies)

Stocked:

Navy Aviation Supply Office
Physical Distribution Division, Code 103
5801 Tabor Avenue
Philadelphia, PA 19120-5099 (20 copies)

SPECIAL
AND
INCENTIVE
PAY
PROVISIONS

101ST SECTION of Level 1 printed in FULL format.

UNITED STATES CODE SERVICE

Copyright 1998, LEXIS Law Publishing, a division of Reed Elsevier Inc.

All rights reserved.

*** THIS SECTION IS CURRENT THROUGH 105-165, APPROVED 3/20/98 ***

*** WITH A GAP OF 160 AND 164 ***

TITLE 37. PAY AND ALLOWANCES OF THE UNIFORMED SERVICES
CHAPTER 5. SPECIAL AND INCENTIVE PAYS

37 USCS @ 301c (1998)

@ 301c. Incentive pay: submarine duty

(a) (1) Subject to regulations prescribed by the President, a member of the naval service who is entitled to basic pay, and (A) holds (or is in training leading to) a submarine duty designator, (B) is in and remains in the submarine service on a career basis, and (C) meets the requirements of paragraph (3), is entitled to continuous monthly submarine duty incentive pay in the amount set forth in subsection (b).

(2) Subject to regulations prescribed by the President, a member of the naval service who is entitled to basic pay but is not entitled to continuous monthly submarine duty incentive pay under paragraph (1) is entitled to submarine duty incentive pay in the amount set forth in subsection (b) for any period during which such member performs frequent and regular operational submarine duty (as defined in paragraph (5)) required by orders.

(3) To be entitled to continuous monthly submarine duty incentive pay through 26 years of service (as computed under section 205 of this title), but excluding, in the case of an officer, periods as an enlisted member before initial appointment as an officer, a member must perform operational submarine duties for at least 6 of the first 12, and at least 10 of the first 18, years of his submarine service. However, if a member performs the prescribed operational submarine duties for at least 8 but less than 10 of the first 18 years of his submarine service, he is entitled to continuous monthly submarine duty incentive pay for the first 22 years of his service (as computed under section 205 of this title), but excluding, in the case of an officer, periods as an enlisted member before initial appointment as an officer.

(4) If upon completion of either 12 or 18 years of submarine service it is determined that a member has failed to perform the minimum prescribed operational submarine duty requirements during the prescribed periods of time, his entitlement to continuous monthly submarine duty incentive pay ceases. If entitlement to continuous monthly submarine duty incentive pay ceases upon completion of 12 years of submarine service, entitlement to that pay may again commence upon completion of 18 years of submarine service if the minimum operational submarine duty requirements have been met, and such pay shall continue for the period of time prescribed in accordance with this section. However, if entitlement to continuous monthly submarine duty incentive pay ceases in the case of any member at the completion of either 12 or 18 years of submarine service or 26 years of service (as computed under section 205 of this title), but excluding, in the case of an officer, periods as an enlisted member before initial appointment as an officer, such member shall be entitled to that pay in the amount set forth in subsection (b) for the performance of subsequent operational submarine duty, or for the performance of service as a member of a submarine operational command staff, if such member's duties require serving on a submarine during underway operations.

(5) In this section:

(A) The term "operational submarine duty" means duty--

(i) while attached under competent orders to a submarine, while serving as an operator or crew member of an operational submersible (including an undersea exploration or research vehicle), while undergoing training preliminary to assignment to a nuclear-powered submarine, while undergoing rehabilitation after assignment to a nuclear-powered submarine, or, in the case of a member qualified in submarines, while attached as a member of a submarine operational command staff whose duties require serving on a submarine during underway operations--

(I) during one calendar month: 48 hours, except that hours served underway in excess of 48 as a member of a submarine operational command staff during any of the immediately preceding five calendar months and not already used to qualify for incentive pay may be applied to satisfy the underway time requirements for the current month;

(II) during any two consecutive calendar months when the requirements of subclause (I) of this clause have not been met: 96 hours; or

(III) during any three consecutive calendar months when the requirements of subclause (II) of this clause have not been met: 144 hours;

(ii) while receiving instruction to prepare for assignment to a submarine of advanced design, or

(iii) while receiving instruction to prepare for a position of increased responsibility on a submarine.

(B) The term "submarine service" means the service performed, under regulations prescribed by the Secretary of the Navy, by a member, and the years of submarine service are computed beginning with the effective date of the initial order to perform submarine service.

(b) A member who meets the requirements prescribed in subsection (a) is entitled to monthly submarine duty incentive pay as follows:

ENLISTED MEMBERS

Years of service computed under section 205				
Pay grade	2 or less	Over 2	Over 3	Over 4
E-9	\$ 225	\$ 225	\$ 225	\$ 270
E-8	\$ 225	225	225	250
E-7	225	225	225	250
E-6	155	170	175	215
E-5	140	155	155	175
E-4	80	95	100	170
E-3	80	90	100	170
E-2	75	90	90	90
E-1	75	75	75	75
	Over 6	Over 8	Over 10	
E-9	\$ 295	\$ 310	\$ 315	
E-8	270	295	310	
E-7	255	265	275	
E-6	230	245	255	

37 USCS @ 301c (1998)

E-5	190	195	195
E-4	175	175	175
E-3	175	175	90
E-2	90	90	90
E-1	75	75	75

Over	Over	Over	Over
12	14	16	18

E-9	\$ 330	\$ 345	\$ 355	\$ 355
E-8	315	330	330	345
E-7	295	310	310	310
E-6	265	265	265	265
E-5	195	195	195	195
E-4	175	175	175	175
E-3	90	90	90	90
E-2	90	90	90	90
E-1	75	75	75	75

Over	Over	Over
20	22	26

E-9	\$ 355	\$ 355	\$ 355
E-8	345	345	345
E-7	310	310	310
E-6	265	265	265
E-5	195	195	195
E-4	175	175	175
E-3	90	90	90
E-2	90	90	90
E-1	75	75	75

COMMISSIONED OFFICERS

Years of service computed under section 205

Pay grade	2 or less	Over 2	Over 3	Over 4
-----------	-----------	--------	--------	--------

O-10	\$ 355	\$ 355	\$ 355	\$ 355
O-9	355	355	355	355
O-8	355	355	355	355
O-7	355	355	355	355
O-6	595	595	595	595
O-5	595	595	595	595
O-4	365	365	365	405
O-3	355	355	355	390
O-2	235	235	235	235
O-1	175	175	175	175

Over	Over	Over
6	8	10

O-10	\$ 355	\$ 355	\$ 355
O-9	355	355	355
O-8	355	355	355

37 USCS @ 301c (1998)

O-7	355	355	355
O-6	595	595	595
O-5	595	595	595
O-4	595	595	595
O-3	595	595	595
O-2	235	235	355
O-1	175	175	355

Over	Over	Over	Over
12	14	16	18

O-10	\$ 355	\$ 355	\$ 355	\$ 355
O-9	355	355	355	355
O-8	355	355	355	355
O-7	355	355	540	535
O-6	595	595	595	595
O-5	595	595	595	595
O-4	595	595	595	595
O-3	595	595	595	595
O-2	355	355	355	355
O-1	355	355	355	355

Over	Over	Over
20	22	26

O-10	\$ 355	\$ 355	\$ 355
O-9	355	355	355
O-8	355	355	355
O-7	535	410	355
O-6	595	595	595
O-5	595	595	595
O-4	595	595	595
O-3	595	595	595
O-2	355	355	355
O-1	355	355	355

WARRANT OFFICERS

Years of service computed under section 205

Pay				
grade	2 or	Over	Over	Over
	less	2	3	4

W-5	\$ 235	\$ 310	\$ 310	\$ 355
W-4	235	310	310	355
W-3	235	310	310	355
W-2	235	310	310	355
W-1	235	310	310	355

Over	Over	Over
6	8	10

W-5	\$ 355	\$ 355	\$ 355
W-4	355	355	355
W-3	355	355	355

37 USCS @ 301c (1998)

W-2	355	355	355	
W-1	355	355	355	
	Over	Over	Over	Over
	12	14	16	18

W-5	\$ 355	\$ 355	\$ 355	\$ 355
W-4	355	355	355	355
W-3	355	355	355	355
W-2	355	355	355	355
W-1	355	355	355	355

	Over	Over	Over
	20	22	26

W-5	\$ 355	\$ 355	\$ 355
W-4	355	355	355
W-3	355	355	355
W-2	355	355	355
W-1	355	355	355

(c) (1) An officer who fails of selection for assignment as an executive officer or commanding officer of a submarine or who declines to serve in either such position may not be paid submarine duty incentive pay except for periods during which the officer is serving on a submarine during underway operations.

(2) An enlisted member may not be paid continuous submarine duty incentive pay while serving ashore between submarine sea duty assignments unless the member has a sufficient period of enlistment (including any extension of an enlistment) remaining to be reassigned to submarine sea duty.

(d) Under regulations prescribed by the President and to the extent provided for by appropriations, when a member of the Naval Reserve who is entitled to compensation under section 206 of this title, performs, under orders, duty on a submarine during underway operations, he is eligible for an increase in such compensation equal to one-thirtieth of the monthly incentive pay authorized by subsection (b) of this section for the performance of that duty by a member of a corresponding grade and years of service who is entitled to basic pay. Such a member is eligible for the increase for each day served, for as long as he is qualified for it, during each regular period of appropriate duty.

(e) [Repealed]

HISTORY: (Added Dec. 23, 1980, P.L. 96-579, @ 3(d), 94 Stat. 3360; Aug. 14, 1981, P.L. 97-39, Title VII, @ 701(a), (b), 95Stat. 942; Oct. 14, 1981, P.L. 97-60, Title I, Part B, @ 114, 95 Stat. 995; Nov. 8, 1985, P.L. 99-145, Title VI, Part C, Subpart 1 @ 633(a), 99 Stat. 646; April 21, 1987, P.L. 100-26, @ 8(e)(4), 101 Stat. 286; Dec. 4, 1987, P.L. 100-180, Div A, Title VI, Part C, @ 623(a), (b), 101 Stat. 1101; Dec. 30, 1987, P.L. 100-224, @ 5(a)(2), 101 Stat. 1538; Sept. 29, 1988, P.L. 100-456, Div A, Title XII, Part D, @ 1233(1)(1), 102 Stat. 2058; Nov. 5, 1990, P.L. 101-510, Div A, Title XIII, Part C, @ 1322(c)(1), 104 Stat. 1672; April 6, 1991, P.L. 102-25, Title VII, @ 702(b)(1), (2), (c), 105 Stat. 117; Dec. 5, 1991, P.L. 102-190, Div A, Title XI, Part A, @ 1111(d)(2), 105 Stat. 1492.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

No change in text of this section resulted from the amendment made by Act Sept. 29, 1988, @ 1233(1)(1), which affected only the statutory instructions for the amendment made by Act Dec. 4, 1987, P.L. 100-180, @ 623(a).

Amendments:

1981. Act Aug. 14, 1981, (effective 1/1/81, as provided by @ 701(c) of such Act) in subsec. (a), substituted paras. (1) and (2) for ones which read:

"(1) Subject to regulations prescribed by the President, a member of the Navy who is entitled to basic pay is also entitled to submarine duty incentive pay in the amount set forth in subsection (b) of this section for the frequent and regular performance of operational submarine duty required by orders.

"(2) Submarine duty incentive pay shall be restricted to members who holdor are in training leading to a submarine duty designator and who are in and remain in the submarine service on a career basis."

Such Act further (effective 1/1/81, as provided by @ 701(c) of such Act), in subsec. (a)(5)(i) introductory matter, inserted "while serving as an operator or crew member of an operational submersible (including an undersea exploration or research vehicle),".

Act Oct. 14, 1981, in subsec. (a), in paras. (3) and (4), inserted ", but excluding, in the case of an officer, periods as an enlisted member before initial appointment as an officer" wherever appearing.

1985. Act Nov. 8, 1985 (effective 10/1/85, as provided by @ 633(b) of such Act), in subsec. (b), substituted the table for Commissioned Officers for one which read:

"COMMISSIONED OFFICERS

"Pay grade	Years of service computed under section 205				
	2 or less	Over 2	Over 3	Over 4	Over 6
O-10	\$ 265	\$ 265	\$ 265	\$ 265	\$ 265
O-9	265	265	265	265	
O-8	265	265	265	265	
O-7	265	265	265	265	
O-6	440	440	440	440	
O-5	440	440	440	440	
O-4	270	270	270	300	
O-3	265	265	265	290	
O-2	175	175	175	175	
O-1	130	130	130	130	

"Pay grade	Years of service computed under section 205				
	Over 12	Over 14	Over 16	Over 18	Over 20
O-10	\$ 265	\$ 265	\$ 265	\$ 265	\$ 265
O-9	265	265	265	265	

37 USCS @ 301c (1998)

O-8	265	265	265	265
O-7	265	265	400	395
O-6	440	440	440	395
O-5	440	440	440	395
O-4	440	440	440	395
O-3	440	440	440	395
O-2	265	265	265	265
O-1	265	265	265	265

1987. Act April 21, 1987, in subsec. (a)(5), in the introductory matter, substituted "In this section:" for "For the purposes of this section, the term--", and, in subparas. (A) and (B), inserted "The term" and revised the first word after the open quotation marks so that the initial letter is lower case.

Act Dec. 4, 1987 (effective and applicable as provided by @ 623(c) of such Act, which appears as a note to this section), as amended Act Sept. 29, 1988 (applicable as if included in Act Dec. 4, 1987, as provided by @ 1233(1) of Act Sept. 29, 1988, which appears as 10 USCS @ 2366 note), in subsec. (a), in paras. (1) and (2), substituted "naval service" for "Navy"; and substituted subsec. (b) for one which read:

"ENLISTED MEMBERS

"Pay grade	Years of service computed under section 205				
	2 or less	Over 2	Over 3	Over 4	Over 6
E-9	\$ 165	\$ 165	\$ 165	\$ 165	\$ 200
E-8	165	165	165	185	
E-7	165	165	165	185	
E-6	115	125	130	160	
E-5	105	115	115	130	
E-4	60	70	75	125	
E-3	60	65	70	70	
E-2	55	65	65	65	
E-1	55	55	55	55	

"Pay grade	Years of service computed under section 205				
	Over 12	Over 14	Over 16	Over 18	Over 20
E-9	\$ 245	\$ 255	\$ 265	\$ 265	
E-8	235	245	245	255	
E-7	220	230	230	230	
E-6	195	195	195	195	
E-5	145	145	145	145	
E-4	130	130	130	130	
E-3	65	65	65	65	
E-2	65	65	65	65	
E-1	55	55	55	55	

37 USCS @ 301c (1998)

"COMMISSIONED OFFICERS

"Pay grade	Years of service computed under section 205				
	2 or less	Over 2	Over 3	Over 4	Over 6
O-10	\$ 265	\$ 265	\$ 265	\$ 265	\$ 265
O-9	265	265	265	265	
O-8	265	265	265	265	
O-7	265	265	265	265	
O-6	440	440	440	440	
O-5	440	440	440	440	
O-4	270	270	270	300	
O-3	265	265	265	290	
O-2	175	175	175	175	
O-1	130	130	130	130	

"Pay grade	Years of service computed under section 205				
	2 or less	Over 2	Over 3	Over 4	Over 6
O-10	\$ 265	\$ 265	\$ 265	\$ 265	\$ 265
O-9	265	265	265	265	
O-8	265	265	265	265	
O-7	265	265	400	395	
O-6	440	440	440	440	
O-5	440	440	440	440	
O-4	440	440	440	440	
O-3	440	440	440	440	
O-2	265	265	265	265	
O-1	265	265	265	265	

"WARRANT OFFICERS

"Pay grade	Years of service computed under section 205				
	2 or less	Over 2	Over 3	Over 4	Over 6
W-4	\$ 235	\$ 310	\$ 310	\$ 355	
W-4	\$ 175	\$ 230	\$ 230	\$ 230	
W-3	175	230	230	230	
W-2	175	230	230	230	
W-1	175	230	230	230	

"Pay grade	Years of service computed under section 205				
	Over 12	Over 14	Over 16	Over 18	Over 20
W-4	\$ 265	\$ 265	\$ 265	\$ 265	\$ 265
W-3	265	265	265	265	

37 USCS @ 301c (1998)

W-2	265	265	265	265
W-1	265	265	265	265

Act Dec. 30, 1987 (applicable as provided by @ 5(a)(4) of such Act, which appears as 10 USCS @ 2437 note) deleted "(b) The monthly rates for special pay under subsection (a) are as follows:" preceding the tables.

1990. Act Nov. 5, 1990 deleted subsec. (e), which read:

"(e) The Secretary of Defense shall report to the Congress before January 1 each year--

"(1) the number of enlisted members and officers, by pay grade, who, during the preceding fiscal year, had at least 12 but less than 18 years of submarine service and who were entitled to continuous monthly submarine duty incentive pay under subsection (a) of this section; and

"(2) the number of enlisted members and officers, by pay grade, who, during such fiscal year, had at least 18 years of submarine service and who were entitled to such incentive pay.

"The Secretary shall include in each such report the number of enlisted members and the number of officers in each category referred to in the first sentence of this subsection, the number of such officers who, during the fiscal year concerned, were performing operational submarine duties, who were performing submarine command staff duties, and who were not performing submarine duties at all."

1991. Act April 6, 1991, in subsec. (a)(1), (2), and (4), deleted "of this section" following "subsection (b)" in each instance; and, in subsec. (a)(1), in para. deleted "of this subsection" after "paragraph (3)", and, in para. (2), deleted "of this subsection" following "paragraph (1)" and "paragraph (5)".

Act Dec. 5, 1991 (effective 2/1/92 as provided by @ 1132 of such Act, which appears as 10 USCS @ 521 note), in subsec. (b), substituted the items relating to pay grades W-4 and W-5 for items relating to pay grade W-4 which read:

"W-4	\$ 235	\$ 310	\$ 310	\$ 355
"W-4	\$ 355	\$ 355	\$ 355	\$ 355

Other provisions:

Effective date of amendments made by @ 3 of Act Dec. 23, 1980. Act Dec. 23, 1980, P.L. 96-579, @ 3(g), 94 Stat. 3364, provided: "The amendments made by this subsection [section] [adding this section and amending 37 USCS @@ 301, 308] shall become effective on the first day of the first month following the month in which this Act is enacted [enacted Dec. 1980]."

Effective date and application of Act Dec. 4, 1987 amendments. Act Dec. 4 1987, P.L. 100-180, Div A, Title VI, Part C, @ 623(c), 101 Stat. 1103, provides:

(1) Subject to paragraph (2), the amendments made by this section shall take effect on the first day of the first month beginning after the date of the enactment of this Act and shall apply only with respect to duty performed on or after that date.

"(2) The amendments made by this section shall take effect only if legislation as described in section 3(c) [@ 3(c) of this Act, which is unclassified] is enacted."

NOTES:

CROSS REFERENCES

This section is referred to in 37 USCS @ 308.

37 USCS @ 305A (1998) printed in FULL format.

UNITED STATES CODE SERVICE

Copyright 1998, LEXIS Law Publishing, a division of Reed Elsevier Inc.

All rights reserved.

*** THIS SECTION IS CURRENT THROUGH 105-165, APPROVED 3/20/98 ***

*** WITH A GAP OF 160 AND 164 ***

TITLE 37. PAY AND ALLOWANCES OF THE UNIFORMED SERVICES

CHAPTER 5. SPECIAL AND INCENTIVE PAYS

37 USCS @ 305a (1998)

@ 305a. Special pay: career sea pay

(a) Under regulations prescribed by the President, a member of a uniformed service who is entitled to basic pay is also entitled, while on sea duty, to special pay at the applicable rate under subsection (b).

(b) The monthly rates for special pay under subsection (a) are as follows:

ENLISTED MEMBERS

Years of sea duty							
Pay grade	1 or less	Over 1	Over 2	Over 3	Over 4	Over 5	Over 6
E-4	\$ 50	\$ 60	\$ 120	\$ 150	\$ 160	\$ 160	\$ 1 60
E-5	50	60	120	150	170	315	325
E-6	100	100	120	150	170	315	325
E-7	100	100	120	175	190	350	350
E-8	100	100	120	175	190	350	350
E-9	100	100	120	175	190	350	350
	Over 7	Over 8	Over 9	Over 10	Over 11	Over 12	Over 13
E-4	\$ 160	\$ 160	\$ 160	\$ 160	\$ 160	\$ 160	\$ 160
E-5	350	350	350	350	350	350	305
E-6	350	350	365	365	365	380	395
E-7	375	390	400	400	410	420	450
E-8	375	390	400	400	410	420	450
E-9	375	390	400	400	410	420	450
	Over 14	Over 16	Over 18				
E-4	\$ 160	\$ 160	\$ 160				
E-5	350	350	350				
E-6	410	425	450				
E-7	475	500	500				
E-8	475	500	520				
E-9	475	520	520				

WARRANT OFFICERS

37 USCS @ 305A (1998)

Years of sea duty							
Pay grade	1 or less	Over 1	Over 2	Over 3	Over 4	Over 5	Over 6
W-1	\$ 130	\$ 135	\$ 140	\$ 150	\$ 170	\$ 175	\$ 200
W-2	150	150	150	150	170	260	265
W-3	150	150	150	150	170	270	280
W-4	150	150	150	150	170	290	310
W-5	150	150	150	150	170	290	310;

	Over 7	Over 8	Over 9	Over 10	Over 11	Over 12	Over 14
W-1	\$ 250	\$ 270	\$ 300	\$ 325	\$ 325	\$ 340	\$ 360
W-2	265	270	310	340	340	375	400
W-3	285	290	310	350	375	400	425
W-4	310	310	310	350	375	400	450
W-5	310	310	310	350	375	400	450;

	Over 16	Over 18	Over 20
W-1	\$ 375	\$ 375	\$ 375
W-2	400	400	400
W-3	425	450	450
W-4	450	500	500
W-5	450	500	500.

COMMISSIONED OFFICERS

Years of sea duty							
Pay Grade	Over 3	Over 4	Over 5	Over 6	Over 7	Over 8	Over 9
O-1	\$ 150	\$ 160	\$ 185	\$ 190	\$ 195	\$ 205	\$ 215
O-2	150	160	185	190	195	205	215
O-3	150	160	185	190	195	205	215
O-4	185	190	200	205	215	220	220
O-5	225	225	225	225	230	245	250
O-6	225	230	230	240	255	265	280
	Over 10	Over 11	Over 12	Over 14	Over 16	Over 18	Over 20
O-1	\$ 225	\$ 225	\$ 240	\$ 250	\$ 260	\$ 270	\$ 280
O-2	225	225	240	250	260	270	280
O-3	225	225	240	260	270	280	290
O-4	225	225	240	270	280	290	300
O-5	260	265	265	285	300	315	340

O-6 290 300 310 325 340 355 380

(c) Under regulations prescribed by the President, a member of a uniformed service who is entitled to career sea pay under this section who has served 36 consecutive months of sea duty (other than an enlisted member in a pay grade above E-4 with more than five years of sea duty) is entitled to a career sea pay premium of \$ 100 a month for the thirty-seventh consecutive month and each subsequent consecutive month of sea duty served by such member.

(d) (1) In this section, the term "sea duty" means duty performed by a member--

(A) while permanently or temporarily assigned to a ship and--

(i) while serving on a ship the primary mission of which is accomplished while under way;

(ii) while serving as a member of the off-crew of a two-crewed submarine; or

(iii) while serving as a member of a tender-class ship (with the hull classification of submarine or destroyer); or

(B) while permanently or temporarily assigned to a ship and while serving on a ship the primary mission of which is normally accomplished while in port, but only during a period that the ship is away from its homeport.

(2) The Secretary concerned may designate duty performed by a member while serving on a ship the primary mission of which is accomplished either while under way or in port as "sea duty" for purposes of this section, even though the duty is performed while the member is permanently or temporarily assigned to a ship-based staff or other unit not covered by paragraph (1).

(3) For the purpose of determining the years of sea duty with which, a member may be credited for purposes of this section, the term "sea duty" also includes duty performed after December 31, 1988 by a member while permanently or temporarily assigned to a ship or ship-based staff and while serving on a ship on which the member would be entitled, during a period that the ship is away from its homeport, to receive sea pay by reason of paragraph (1)(B).

(4) A ship shall be considered to be away from its homeport for purposes of this subsection when it is--

(A) at sea; or

(B) in a port that is more than 50 miles from its homeport.

HISTORY: (Added Oct. 20, 1978, P.L. 95-485, Title VIII, @ 804(a)(1), 92 Stat. 1620; Sept. 8, 1980, P.L. 96- 343, @ 3(a), 94 Stat. 1124; Dec. 23, 1980, P.L. 96-579, @ 4(a), 94 Stat. 3364; Oct. 14, 1981, P.L. 97-60, Title I, Part B, @ 116, 95 Stat. 996; Oct. 12, 1982, P.L. 97-295, @ 3(1), 96 Stat. 1303; Oct. 19, 1984, P.L. 98-525, Title VI, Part C, @ 623(a), 98 Stat. 2541; Nov. 8, 1985, P.L. 99-145, Title VI, Part C, Subpart 1 @ 634(a), 99 Stat. 647; April 21, 1987, P.L. 100-26, @ 8(e)(5), 101 Stat. 286; Dec. 4, 1987, P.L. 100- 180, Div A, Title VI, Part C, @ 621(a)-(c), 101 Stat. 1097; Dec. 30, 1987, P.L. 100-224, @ 5(a)(1), 101 Stat. 1538; Sept. 29, 1988, P.L. 100-456, Div A, Title XII, Part D, @ 1233(b)(1), 102 Stat. 2057; Nov. 29, 1989, P.L. 101-189, Div A, Title VI, Part F, @ 653(b), 103 Stat. 1462; April 6, 1991, P.L. 102-25, Title VII, @ 702(b)(1), (c), 105 Stat. 117; Dec. 5, 1991, P.L. 102-190, Div A, Title XI, Part A, @ 1111(d)(3), 105 Stat. 1492; Feb. 10, 1996, P.L. 104-106, Div A, Title VI, Subtitle B, @ 618, 110 Stat. 362.)

(As amended Nov. 18, 1997, P.L. 105-85, Div A, Title VI, Subtitle B, @ 620, 111 Stat. 1790.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

Act Oct. 20, 1978, P.L. 95-485, Title VIII, @ 804(a)(2), 92 Stat. 1620, which provided for the amendment of subsec. (b) of this section, effective Oct. 1, 1981, was repealed by Act Sept. 8, 1980, P.L. 96-343, @ 3(b), 94 Stat. 1124.

Effective date of section:

Act Oct. 20, 1978, P.L. 95-485, Title VIII, @ 804(a)(1), 92 Stat. 1620, provided in part that this section is effective October 1, 1978.

Amendments:

1980. Act Sept. 8, 1980, substituted subsec. (b) for one which read:

"(b)

(1) For sea duty performed during fiscal year 1979 or 1980, the monthly rates for special pay under subsection (a) are as follows:

"Years of sea duty:	Monthly rate
Over 3.....	\$ 25
Over 5.....	35
Over 12.....	55

"(2) For sea duty performed during fiscal year 1981, the monthly rates for special pay under subsection (a) are as follows:

"Years of sea duty:	Monthly rate
Over 3.....	\$ 25
Over 5.....	35
Over 7.....	45
Over 12.....	55".

Act Dec. 23, 1980, substituted this section for one which read:

"(a) Under regulations prescribed by the President, an enlisted member of a uniformed service who is entitled to basic pay and who (1) is in pay grade E-4 or above, and (2) has served more than three years of sea duty, is also entitled, while on sea duty, to special pay at the applicable rate under subsection (b).

"(b) The monthly rates for special pay under subsection (a) of this section are as follows:

"Years of sea duty:	Monthly rate
Over 3.....	\$ 29
Over 5.....	40
Over 7.....	52
Over 9.....	63
Over 10.....	75
Over 11.....	86
Over 12.....	115".

1981. Act Oct. 14, 1981, in subsec. (d)(1), inserted "or while serving as a member of the off-crew of a two-crewed submarine".

1982. Act Oct. 12, 1982, in subsec. (d), in the concluding matter, substituted "(2)" for "(B)".

1984. Act Oct. 19, 1984 (effective 10/1/84, as provided by @ 623(c) of such Act, which appears as a note to this section), in subsec. (b), substituted the table relating to pay for enlisted members for one which read:

37 USCS @ 305A (1998)

"ENLISTED MEMBERS

"Pay grade	Years of sea duty				
	1 or less	Over 1	Over 2	Over 3	Over 4
E-4	\$ 50	\$ 60	\$ 125	\$ 160	
E-5	60	70	140	175	
E- 6	125	135	170	190	
E-7	135	145	215	235	
E-8	165	180	225	255	
E-9	175	195	235	265	

"Pay grade	Years of sea duty				
	Over 7	Over 8	Over 9	Over 10	Over 11
E-4	\$ 175	\$ 175	\$ 175	\$ 175	
E-5	220	220	220	220	
E-6	235	245	255	255	
E-7	265	270	275	280	
E-8	285	290	300	310	
E-9	310	310	310	310	

1985. Act Nov. 8, 1985 (effective 10/1/85, as provided by @ 634(b) of such Act), in subsec. (b), substituted the tables relating to pay for warrant officers and commissioned officers for ones which read:

"WARRANT OFFICERS

"Pay grade	Years of sea duty				
	1 or less	Over 1	Over 2	Over 3	Over 4
W-1	\$ 130	\$ 135	\$ 140	\$ 150	
W-2	150	150	150	150	
W-3	150	150	150	150	
W-4	150	150	150	150	

"Pay grade	Years of sea duty				
	Over 7	Over 8	Over 9	Over 10	Over 11
W-1	\$ 250	\$ 270	\$ 275	\$ 280	
W-2	265	270	275	280	
W-3	285	290	300	310	
W-4	310	310	310	310	

37 USCS @ 305A (1998)

"COMMISSIONED OFFICERS

"Pay grade	Years of sea duty				
	Over	Over	Over	Over	Over
	3	4	5	6	7
O-1<1>	\$ 150	\$ 160	\$ 185	\$ 190	
O-2<1>	150	160	185	190	
O-3	150	160	185	190	
O-4	185	190	200	205	
O-5	225	225	225	225	
O-6	225	230	230	240	

"Pay grade	Years of sea duty				
	Over	Over	Over	Over	Over
	8	9	10	11	12
O- 1<1>	\$ 205	\$ 215	\$ 225	\$ 225	
O-2<1>	205	215	225	225	
O-3	205	215	225	225	
O-4	215	220	225	225	
O-5	245	250	260	265	
O-6	265	280	290	300	

"<1> Commissioned officers with at least four years of active service as enlisted members or as noncommissioned warrant officers."

1987. Act April 21, 1987, in subsec. (d), in the introductory matter substituted "In this section," for "For the purposes of this section,".

Act Dec. 4, 1987 (effective and applicable as provided by @ 621(e) of such Act, which appears as a note to this section) substituted subsec. (b) for one which read:

"(b) The monthly rates for special pay under subsection (a) of this section are as follows:

"ENLISTED MEMBERS

"Pay grade	Years of sea duty				
	1 or	Over	Over	Over	Over
	less	1	2	3	4
E-4 ..	\$ 50	\$ 60	\$ 125	\$ 160	
E-5 ..	60	70	140	175	
E-6 ..	125	135	170	190	
E-7 ..	135	145	215	235	
E-8 ..	165	180	225	255	
E-9 ..	175	195	235	265	

"Pay grade	Years of sea duty				
	Over	Over	Over	Over	Over

37 USCS @ 305A (1998)

9 10 11 12 13

E-4	\$ 175	\$ 175	\$ 175	\$ 175	\$ 175
E-5	220	220	220	220	
E-6	255	265	265	280	
E-7	275	280	300	310	
E-8	300	310	310	320	
E-9	310	320	330	350	

"WARRANT OFFICERS

Years of sea duty

"Pay grade

1 or less	Over 1	Over 2	Over 3	Over 4
-----------	--------	--------	--------	--------

W-1 ..	\$ 130	\$ 135	\$ 140	\$ 150	\$ 170
W-2 ..	150	150	150	150	
W-3 ..	150	150	150	150	
W-4 ..	150	150	150	150	

Years of sea duty

"Pay grade

Over 9	Over 10	Over 11	Over 12	Over 14
--------	---------	---------	---------	---------

W-1	\$ 275	\$ 280	\$ 290	\$ 300	\$ 300
W-2	275	280	290	310	
W-3	300	310	310	330	
W-4	310	320	330	350	

"COMMISSIONED OFFICERS

Years of sea duty

"Pay grade

Over 3	Over 4	Over 5	Over 6	Over 7
--------	--------	--------	--------	--------

O-1	\$ 150	\$ 160	\$ 185	\$ 190	\$ 195
O-2	150	160	185	190	
O-3	150	160	185	190	
O-4	185	190	200	205	
O-5	225	225	225	225	
O-6	225	230	230	240	

Years of sea duty

"Pay grade

Over 10	Over 11	Over 12	Over 13	Over 14
---------	---------	---------	---------	---------

O-1	\$ 225	\$ 225	\$ 240	\$ 250	\$ 260
O-2	225	225	240	250	
O-3	225	225	240	260	
O-4	225	225	240	270	
O-5	260	265	265	285	
O-6	290	300	310	325	

Such Act further (effective as provided by @ 621(e)(2) of such Act, which appears as a note to this section), in subsec. (c), inserted "(other than an enlisted member in a pay grade above E-4 with more than five years of sea duty)".

Such Act further (effective and applicable as provided by @ 621(e) of such Act, which appears as a note to this section) substituted subsec. (d) for one which read:

"(d) In this section, the term 'sea duty' means duty performed by a member--

"(1) while permanently or temporarily assigned to a ship, ship-based staff, or ship-based aviation unit and while serving on a ship the primary mission of which is accomplished while underway or while serving as a member of the off crew of a two-crewed submarine; or

"(2) while permanently or temporarily assigned to a ship or ship-based staff and while serving on a ship the primary mission of which is normally accomplished while in port, but only during a period that the ship is away from its homeport for 30 consecutive days or more.

A ship is considered away from its homeport for purposes of clause (2) of the first sentence when it is at sea or in a port that is more than 50 miles from its homeport."

Act Dec. 30, 1987 (applicable as provided by @ 5(a)(4) of such Act, which appears as 10 USCS @ 2437 note), in the table relating to warrant officers, substituted "Over 14" for "Over 13".

1988. Act Sept. 29, 1988, in subsec. (d)(2), substituted "after December 31, 1988," for "on or after the effective date specified in section 621(e)(1) of the National Defense Authorization Act for Fiscal Year 1988".

1989. Act Nov. 29, 1989, in subsec. (b), in the heading of the table relating to officers in pay grades 0-1 through 0-6, inserted "COMMISSIONED".

1991. Act April 6, 1991, in subsec. (a), deleted "of this section" following "subsection (b)".

Act Dec. 5, 1991 (effective 2/1/92 as provided by @ 1132 of such Act, which appears as 10 USCS @ 521 note), in subsec. (b), inserted the table entries relating to pay grade W-5.

1996. Act Feb. 10, 1996, in subsec. (d)(1), substituted subpara. (A) for one which read: "while permanently or temporarily assigned to a ship, ship-based staff, or ship-based aviation unit and while serving on a ship the primary mission of which is accomplished while under way or while serving as a member of the off-crew of a two-crewed submarine; or".

1997. Act Nov. 18, 1997, in subsec. (d), in para. (1), in subpara. (A), deleted ", ship-based staff, or ship-based aviation unit" following "assigned to a ship" and, in subpara. (B), deleted "or ship-based staff" following "assigned to a ship", redesignated paras. (2) and (3) as paras. (3) and (4), respectively, and added a new para. (2).

Other provisions:

Determination of amount of sea credit; periods prior to October 1, 1978. Act Oct. 20, 1978, P.L. 95-485, Title VIII, @ 804(a)(3), 92 Stat. 1620, provided: "In determining the amount of sea duty to be credited to an enlisted member of a uniformed service for purposes of section 305a of title 37, United States Code (as added by paragraph (1)), the Secretary concerned shall credit such member with all periods of service by such member before October 1, 1978, during which such member served in a sea duty status."

Application of amendments made by @ 3 of Act Sept. 8, 1980. Act Sept. 8, 1980, P.L. 96-343, @ 3(c), 94 Stat. 1124, provided: "The amendments made by

this section [amending this section and repealing note this section] shall be effective with respect to special pay payable under section 305a of title 37, United States Code, for months after August 1980."

Effective date of amendment made by @ 4 of Act Dec. 23, 1980. Act Dec. 23, 1980, P.L. 96-579, @ 4(b), 94 Stat. 3366, provided: "The amendment made by this section [amending this section] shall be effective with respect to special pay payable under section 305a of title 37, United States Code, for months after the month in which this section is enacted."

Application and construction of Oct. 12, 1982 amendment. For provisions as to the application and construction of the Oct. 12, 1982 amendment of this section (see the Amendments note to this section), see @ 5 of such Act, which appears as 10 USCS @ 101 note.

Effective date of Oct. 19, 1984 amendments. Act Oct. 19, 1984, P.L. 98-525, Title VI, Part C, @ 623(c), 98 Stat. 2542, provides: "The amendments made by this section [for full classification, consult USCS Tables volumes] shall take effect on October 1, 1984."

Save pay. Act Dec. 4, 1987, P.L. 100-180, Div A, Title VI, Part C, @ 621(d), 101 Stat. 1100, effective as provided by @ 612(e) of such Act, which appears as a note to this section, provides: "A member of the uniformed services who at any time during the three-month period ending on the day before the effective date applicable to that member under subsection (e) [note to this section] for the new rates of career sea pay is entitled to career sea pay at a rate that is higher than the rate established under such new rates for the member's pay grade and years of sea duty shall be paid such special pay, when entitled to receive it, at such higher rate until the member is permanently reassigned to duty for which the member is not entitled to such special pay. In the case of a member covered by the preceding sentence who is reduced in grade under the Uniform Code of Military Justice (chapter 47 of title 10, United States Code), the old rate of career sea pay applicable to such member under the preceding sentence which may be paid in lieu of the rate applicable to the member under the new rates of career sea pay shall be the rate under the old rates of career sea pay for the member's pay grade as so reduced and the member's years of sea duty."

Effective date and applicability of 1987 amendments. Act Dec. 4, 1987, P.L. 100-180, Div A, Title VI, Part C, @ 621(e), 101 Stat. 1100, provides:

"(1) Except as provided under paragraph (2), the amendments made by this section [amending this section] shall take effect on the first day of the first month beginning after the date of the enactment of this Act and shall apply with respect to duty performed on or after that date.

"(2) The new rates of career sea pay that are applicable to enlisted members in pay grades above pay grade E-4 who have five or more years of sea duty and the amendment made by subsection (b) [amending subsec. (c) of this section] shall take effect on the first day of the fourth month beginning after the effective date specified under paragraph (1). In the case of such members, the old rates of career sea pay shall remain in effect until the new rates take effect under the preceding sentence."

Act Dec. 4, 1987; definitions. Act Dec. 4, 1987, P.L. 100-180, Div A, Title VI, Part C, @ 621(f), 101 Stat. 1100, effective as provided by @ 621(e) of such Act, which appears as a note to this section, provides:

"For purposes of subsections (d) and (e) [notes to this section]:

"(1) The term 'career sea pay' means special pay under section 305a of title 37, United States Code.

"(2) The term 'old rates', with respect to career sea pay, means the rates of such pay in effect on the date of the enactment of this Act.

"(3) The term 'new rates', with respect to career sea pay, means the rates of such pay provided by the amendment made by subsection (a) [amending subsec.

(b) of this section].".

NOTES:

CROSS REFERENCES

This section is referred to in 37 USCS @@ 305, 907.

RESEARCH GUIDE

Am Jur:

53A Am Jur 2d, Military and Civil Defense @ 171.

102ND SECTION of Level 1 printed in FULL format.

UNITED STATES CODE SERVICE

Copyright 1998, LEXIS Law Publishing, a division of Reed Elsevier Inc.

All rights reserved.

*** THIS SECTION IS CURRENT THROUGH 105-165, APPROVED 3/20/98 ***

*** WITH A GAP OF 160 AND 164 ***

TITLE 37. PAY AND ALLOWANCES OF THE UNIFORMED SERVICES
CHAPTER 5. SPECIAL AND INCENTIVE PAYS

37 USCS @ 308 (1998)

@ 308. Special pay: reenlistment bonus

(a)

(1) A member of a uniformed service who--

(A) has completed at least twenty-one months of continuous active duty (other than for training) but not more than fourteen years of active duty;

(B) is qualified in a military skill designated as critical by the Secretary of Defense, or by the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy;

(C) is not receiving special pay under section 312a of this title; and

(D) reenlists or voluntarily extends his enlistment in a regular component of the service concerned for a period of at least three years;

may be paid a bonus as provided in paragraph (2).

(2) The bonus to be paid under paragraph (1) may not exceed the lesser of the following amounts:

(A) The amount equal to the product of--

(i) ten times the monthly rate of basic pay to which the member was entitled at the time of the discharge or release of the member; and

(ii) the number of years (or the monthly fractions thereof) of the term of reenlistment or extension of enlistment, not to exceed six.

(B) \$ 45,000.

(3) Any portion of a term of reenlistment or extension of enlistment of a member that, when added to the total years of service of the member at the time of discharge or release, exceeds 16 years may not be used in computing a bonus under paragraph (2)(A).

(4) Notwithstanding paragraph (1)(B), a member who agrees to train and reenlist for service in a military skill which, at the time of that agreement, is designated as critical, may be paid the bonus approved for that skill, at the rate in effect at the time of agreement, upon completion of training and qualification in that skill, if otherwise qualified under this subsection and even if that skill is no longer designated as critical at the time the member becomes eligible for payment of the bonus.

(b) (1) Bonus payments authorized under this section may be paid in either a lump sum or in installments. If the bonus is paid in installments, the initial payment shall be not less than 50 percent of the total bonus amount.

(2) Of the bonuses paid under this section to members of a uniformed service during a fiscal year, not more than 10 percent may exceed \$ 20,000.

(c) For the purpose of computing the reenlistment bonus in the case of an officer with prior enlisted service who may be entitled to a bonus under subsection (a), the monthly basic pay of the grade in which he is enlisted, computed in accordance with his years of service computed under section 205 of

this title, shall be used instead of the monthly basic pay to which he was entitled at the time of his release from active duty as an officer.

(d) (1) A member who voluntarily, or because of his misconduct, does not complete the term of enlistment for which a bonus was paid to him under this section or a member who is not technically qualified in the skill for which a bonus was paid to him under this section (other than a member who is not qualified because of injury, illness, or other impairment not the result of his own misconduct) shall refund that percentage of the bonus that the unexpired part of his additional obligated service is of the total reenlistment or extension period for which the bonus was paid.

(2) If a refund is not required under paragraph (1) in the case of a member who fails to complete a term of enlistment, the Secretary of Defense with respect to the armed forces under the Secretary's jurisdiction, and the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy, may decline to make any payment of a bonus installment under this section that is due to be paid to the member after the date on which the member fails to complete the term of enlistment for which the bonus is being paid. The Secretary of Defense and the Secretary of Transportation may prescribe the circumstances under which bonus installments may be terminated under this paragraph.

(e) For the purposes of determining the eligibility of a member for a bonus under this section and of computing the amount of that bonus--

(1) any period of enlistment (including any extension of an enlistment) (A) that is incurred by the member for the purpose of continuing to qualify for continuous submarine duty incentive pay under section 301c of this title, and (B) for which no bonus is otherwise payable; or

(2) any unserved period of two years or less of an extension of an enlistment for which no bonus has been paid or for which no bonus is otherwise payable under this section,

may, under regulations prescribed by the Secretary concerned, be considered as part of an immediately subsequent term of reenlistment (or as part of an immediately subsequent voluntary extension of an enlistment).

(f) This section shall be administered under regulations prescribed by the Secretary of Defense for the armed forces under his jurisdiction, and by the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy.

(g) No bonus shall be paid under this section with respect to any reenlistment, or voluntary extension of an active-duty enlistment, in the armed forces entered into after September 30, 1999.

HISTORY: (Sept. 7, 1962, P.L. 87-649, @ 1, 76 Stat. 467; Aug. 21, 1965, P.L. 89-132, @ 3, 79 Stat. 547; Oct. 22, 1968, P.L. 90-623, @ 3(1), 82 Stat. 1314; May 10, 1974, P.L. 93-277, @ 2(1), 88 Stat. 119; June 29, 1977, P.L. 95-57, @ 1, 91 Stat. 253; Oct. 20, 1978, P.L. 95-485, Title VIII, @ 802(a)(1), (b), 92 Stat. 1619; Sept. 8, 1980, P.L. 96-342, Title VIII, @ 804(a), 94 Stat. 1092; Dec. 23, 1980, P.L. 96-579, @ 3(f), 94 Stat. 3364; Oct. 14, 1981, P.L. 97-60, Title I, Part B, @ 117(a), 95 Stat. 996; Oct. 2, 1982, P.L. 97-276, @ 131, 96 Stat. 1197; Dec. 21, 1982, P.L. 97-377, Title I, @ 101(c), 96 Stat. 1865; March 30, 1983, P.L. 98-14, @ 1, 97 Stat. 55; Oct. 19, 1984, P.L. 98-525, Title VI, Part C, 621(a), (b), 98 Stat. 2540; Nov. 8, 1985, P.L. 99-145, Title VI, Part C,

Subpart 1, @ 631(a), 99 Stat. 643; Dec. 4, 1987, P.L. 100-180, Div A, Title VI, Part C, @@ 625(a), 626(a), 101 Stat. 1104; Nov. 29, 1989, P.L. 101-189, Div A, Title VI, Part B, @ 611(a), 103 Stat. 1445; Nov. 5, 1990, P.L. 101-510, Div A, Title VI, Part B, @ 615(a), 104 Stat. 1578; April 6, 1991, P.L. 102-25, Title VII, @ 702(b)(1), (c), 105 Stat. 117; Oct. 23, 1992, P.L. 102-484, Div A, Title VI, Subtitle B, @ 612(a), 106 Stat. 2421; Nov. 30, 1993, P.L. 103-160, Div A, Title VI, Subtitle B, @ 613(b), 107 Stat. 1681; Oct. 5, 1994, P.L. 103-337, Div A, Title VI, Subtitle B, @ 613(b), 108 Stat. 2783; Feb. 10, 1996, P.L. 104-106, Div A, Title VI, Subtitle B, @ 613(b), 110 Stat. 359.)

(As amended Sept. 23, 1996, P.L. 104-201, Div A, Title VI, Subtitle B, @ 613(b), 110 Stat. 2544; Nov. 18, 1997, P.L. 105-85, Div A, Title VI, Subtitle B, @ 613(b), 111 Stat. 1786.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
308(a)	37:239(a).	Oct. 12, 1949, ch 681,
	37:239(e).	Sec. 208, added July 16,
308(b)	37:239(b).	1954, ch 535, Sec. 2, 68
308(c)	37:239(c).	Stat. 488; July 25,
308(d)	37:239(d).	1961, P.L. 87-103,
308(e)	37:329(f).	Sec. 1 (as applicable to
308(f)	37:239(g).	Sec. 208), 75 Stat. 219.

In subsection (a), the words "reenlists . . . after . . . compulsory or voluntary active duty or who voluntarily extends his enlistment for at least two years" are substituted for the words "reenlists . . . after . . . active duty" and former 37 USC @ 239(e). The words "(other than for training)" are inserted, since the source statute has been consistently interpreted to exclude that kind of duty. The words "or release" are inserted in column 1 of the table and in footnotes 2, 4, and 5 to conform to the introductory language preceding the tables.

In subsection (b), the words "a total of" are omitted as surplusage.

Amendments:

1965. Act Aug. 21, 1965 (effective 9/1/65, as provided by @ 10 of such Act), added subsec. (g).

1968. Act Oct. 22, 1968, in subsecs. (e) and (g), substituted "Transportation" for "the Treasury".

1974. Act May 10, 1974 (effective as provided by @ 4 of such Act, which appears as a note to this section) substituted this section for one which read:

"(a) Subject to subsections (b) and (c) of this section, a member of a uniformed service who reenlists in a regular component of the service concerned within three months after the date of his discharge or release from compulsory or voluntary active duty (other than for training), or who voluntarily extends his enlistment for at least two years, and who is not covered by section 207 of the Career Compensation Act of 1949, as amended (70 Stat. 338), is entitled to a bonus computed as follows:

"Reenlistment involved n1	Column 1 Take--	Column 2 Multiply by--
First	Monthly basic pay to which member was entitled at the time of discharge or release.<2>	Number of years specified in reenlistment contract, or six, if none specified.<3>
Second	Two-thirds of the monthly basic pay to which the member was entitled at the time of discharge or release.<4>	Do.<3>
Third	One-third of the monthly basic pay to which the member was entitled at the time of discharge or release.<5>	Do.<3>
Fourth (and subsequent) ...	One-sixth of the monthly basic pay to which the member was entitled at the time of discharge or release.<5>	Do.<3>

<1> Any reenlistment when a bonus was not authorized is not counted.

<2> Two-thirds of the monthly basic pay in the case of a member in pay grade E-1 at the time of discharge or release.

<3> On the sixth anniversary of an indefinite reenlistment, and on each anniversary thereafter, the member is entitled to a bonus equal to one-third of the monthly basic pay to which he is entitled on that anniversary date.

<4> A bonus may not be paid to a member in pay grade E-1 or E-2 at the time of discharge or release.

<5> A bonus may not be paid to a member in pay grade E-1, E-2, or E-3 at the time of discharge or release.

"(b) A member who reenlists--

"(1) during his prescribed period of basic recruit training; or

"(2) after completing 20 years of active Federal service;

is not entitled to a bonus. A member who reenlists before completing 20 years of active Federal service, but who will, under that enlistment, complete more than 20 years of that service, is entitled to a bonus computed by using as a multiplier only the number of years that, when added to his previous service, totals 20 years.

"(c) The total amount that may be paid to a member under this section, or under this section and any other law authorizing a reenlistment bonus, may not be more than \$ 2,000.

"(d) An officer of a uniformed service who reenlists in that service within three months after his release from active duty as an officer is entitled to a bonus computed under subsection (a) of this section, if he served as an enlisted member in that service immediately before serving as an officer. For the purposes of this subsection, the monthly basic pay, or appropriate fraction if the member received a bonus for a prior enlistment, of the grade in which he is enlisted, computed in accordance with his years of service computed under section 205 of this title, shall be used in column 1 of the table in subsection (a) of this section instead of the monthly basic pay to which he was entitled

at the time of his release from active duty as an officer.

"(e) Under regulations approved by the Secretary of Defense, or by the Secretary of Transportation with respect to the Coast Guard, a member who voluntarily, or because of his misconduct, does not complete the term of enlistment for which a bonus was paid to him under this section shall refund that percentage of the bonus that the unexpired part of his enlistment is of the total enlistment period for which the bonus was paid.

"(f) The Secretary concerned may prescribe regulations for the administration of this section in his department.

"(g) Under regulations to be prescribed by the Secretary of Defense, or the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy, a member who is designated as having a critical military skill and who is entitled to a bonus computed under subsection (a) of this section upon his first reenlistment may be paid an additional amount not more than four times the amount of that bonus. The additional amount shall be paid in equal yearly installments in each year of the reenlistment period. However, in meritorious cases the additional amount may be paid in fewer installments if the Secretary concerned determines it to be in the best interest of the members. An amount paid under this subsection does not count against the limitation prescribed by subsection (c) of this section on the total amount that may be paid under this section."

1977. Act June 29, 1977, substituted subsec. (d) for one which read: "(d) A member who voluntarily, or because of his misconduct, does not complete the term of enlistment for which a bonus was paid to him under this section shall refund that percentage of the bonus that the unexpired part of his enlistment is of the total enlistment period for which the bonus was paid."; in subsec. (f), substituted "September 30, 1978" for "June 30, 1977". For effective date of this amendment, see Other provisions note to this section.

1978. Act Oct. 20, 1978, @ 802(a)(1), in subsec. (a), inserted "(1)" after "(a)", redesignated paras. (1), (2), (3), and (4) as subparas. (A), (B), (C), and (D), respectively, in para. (1)(B), as so redesignated, substituted "qualified in a military skill designated as critical" for "designated as having a critical military skill", added para. (2); for effective date of this section, as amended, see Other provisions note to this section.

Act Oct. 20, 1978, @ 802(b), in subsec. (f), substituted "September 30, 1980" for "September 30, 1978".

1980. Act Sept. 8, 1980, in subsec. (a)(1)(A), substituted "fourteen years" for "ten years"; in subsec. (a)(1), concluding matter, substituted "\$ 20,000" for "\$ 15,000" and substituted "sixteen years" for "twelve years"; in subsec. (f), substituted "September 30, 1982" for "September 30, 1980"; for application of the section, as amended, see Other provisions note to this section.

Act Dec. 23, 1980, redesignated subsecs. (e) and (f) as subsecs. (f) and (g), respectively; and added new subsec. (e). Section 3(g) of Act Dec. 23, 1980, provided that these amendments are effective on the first day of the first month following Dec. 1980.

1981. Act Oct. 14, 1981, substituted subsec. (e) for one which read:

"(e) Any period of enlistment (including any extension of an enlistment)--

"(1) which is incurred by a member for the purpose of continuing to qualify for continuous submarine duty incentive pay under section 301c of this title; and

"(2) for which no bonus is otherwise payable under this section,

may, under regulations prescribed by the Secretary of the Navy, be considered as part of an immediately subsequent term of reenlistment, or as part of an immediately subsequent voluntary extension of an enlistment, for the purpose of determining the eligibility of the member for a bonus under this section and

for the purpose of computing the amount of such bonus."

1982. Act Oct. 2, 1982, in subsec. (g), substituted "December 17, 1982" for "September 30, 1982".

Act Dec. 21, 1982, in subsec. (g), substitute "March 31, 1983" for "December 17, 1982".

1983. Act March 30, 1983, in subsec. (g), substituted "September 30, 1984" for "March 31, 1983".

1984. Act Oct. 19, 1984, in subsec. (a)(1), in the concluding matter, substituted "\$ 30,000" for "\$ 20,000"; in subsec. (b), designated the existing provisions as para. (1), and added para. (2); and in para. (g), substituted "1987" for "1984".

1985. Act Nov. 8, 1985, in subsec. (b), substituted para. (1) for one which read: "Bonus payments authorized under this section may be paid in either a lump sum or in installments."

1987. Act Dec. 4, 1987, @ 625(a) (applicable as provided by @ 625(b) of such Act, which appears as a note to this section), in subsec. (b), substituted para. (1) for one which read: "Not less than 75 percent of the amount of a bonus under this section shall be paid in a lump sum at the beginning of the period for which the bonus is paid, with any remaining amount paid in equal annual installments."

Such Act further, by @ 626(a), in subsec. (g), substituted "September 30, 1992" for "September 30, 1987".

1989. Act Nov. 29, 1989 (applicable as provided by @ 611(b) of such Act, which appears as a note to this section), in subsec. (a), in para. (1), in the concluding matter, substituted "paid a bonus as provided in paragraph (2)." for "paid a bonus, not to exceed six months of the basic pay to which he was entitled at the time of his discharge or release, multiplied by the number of years, or the monthly fractions thereof, of additional obligated service, not to exceed six years, or \$ 30,000 whichever is the lesser amount. Obligated service in excess of sixteen years will not be used for bonus computation.", redesignated former para. (2) as para. (4), added new paras. (2) and (3), and, in para. (4) as redesignated, deleted "of this subsection" following "(1)(B)".

1990. Act Nov. 5, 1990 (applicable as provided by @ 615(b) of such Act, which appears as a note to this section), in subsec. (d), designated the existing provisions as para. (1), and added para. (2).

1991. Act April 6, 1991, in subsec. (c), deleted "of this section" following "subsection (a)".

1992. Act Oct. 23, 1992, in subsec. (g), substituted "September 30, 1993" for "September 30, 1992".

1993. Act Nov. 30, 1993 (effective 9/30/93 and applicable as provided by 613(h)(1) of such Act, which appears as a note to this section), in subsec. (g), substituted "September 30, 1995" for "September 30, 1993".

1994. Act Oct. 5, 1994, in subsec. (g), substituted "September 30, 1996" for "September 30, 1995".

1996. Act Feb. 10, 1996, in subsec. (g), substituted "September 30, 1997" for "September 30, 1996".

Act Sept. 23, 1996, in subsec. (g), substituted "September 30, 1998" for "September 30, 1997".

1997. Act Nov. 18, 1997, in subsec. (g), substituted "September 30, 1999" for "September 30, 1998".

Other provisions:

Legislative construction. Act Oct. 22, 1968, P.L. 90-623, @ 6(a), 82 Stat. 1315, located at 5 USCS @ 5334 note, provided that the amendments made to this section by Act Oct. 22, 1968 restate, without substantive change, the laws

replaced by the amendments on Oct. 22, 1968 and that laws effective after June 30, 1968 that are inconsistent with this Act supersede it to the extent of the inconsistency.

Optional choice of reenlistment bonus. Act May 10, 1974, P.L. 93-277, @ 3, 88 Stat. 121, provided: "Notwithstanding section 308 of title 37, United States Code, as amended by this Act, a member of a uniformed service on active duty on the effective date of this Act [effective June 1, 1974], who would have been eligible, at the end of his current or subsequent enlistment, for the reenlistment bonus prescribed in section 308(a) or (d) of that title, as it existed on the day before the effective date of this Act [effective June 1, 1974], shall continue to be eligible for the reenlistment bonus under that section as it existed on the day before the effective date of this Act [effective June 1, 1974]. If a member is also eligible for the reenlistment bonus prescribed in that section as amended by this Act, he may elect to receive either one of those reenlistment bonuses. However, a member's eligibility under section 308(a) or (d) of that title, as it existed on the day before the effective date of this Act [effective June 1, 1974], terminates when he has received a total of \$ 2,000 in reenlistment bonus payments, received under either section 308(a) or (d) of that title as it existed on the day before the effective date of this Act [effective June 1, 1974], or under section 308 of that title, as amended by this Act, or from a combination of both."

Effective date of May 10, 1974 amendments. Act May 10, 1974, P.L. 93-277, @ 4, 88 Stat. 121, provided: "The amendments made by this Act [amending this section and 37 USCS @ 308a] become effective on the first day of the month following the date of enactment."

Effective date of June 29, 1977 amendments. Act June 29, 1977, P.L. 95-57, @ 3, 91 Stat. 253, provided: "The amendments made by this Act [amending this section and 37 USCS @ 308a] shall become effective on July 1, 1977."

Effective date of amendments made by @ 802(a)(1) of Act Oct. 20, 1978. Act Oct. 20, 1978, P.L. 95-485, Title VIII, @ 802(a)(2), 92 Stat. 1619, provided: "The amendments made by paragraph (1) [amending this section] shall take effect on October 1, 1978."

Applicability of amendments made by @ 804 of Act Sept. 8, 1980. Act Sept. 8, 1980, P.L. 96-342, Title VIII, @ 804(c), 94 Stat. 1092, provided: "The amendments made by this section [amending this section and 37 USCS @ 308a] shall only apply to enlistments, reenlistments, and extensions of enlistments made after September 30, 1980."

Applicability of Oct. 14, 1981 amendments. Act Oct. 14, 1981, P.L. 97-60, Title I, Part B, @ 117(d), 95 Stat. 997, provided: "The amendments made by this section [amending this section and 37 USCS @ 308a and adding 37 USCS @ 308f] shall apply to enlistments and reenlistments after the date of the enactment of this Act."

Applicability of Nov. 8, 1985 amendment. Nov. 8, 1985, P.L. 99-145, Title VI, Part C, Subpart 1, @ 631(b), 99 Stat. 643, provides: "The amendment made by subsection (a) [amending subsec. (b)(1) of this section] shall apply with respect to bonuses paid for reenlistments or extensions of enlistment effective after September 30, 1986."

Cost reductions for fiscal year 1987. Act Nov. 14, 1986, P.L. 99-661, Div A, Title VI, Part F, @ 663(a), 100 Stat. 3894, provides: "During fiscal year 1987, the Secretary concerned may not pay more than 50 percent of an amount paid to any person under section 308 of title 37, United States Code, in a lump sum."

Applicability of Dec. 4, 1987 amendment. Act Dec. 4, 1987, P.L. 100-180, Div A, Title VI, Part C, @ 625(b), 101 Stat. 1104, provides: "The amendment made by subsection (a) [amending subsec. (b)(1) of this section] shall apply with respect to bonuses paid for reenlistment or extension of enlistment agreements

entered into after September 30, 1987."

Coverage of period of lapsed authority. Act Dec. 4, 1987, P.L. 100-180, Div A, Title VI, Part C, @ 626(c), 101 Stat. 1104, provides:

"(1) The Secretary concerned, in the case of any person who during the period beginning on October 1, 1987, and ending on the date of the enactment of this Act would have qualified for an agreement with the Secretary described in paragraph (2) but for the fact that the authority for the payment of bonuses provided by that section had lapsed, shall pay to that person a bonus under the terms of the appropriate section specified in that paragraph (and related regulations) as in effect on September 30, 1987.

"(2) An agreement referred to in paragraph (1) is an agreement with the Secretary for the payment of a bonus under section 308, 308a, 308b, 308c, 308e, 308f, 308g, 308h, or 308i of title 37, United States Code."

Applicability of amendments made by @ 611 of Act Nov. 29, 1989. Act Nov. 29, 1989, P.L. 101-189, Div A, Title VI, Part B, @ 611(b), 103 Stat. 1445, provides: "The amendments made by this section [amending subsec. (a) of this section] shall apply with respect to reenlistment and extension of enlistment agreements entered into under section 308(a) of title 37, United States Code, after September 30, 1989."

Applicability of 1990 amendments to subsec. (d). Act Nov. 5, 1990, P.L. 101-510, Div A, Title VI, Part B, @ 615(b) 104 Stat. 1578, provides: "The amendment made by subsection (a) [amending subsec. (d) of this section] shall apply with respect to any bonus paid under section 308 of title 37, United States Code, to a person in connection with the reenlistment or extension of the term of enlistment of the person in the Armed Forces on or after the date of the enactment of this Act."

Applicability of 1992 amendments to agreements for a bonus or special pay. For applicability of amendments made by Act Oct. 23, 1992, P.L. 102-484, to agreements for a bonus or special pay under this section which are executed during the 90-day period beginning on Oct. 23, 1992, see @ 612(j)(2) of such Act, which appears as 37 USCS @ 301b note.

Effective date and application of certain 1993 amendments. Act Nov. 30, 1993, P.L. 103-160, Div A, Title VI, Subtitle B, @ 613(h)(1), 107 Stat. 1681, provides: "The amendments made by subsections (b) and (c) [amending subsec. (g) of this section and 37 USCS @ 308a(c)] shall take effect as of September 30, 1993, and shall apply with respect to an enlistment, reenlistment, or extension of an enlistment described in section 308 or 308a of title 37, United States Code, occurring on or after that date."

NOTES:

CROSS REFERENCES

This section is referred to in 37 USCS @ 312a.

RESEARCH GUIDE

Am Jur:

53A Am Jur 2d, Military and Civil Defense @ 170.

INTERPRETIVE NOTES AND DECISIONS

1. Generally
2. Purpose
3. Entitlement to bonus, generally
4. --Time of award determination
5. --Attorneys fees to recover bonus
6. Refund of bonus

1. Generally

Soldier's entitlement to pay is dependent upon statutory right, and, accordingly, rights of Navy enlisted men seeking payments of Variable Reenlistment Bonuses must be determined by reference to statutes and regulations governing Variable Re-enlistment Bonus program, rather than to ordinary contract principles; nothing in language of 1974 Act, which amended 37 USCS @ 308 by repealing Variable Re-enlistment Bonus program and authorizing different program of bonuses, or in Act's legislative history, expresses intention that members of Armed Forces who had extended their enlistments when the Variable Re-enlistment Bonus program was in effect, but who did not begin to serve re-enlistment extensions until after such repeal, should be divested of their rights to bonuses to which they were entitled under Variable Re-enlistment Bonus program; fact that provisions repealing Regular Re-enlistment Bonus program contained savings provisions as to service members on active duty as of effective date of Act, but did not have such savings provisions as to Variable Re-enlistment Bonus program, does not mean that Congress intended to abolish them entirely, but only operated to foreclose Variable Re-enlistment Bonus program to those who re-enlisted after effective date of 1974 Act; legislative history of 1974 Act does not indicate Congress considered possible unfairness that elimination of Variable Re-enlistment Bonus could work on service members who had not started to serve re-enlistment term until after 1974 Act became effective. *United States v Larionoff* (1977) 431 US 864, 53 L Ed 2d 48, 97 S Ct 2150.

United States Supreme Court's opinion in *United States v Larionoff*, 431 US 864 (1977) concerning military re-enlistment bonuses does not alter fundamental rules of law that (1) service member's entitlement to military pay is governed by statute rather than ordinary contract principles, and (2) in absence of specific statutory authority, government is not liable for negligent or erroneous acts of its agents; hence amount of any re-enlistment bonus payable to service member depends on applicable statutes and regulations, and in no event can bonus amount be established through private negotiation or contract between member and his recruiter. (1981) *Op Comp Gen* p 257.

2. Purpose

Purpose of Congress in enacting Variable Re-enlistment Bonus program under predecessor to 37 USCS @ 308(a) was to induce selected service members to extend their period of service beyond original enlistment, which purpose could be accomplished only if service member could count on receiving amount of bonus agreed to at time he made his decision concerning re-enlistment. *United States v Larionoff* (1977) 431 US 864, 53 L Ed 2d 48, 97 S Ct 2150.

3. Entitlement to bonus, generally

Plaintiffs, Navy enlisted personnel who agreed to enter periods of extended service in order to participate in training program culminating in Communications Technician-Maintenance (CTM) service rating, which was "critical military skill" qualifying for Variable Re-enlistment Bonus (VRB) equal to four times enlisted member's Regular Enlistment Bonus, were entitled to VRB where, though Navy terminated VRB award for CTM rating before plaintiffs actually entered their respective periods of re-enlistment, plaintiffs had executed agreements to re-enlist prior to announcement of termination and were entitled to VRB award level then in effect. *Larionoff v United States* (1976) 175 US App DC 32, 533 F2d 1167, 21 FR Serv 2d 902, affd (1977) 431 US 864, 53 L Ed 2d 48, 97 S Ct 2150.

Former serviceman who was to receive bonus for his reenlistment, but who was discharged as conscientious objector following such reenlistment, was not

entitled to bonus money not earned by completion of term of enlistment since his discharge was "voluntary" within meaning of 37 USCS @ 308. *Illiff v Schlessinger* (1976, CA10 NM) 539 F2d 1275.

Under predecessor to 37 USCS @ 308, providing for variable re-enlistment bonus to personnel re-enlisting in critical skills areas, serviceman with critical skills, who re-enlists to enroll in college program outside of critical skill, is not entitled to variable re-enlistment bonus. *Deschler v United States* (1974) 203 Ct Cl 477.

Plaintiff was not entitled to reenlistment bonus where he extended his reenlistment for only nine months, which is less than three years required to qualify for bonus, nor was he entitled to bonus based on his subsequent four-year reenlistment since it did not occur until after his career field had been dropped from critical skills list. *Ford v United States* (1995) 33 Fed Cl 560, 1995 US Claims LEXIS 114.

4. --Time of award determination

Department of Defense regulations governing Variable Re-enlistment Bonuses under predecessor to 37 USCS @ 308(a) were invalid to extent that bonus was determined by reference to award level in effect at time service member began to serve extension, rather than at time he agreed to extend. *United States v Larionoff* (1977) 431 US 864, 53 L Ed 2d 48, 97 S Ct 2150.

Selective Re-enlistment Bonus payments under 37 USCS @ 308 must be based on award level multiplier in effect on date extension agreement is executed, rather than on date extension agreement becomes operative. (1979) 58 Op Comp Gen p. 282.

5. --Attorneys fees to recover bonus

Requested award of attorney fees of 5 percent of common fund in excess of \$ 27,000,000 is awarded in successful prosecution of class actions to obtain payment of military Variable Reenlistment Bonuses, where alternative lodestar approach advanced by government, when calculated with use of multipliers, would still exceed 5 percent award, because 10 percent award of fund would have been reasonable except for voluntary limits imposed by counsel in notice to class members in view of extraordinary efficiency in which case was advanced, development of expertise for single case and 100 percent recovery, and also because percentage awards encourage class counsel to push fund to limits and lesser award would discourage bar from assuming risk and responsibility in similar cases. *Edmonds v United States* (1987, DC SC) 658 F Supp 1126.

6. Refund of bonus

Servicemen receiving bonuses are not denied due process by Navy's accounting procedures permitting retention of bonus money not earned by completion of re-enlistment term. *Illiff v Schlessinger* (1976, CA10 NM) 539 F2d 1275.

Plaintiff, who had previously received bonus upon re-enlistment in Air Force, and who was induced to reenlist in Navy by promises of first reenlistment bonus, cannot invoke doctrine of estoppel against government as no official in Navy has authority to nullify or contradict mandate of 37 USCS @ 308. *Parker v United States* (1972) 198 Ct Cl 661, 461 F2d 806.

Members of United States Air Force who have received bonuses become liable to refund pro rata amount of bonuses if they do not complete term of service for which they were paid and collection is required of pay and allowances received for advance leave which becomes excess leave upon discharge; thus, although it is possible to estimate in advance, based on projected early discharge date, amounts which member will owe upon discharge, members are not actually in debt for unearned bonuses or advance leave until date of discharge and there is no

37 USCS @ 308 (1998)

authority to begin collection for those amounts from member's pay prior to discharge without their consent. (1980) 60 Op Comp Gen p 51.

37 USCS @ 308A (1998) printed in FULL format.

UNITED STATES CODE SERVICE

Copyright 1998, LEXIS Law Publishing, a division of Reed Elsevier Inc.

All rights reserved.

*** THIS SECTION IS CURRENT THROUGH 105-165, APPROVED 3/20/98 ***

*** WITH A GAP OF 160 AND 164 ***

TITLE 37. PAY AND ALLOWANCES OF THE UNIFORMED SERVICES
CHAPTER 5. SPECIAL AND INCENTIVE PAYS

37 USCS @ 308a (1998)

@ 308a. Special pay: enlistment bonus

(a) Notwithstanding section 514(a) of title 10 or any other law, under regulations prescribed by the Secretary of Defense, or by the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy, a person who enlists in an armed force for a period of at least four years in a skill designated as critical, or who extends his initial period of active duty in that armed force to a total of at least four years in a skill designated as critical, may be paid a bonus in an amount prescribed by the appropriate Secretary, but not more than \$ 12,000. The bonus shall be paid in periodic installments, as determined by the appropriate Secretary, except that the first installment may not exceed \$ 7,000 and the remainder shall be paid in equal periodic installments which may not be paid less frequently than once every 3 months.

(b) Under regulations prescribed by the Secretary of Defense, or by the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy, a person who voluntarily, or because of his misconduct, does not complete the term of enlistment for which a bonus was paid to him under this section or a member who is not technically qualified in the skill for which a bonus was paid to him under this section (other than a person who is not qualified because of injury, illness, or other impairment not the result of his own misconduct) shall refund that percentage of the bonus that the unexpired part of his enlistment is of the total enlistment period for which the bonus was paid.

(c) No bonus shall be paid under this section with respect to any enlistment or extension of an initial period of active duty in the armed forces made after September 30, 1999.

HISTORY: (Added Sept. 28, 1971, P.L. 92-129, Title II, @ 203(a), 85 Stat. 358; July 9, 1973, P.L. 93-64, Title II, @ 204, 87 Stat. 149; May 10, 1974, P.L. 93-277, @ 2(2), 88 Stat. 120; June 29, 1977, P.L. 95-57, @ 2, 91 Stat. 253; Oct. 20, 1978, P.L. 95-485, Title VIII, @ 802(b), 92 Stat. 1619; Sept. 8, 1980, P.L. 96-342, Title VIII, @ 804(b), 94 Stat. 1092; Oct. 14, 1981, P.L. 97-60, Title I, Part B, @ 117(b), 95 Stat. 996; Oct. 2, 1982, P.L. 97-276, @ 131, 96 Stat. 1197; Dec. 21, 1982, P.L. 97-377, Title I, @ 101(c), 96 Stat. 1865; March 30, 1983, P.L. 98-14, @ 1, 97 Stat. 55; Oct. 19, 1984, P.L. 98-525, Title VI, Part C, @ 621(a), 98 Stat. 2540; Dec. 4, 1987, P.L. 100-180, Div A, Title VI, Part C, @ 626(a), 101 Stat. 1104; Nov. 29, 1989, P.L. 101-189, Div A, Title VI, Part B, @ 612(a), 103 Stat. 1445; Oct. 23, 1992, P.L. 102-484, Div A, Title VI, Subtitle B, @ 612(b), 106 Stat. 2421; Nov. 30, 1993, P.L. 103-160, Div A, Title VI, Subtitle B, @ 613(c), 107 Stat. 1681; Oct. 5, 1994, P.L. 103-337, Div A, Title

37 USCS @ 308A (1998)

VI, Subtitle B, @ 613(c), 108 Stat. 2783; Feb. 10, 1996, P.L. 104-106, Div A, Title VI, Subtitle B, @ 613(c), 110 Stat. 359.)

(As amended Sept. 23, 1996, P.L. 104-201, Div A, Title VI, Subtitle B, @ 613(c), 110 Stat. 2544; Nov. 18, 1997, P.L. 105-85, Div A, Title VI, Subtitle B, @ 613(c), 111 Stat. 1786.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Effective date of section:

Act Sept. 28, 1971, P.L. 92-139, Title II, @ 209, 85 Stat. 259, provided that this section shall become effective on such date as shall be prescribed by Secretary of Defense, but not earlier than February 1, 1971.

Amendments:

1973. Act July 9, 1973 (effective 7/1/73, as provided by @ 206 of such Act), in subsec. (a), substituted "the career field of Infantry, Armor, or Field Artillery Cannon in the Army, or the career field of Infantry, Field Artillery, or Tank and Amphibian Tractor in the Marine Corps" and "such a career field" for "any combat element of an armed force" and "a combat element of an armed force", respectively; and in subsec. (c), substituted "June 30, 1974" for "June 30, 1973".

1974. Act May 10, 1974 (effective as provided by @ 4 of such Act, which appears as 37 USCS @ 308 note) substituted this section for one which read:

"(a) Notwithstanding section 514(a) of title 10 or any other provision of law, a person who enlists in the career field of Infantry, Armor, or Field Artillery Cannon in the Army, or the career field of Infantry, Field Artillery, or Tank and Amphibian Tractor in the Marine Corps for a period of at least three years, or who extends his initial period of active duty in such a career field to a total of at least three years, may, under regulations to be prescribed by the Secretary of Defense, be paid a bonus in an amount prescribed by the Secretary, but not more than \$ 3,000. The bonus may be paid in a lump sum or in equal periodic installments, as determined by the Secretary.

"(b) Under regulations approved by the Secretary of Defense, a person who voluntarily, or because of his misconduct, does not complete the term of enlistment for which a bonus was paid to him under this section shall refund that percentage of the bonus that the unexpired part of his enlistment is of the total enlistment period for which the bonus was paid.

"(c) No bonus shall be paid under this section with respect to any enlistment or extension of an initial period of active duty in the armed forces made after June 30, 1974."

1977. Act June 29, 1977 (effective 7/1/77, as provided by @ 3 of such Act), substituted a new subsec. (b) for one which read: "(b) Under regulations prescribed by the Secretary of Defense, or by the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy, a person who voluntarily, or because of his misconduct, does not complete the term of enlistment for which a bonus was paid to him under this section shall refund that percentage of the bonus that the unexpired part of his enlistment is of the total enlistment period for which the bonus was paid."; in subsec. (c), substituted "September 30, 1978" for "June 30, 1977".

1978. Act Oct. 20, 1978, in subsec. (c), substituted "September 30, 1980" for "September 30, 1978".

1980. Act Sept. 8, 1980, in subsec. (a), substituted "\$ 5,000" for "\$ 3,000"; in subsec. (c), substituted "September 30, 1982" for "September 30, 1980"; for application of this section, as amended, see Other provisions note to this section.

1981. Act Oct. 14, 1981, in subsec. (a), substituted "\$ 8,000" for "\$ 5,000" and substituted the sentence beginning "The bonus shall be paid . . ." for "The bonus may be paid in a lump sum or in equal periodic installments, as determined by the appropriate Secretary."

1982. Act Oct. 2, 1982, in subsec. (c), substituted "December 17, 1982" for "September 30, 1982".

Act Dec. 21, 1982, in subsec. (c), substituted "March 31, 1983" for "December 17, 1982".

1983. Act March 30, 1983, in subsec. (c), substituted "September 30, 1984" for "March 31, 1983".

1984. Act Oct. 19, 1984, in subsec. (c), substituted "1987" for "1984".

1987. Act Dec. 4, 1987, in subsec. (c), substituted "September 30, 1992" for "September 30, 1987".

1989. Act Nov. 29, 1989 (applicable as provided by @ 612(c) of such Act, which appears as a note to this section), in subsec. (a), substituted "\$ 12,000" for "\$ 8,000" and "\$ 7,000" for "\$ 5,000".

1992. Act Oct. 23, 1992, in subsec. (c), substituted "September 30, 1993" for "September 30, 1992".

1993. Act Nov. 30, 1993 (effective 9/30/93 and applicable as provided by @ 613(h)(1) of such Act, which appears as 37 USCS @ 308 note), in subsec. (c), substituted "September 30, 1995" for "September 30, 1993".

1994. Act Oct. 5, 1994, in subsec. (c), substituted "September 30, 1996" for "September 30, 1995".

1996. Act Feb. 10, 1996, in subsec. (c), substituted "September 30, 1997" for "September 30, 1996".

Act Sept. 23, 1996, in subsec. (c), substituted "September 30, 1998" for "September 30, 1997".

1997. Act Nov. 18, 1997, in subsec. (c), substituted "September 30, 1999" for "September 30, 1998".

Other provisions:

Pay continuation. Act Sept. 28, 1971, P.L. 92-129, Title II, @ 210, 85 Stat. 360, located at 37 USCS @ 302 note, provided that enactment of this section did not reduce the pay to which any member of the uniformed services was entitled on June 30, 1971.

Applicability of Sept. 8, 1980 amendments. Act Sept. 8, 1980, P.L. 96-342, Title VIII, @ 804(c), 94 Stat. 1092, located at 37 USCS @ 308 note, provided that the amendments made to this section by Act Sept. 8, 1980 are only applicable to enlistments, reenlistments, and extensions of enlistments made after Sept. 30, 1980.

Applicability of Oct. 14, 1981 amendments. Act Oct. 14, 1981, P.L. 97-60, Title I, Part B, @ 117(d), 95 Stat. 997, which appears as 37 USCS @ 308 note, provided that the amendments made to this section by such Act are applicable to enlistments and reenlistments after the date of the enactment of such Act on Oct. 14, 1981.

Limitation on payments. Act Nov. 29, 1989, P.L. 101-189, Div A, Title VI, Part B, @ 612(b), 103 Stat. 1446, provides: "The total amount of payments made during fiscal year 1990 under section 308a(a) of title 37, United States Code, by the Secretary of the Army may not exceed \$ 66,400,000."

Applicability of amendments made by @ 612 of Act Nov. 29, 1989. Act Nov. 29, 1989, P.L. 101-189, Div A, Title VI, Part B, @ 612(c), 103 Stat. 1446, provides: "The amendments made by subsection (a) [amending subsec. (a) of this section] shall apply with respect to an enlistment or extension of an initial period of active duty (in a skill designated as critical) entered into on or after October 1, 1989."

37 USCS @ 308A (1998)

Applicability of 1992 amendments to agreements for a bonus or special pay. For applicability of amendments made by Act Oct. 23, 1992, P.L. 102-484, to agreements for a bonus or special pay under this section which are executed during the 90-day period beginning on Oct. 23, 1992, see @ 612(j)(2) of such Act, which appears as 37 USCS @ 301b note.

NOTES:

CROSS REFERENCES

This section is referred to in 10 USCS @ 227.

RESEARCH GUIDE

Am Jur:

53A Am Jur 2d, Military and Civil Defense @ 170.

INTERPRETIVE NOTES AND DECISIONS

Individuals who enlist in Reserve Component under Delayed Entry Program and qualify for bonus under 37 USCS @ 308a are entitled to have award level of bonus fixed on date of enlistment in Delayed Entry Program, rather than on date of entry on active duty, although actual payment of bonus is contingent on individual's qualifying and serving in designated military specialty. (1979) 58 Op Comp Gen p. 282.

37 USCS @ 312A (1998) printed in FULL format.

UNITED STATES CODE SERVICE

Copyright 1998, LEXIS Law Publishing, a division of Reed Elsevier Inc.

All rights reserved.

*** THIS SECTION IS CURRENT THROUGH 105-165, APPROVED 3/20/98 ***

*** WITH A GAP OF 160 AND 164 ***

TITLE 37. PAY AND ALLOWANCES OF THE UNIFORMED SERVICES
CHAPTER 5. SPECIAL AND INCENTIVE PAYS

37 USCS @ 312a (1998)

@ 312a. Special pay: nuclear-trained and qualified enlisted members

(a) Under regulations prescribed by the Secretary of Defense, an enlisted member of the naval service who--

(1) is entitled to basic pay;

(2) is currently qualified for duty in connection with the supervision, operation, and maintenance of naval nuclear propulsion plants; and

(3) has completed at least six, but not more than ten, years of active duty and executes, when eligible, a reenlistment agreement for not less than two years;

may upon acceptance of the reenlistment agreement by the Secretary of the Navy or his designee, be paid a bonus not to exceed six months of the basic pay to which he was entitled at the time of his discharge or release, multiplied by the number of years or the monthly fractions thereof, of additional obligated service, not to exceed six years, or \$ 15,000, whichever is the lesser amount.

(b) Bonus payments authorized under this section may be paid in either a lump sum or in installments.

(c) An amount paid to a member under subsection (a) is in addition to all other compensation to which he is entitled and does not count against the limitation prescribed by section 308(a) of this title concerning the total amount of reenlistment bonus that may be paid.

(d) Under regulations prescribed by the Secretary of the Navy, refunds, on a pro rata basis, of sums paid under subsection (a) may be required, and further payments terminated, if the member who has received the payment fails to complete his reenlistment contract, or fails to maintain his technical qualification for duty in connection with supervision, operation, and maintenance of naval nuclear propulsion plants.

(e) Provisions of this section shall be effective only in the cases of members who, on or before June 30, 1975, execute the required written agreement to remain in active service.

HISTORY: (Added Oct. 27, 1972, P.L. 92-581, @ 1(3), 86 Stat. 1277; Oct. 12, 1982, P.L. 97-295, @ 3(3), 96 Stat. 1303; April 6, 1991, P.L. 102-25, Title VII, @ 702(b)(1), (c), 105 Stat. 117.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

37 USCS @ 312A (1998)

"Section 308(c) of this title", referred to in subsec. (c), was omitted in amendment of 37 USCS @ 308 by Act May 10, 1974, P.L. 93-277, @ 2(1), 88 Stat. 119. It related to a \$ 2,000 maximum limit as reenlistment bonus and is now covered by 37 USCS @ 308(a).

"Section 308(g) of this title", referred to in subsec. (c), was omitted in amendment of 37 USCS @ 308 by Act May 10, 1974, P.L. 93-277, @ 2(1), 88 Stat. 119. It related to an additional bonus to members of the Coast Guard having critical skills.

Amendments:

1982. Act Oct. 12, 1982, in subsec. (c), substituted "308(a)" for "308(c)", and deleted the former concluding sentence, which read: "However, if he receives payment under this section, he is not entitled to any further payments under section 308(g) of this title.".

1991. Act April 6, 1991, in subsecs. (c) and (d), deleted "of this section" following "subsection (a)" in both instances.

Other provisions:

Application and construction of the Oct. 12, 1982 amendment of this section. For provisions as to the application and construction of the Oct. 12, 1982 amendment of this section (see the Amendments note to this section), see @ 5 of such Act, which appears as 10 USCS @ 101 note.

NOTES:

CROSS REFERENCES

This section is referred to in 37 USCS @ 308.

From: Richard Scarnides
To: Rob Weiner

Military's early discharge rate soars

Values problems, tougher rules cited

By Rowan Scarborough
THE WASHINGTON TIMES

A1

The military is kicking out more than one-third of its enlisted personnel for misbehavior, performance shortfalls, obesity, pregnancy and physical problems before they complete a first enlistment, a draft report says.

Military experts say the rate is too high for an all-volunteer force, is a further sign of readiness woes and reflects society's more casual attitude toward traditional values.

The statistics show the four branches prematurely discharged nearly 36 percent of enlisted personnel who joined in 1993 before completing their four-year commitments. This compares with a rate of about 30 percent during the 1980s, according to a draft General Accounting Office "discussion paper" circulating in the Pentagon. A copy was obtained by The Washington Times.

The study focused on enlisted men and women separated for misconduct and other problems after they finished basic training.

Loren Thompson, a defense analyst at the Lexington Institute, said the trend is attributable to a number of factors — a good economy, no overriding national security threat and a less-values-oriented Generation X.

"I don't think there's any question that over time, the sense of discipline, the sense of values, has tended to erode among the nation's youth," Mr. Thompson said. "It doesn't mean they don't have values, but it means a larger number of them have values that are pretty largely removed from what tradition has considered our values."

The GAO document said the Air Force, the Army, the Navy and the Marine Corps are all troubled by the upward attrition rates, but face a dilemma: They want to lower the rate, even while they are initiating values training and maintaining a "zero tolerance" for drug use and other offenses.

The attrition rate adds to the military's readiness problems, experts say, especially when coupled with the fact that hundreds of combat pilots and skilled workers are opting to leave the military after their first enlistment.

see MILITARY, page A11

MILITARY

From page A1

Enlisted personnel make up 1.16 million of the nation's 1.4 million-member armed forces, carrying out blue-collar, administrative and technical tasks.

"This is part of a much larger problem," said Robert Maginnis, a retired Army lieutenant colonel and analyst at the Family Research Council.

"A volunteer army to have a 35 percent attrition rate is pretty high," he said. "Either the Nintendo generation kids coming into the military today don't have the sort of discipline required to obey military rules, or they are not being challenged because we've lowered the standards."

Noting the military is cutting back on training time to save money, Col. Maginnis added, "The only way you can retain them in the peacetime army is to challenge them. That's what these smart high school kids want. They don't want to be sitting on their duffs. If they're an infantry man, they want to be blowing things up."

The GAO, Congress' auditing arm, identified several developments that contribute to the high rates:

- It is too easy to get kicked out. The military lets people who fail tests, become pregnant, gain weight or commit minor infractions to leave with honorable discharges, even though they did not

live up to their four-year contracts. The GAO suggested "stricter disincentives" to separate.

- The volunteer force has made commanders less tolerant of marginal performers who might otherwise have been encouraged to improve if the country still had conscription. "One obvious result of this change in philosophy was a rise in attrition after the draft ended," the GAO report says.

- The services' "zero tolerance" for drug use means otherwise good performers get the boot instead of a chance at rehabilitation. The Army is moving to make its drug policy even stricter. Commanders may now let a first-time offender stay in if he has three years or less of service. One proposed policy would restrict such discretion.

- About 12 percent of personnel fired for misconduct committed "minor disciplinary offenses." The report quoted an Air Force officer at one base as saying, "It was extremely rare for an enlistee to be granted probation and rehabilitation." The Navy is getting tougher. It has changed what constitutes a "pattern" of misconduct from three or more offenses to two or more.

The GAO said the military prematurely separated more than 37,000 men and nearly 8,000 women who joined in 1993. That means it wasted some of the \$2.5 billion it cost to recruit and train them, the report said.

In addition, some qualify for

ATTRITION IN THE MILITARY

Official reasons for discharging servicemen and women after subtracting discharges for pregnancy.

Reason	Male attrition 7th to 48th month	Female attrition 7th to 48th month
Misconduct	33.43%	15.32%
Medical/physical problems	15.16	18.50
Performance problems	12.45	14.87
Drugs	9.28	2.62
Character/behavior disorder	6.86	9.47
Miscellaneous reasons*	4.42	6.52
Weight/body fat	4.18	6.54
Dependency/hardship	3.53	7.57
Alcoholism	2.23	0.96
Erroneous enlistment	0.88	0.15
Homosexuality	0.52	1.67
Parenthood	0.38	12.15
Sexual perversion	0.23	0.09
All other reasons	6.47	3.56

* The Air Force includes early releases for employment in the category of miscellaneous reasons.

Source: General Accounting Office

The Washington Times

severance deals that include a housing allowance and continued medical benefits.

"When the services separate enlistees between their seventh and 48th months of service, they are receiving only a partial return on their investment in personnel whom they have fully trained and provided with on-the-job experience," the document said.

The main reasons post-boot camp men who enlisted in 1993

left early were for misconduct (12,425), medical or physical problem (5,634), performance shortfall (4,625), drug use (3,448) and character disorder (2,548). The services dismissed 192 male enlistees for homosexuality and 85 for sexual perversion.

More than one-quarter of the 7,884 women were separated for pregnancy. Other reasons: medical or physical problem (1,075) and misconduct (890).

The Washington Times

THURSDAY, AUGUST 13, 1998

11746