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**MILITARY RECORD CORRECTION BOARDS AND
THEIR JUDICIAL REVIEW**
Military Law Section Program

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10:00 a.m. – 11:30 a.m.



Raymond J. Toney

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Education

Mr. Toney earned a Bachelor of Science degree (with Honors) from the University of Alabama. He graduated with Highest Honors from the Norwich Law School, one of England's leading law schools. Mr. Toney earned an advanced degree from the Faculty of Law, University of Oxford, where he specialized in comparative law. He was a Visiting Lecturer at the Norwich Law School and the Faculty of Law, University of Trier, Germany. Mr. Toney is a member of the Editorial Board of the International Journal of Evidence and Proof.

Experience

Mr. Toney was an officer in the U.S. Army Reserve. He has successfully represented clients in a wide range of military law matters. Mr. Toney has particular interest and experience in the areas of officer and enlisted promotions, whistleblowing, investigations, involuntary separations, physical disability evaluations, security clearances, and the correction of military records. He also represents military personnel and former military personnel requiring emergency and non-emergency federal court action. He has a number of active federal court cases involving the violation of military regulations, federal statutes, and the U.S. Constitution.

Bar Admissions

Mr. Toney, a member of the New York Bar, is admitted to practice in the U.S. Supreme Court; all New York state courts; the U.S. District Court for the Southern District of New York; the U.S. District Court for the Eastern District of New York; the U.S. District Court for the Western District of New York; the U.S. Court of Appeals for the Second Circuit; the U.S. District Court for the District of Columbia; the U.S. Court of Appeals for the D.C. Circuit; and the U.S. Court of Federal Claims. He is pursuing admission to the Bar of the State of California.

Texas State Bar Association, Military Law Committee Correction of Military Records and Judicial Review

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I. CORRECTION OF MILITARY RECORDS

Statutory Authorities

Generally: 10 U.S.C. § 1551 to 1559.

A. Boards for the Correction of Military Records.

10 U.S.C. § 1552.

B. General Authority

(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 Homeland Security may in the same manner correct any military record of the Coast Guard.

C. Procedures.

(a) (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.

D. Time for Application.

(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.

E. Money Payments.

(c) (1) 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, or on account of his or another's service as a civilian employee.

F. "Military Record."

(g) In this section, the term "military record" means a document or other record that pertains to

- (1) an individual member or former member of the armed forces, or
- (2) at the discretion of the Secretary of the military department concerned, any other military matter affecting a member or former member of the armed forces, an employee or former employee of that military department, or a dependent or current or former spouse of any such person. Such term does not include records pertaining to civilian employment matters (such as matters covered by title 5 and chapters 81, 83, 87, 108, 373, 605, 607, 643, and 873 of this title).

G. 10 U.S.C. § 1556 (Ex Parte Communications).

(a) In General.— The Secretary of each military department shall ensure that an applicant seeking corrective action by the Army Review Boards Agency, the Air Force Review Boards Agency, or the Board for Correction of Naval Records, as the case may be, is provided a copy of all correspondence and communications (including summaries of verbal communications) to or from the agency or board, or a member of the staff of the agency or board, with an entity or person outside the agency or board that pertain directly to the applicant's case or have a material effect on the applicant's case.

H. BCMR Regulations.

Department of Defense Directive 1332.41.

Army Regulation 15-185.

Air Force Instruction 36-2603.

Secretary of the Navy (SECNAV) Instruction 5420.193 (governs USMC applications).

Coast Guard, Code of Federal Regulations, 33 C.F.R Part 52.

I. Application Form Required.

DD Form 149.

J. FOIA Data on Board Practices and Procedures.

Army <http://rjtlaw.net/ABCMR%20FOIA%20Responses.pdf>

Navy <http://rjtlaw.net/BCNR%20FOIA%20Responses.pdf>

Air Force <http://rjtlaw.net/Air%20Force%20FOIA%20Responses.pdf>

Coast Guard <http://rjtlaw.net/CG%20BCMR%20FOIA.pdf>

K. BCMR Decisions.

Available at: <http://boards.law.af.mil/>

L. BCMR FOIA Responses/Analyses.

(1) Navy BCMR members devotes on average 1.6 minutes to deciding each application; (2) Army BCMR members devote on average 3.75 minutes to deciding each application; (3) the Navy, Army, and Coast Guard do not require their board members to review applications and supporting evidence before deciding applications; (4) the Army and Coast Guard present their board members with written, summarized statements of fact and law, along with recommended decisions prepared by staff members, which are then voted on by board members; (5) board members serve on an *ad hoc* basis as additional duties to their full-time military department employment; and (6) board members do not undergo specialized or even detailed training prior to assuming their duties.¹

M. Types of Claims Brought Before BCMRs.

1. Appeal of Discharge Review Board decisions (upgrades, RE codes, reasons for separation).
2. Involuntary discharges/separations (with or without separation board hearing).
3. Non-selection for promotion.
4. Adverse/negative performance evaluation reports.
5. Positive urinalyses.
6. Letters of Reprimand/other adverse actions.
7. Article 15 proceedings.
8. Whistleblower reprisal.
9. Discrimination.
10. Procedural violations (due process).
11. Removal from active duty.
12. Pay and retirement benefit disputes.
13. Privacy Act violations (amendment requests).
14. Physical Disability Evaluation decisions.

N. Representing Applicants.

*Treat BCMR cases like any other legal action. Remember, claims and arguments not raised before the boards will likely be treated as waived for subsequent purposes (reconsideration, judicial review). “You snooze, you lose.”

¹ The Air Force BCMR fares considerably better on this count.

*If your client is approaching the 3-year limitation period, file ASAP and inform the BCMR that you are developing evidence and argument to be later submitted. If your client is past the 3-year limit, do the same.

*The applicant must first exhaust available intra-service remedies (*e.g.*, boards established to review performance evaluations and adverse information, Article 138 complaints, Article 15 appeals) before applying to the BCMR. Available remedies are service-specific.

1. Obtain Official Military Personnel File. Seek other information through FOIA and Privacy Act requests (*e.g.*, promotion board records/documents, reports of investigations).
2. Obtain Official Medical Records (where at issue).
3. Identify and review all relevant statutes and regulations.
4. Draft concise, detailed statement of facts with references to attached exhibits/enclosures. Highlight outstanding conduct and performance.
5. Research BCMR and federal court decisions.
6. Speak to witnesses and obtain sworn statements where possible.
7. Identify every legal claim, and every argument in equity. *Remember, the standard is “error and/or injustice.” I suggest arguing that the doctrine of precedent requires relief where you have a strong case on-point from the BCMRs. The BCMRs will tell you they are not bound by their own previous decisions and may reject your argument, but you set-up a good claim of arbitrary and capricious action for judicial review.
8. Prepare a detailed memorandum of points and authorities.
9. Cite federal court decisions where useful.
10. Clearly state the relief requested.
11. Ask client to review and comment on drafts and approve final submission.
12. Request a personal appearance hearing, even though rarely granted.
13. Presume that what you submit will be reviewed in federal court.
14. Address the boards authoritatively and respectfully.
15. Respond to any advisory opinions received. *See* discussion below.
16. Use expert witnesses where necessary and financially possible.
17. Use medical/scientific studies where relevant (*e.g.*, PTSD, drug metabolism).
18. Make sure the client has exhausted intra-service remedies.

O. After You Have Filed: The Advisory Opinions.

In most cases you will receive from the BCMRs advisory opinions they requested concerning the case. You should always respond to the advisory opinions, even if they are favorable and recommend some relief. Failure to respond will be noted by the boards. The advisory opinions typically recommend denial of relief, but there are notable exceptions.

*Even where you receive a favorable recommendation in an advisory opinion, the boards may deny (and have denied) relief. Inform the client of this.

* You might consider requesting advisory opinions from the BCMRs because they do not always solicit them (Navy in particular).

* Watch for and refute recommended denials based on “harmless error,” which applies to BCMR decisions.

P. The BCMR Decision.

When you receive the board’s decision, forward it to your client immediately. Even though your representation of the client likely ends with the final decision, you should inform the client of her ability to seek judicial review of the decision in federal court.

Scrutinize the decision very carefully and note whether all the claims and arguments you raised were explicitly addressed and “passed on” by the BCMR. Frequently they are not. If not, you can return to the board with a request that all claims and arguments be addressed. You may do so as the same case or as an application for reconsideration. I prefer the former in order to preserve the client’s right to request reconsideration. *See* discussion below. The BCMRs’ failure to address a non-frivolous claim or argument is a common ground for remand to the BCMR by a federal court.

If the BCMR addressed all claims and arguments, you should inform the client of the option of judicial review and applicable statutes of limitations. *See* discussion below.

Q. Applications for Reconsideration.

Each BCMR permits applications for reconsideration based on newly discovered evidence or argument. The Army requires reconsideration requests to be filed within one year of a previous, final decision, and strictly enforces the time limit. The Navy does not impose a time limit yet seems to arbitrarily deny reconsideration requests. The Air Force does not place a time limit on such requests, nor does the Coast Guard. Decisions to grant or deny reconsideration, (*i.e.*, the materiality of new evidence) once it is established that new evidence is submitted, are to be made by BCMR members, not staff. *See Lipsman v. Sec’y of the Army*, 335 F. Supp. 2d 48 (D.D.C. 2004).

R. Special Circumstances.

1. Late Applications.

If an application is out-of-time, inform the client of that fact and of the provisions of 10 U.S.C. § 1552 applicable to late applications. Also review the military department’s BCMR regulation.

In practice, the Air Force BCMR does not seem to deny late applications. The Navy seems to do so arbitrarily. The Army typically accepts and considers the application

on the merits, and if no relief is granted, states that the interests of fairness and justice did not warrant excusal of late application. Denial of an application based on the limitation period is reviewable in federal court.

2. Federal Court Statutes of Limitations.

There is a 6-year limitation on applications for review of BCMR decisions. ***If your case is one in which the Military Pay Act applies, *i.e.*, favorable court decision will result in entitlement to back-pay in excess of \$10,000.00, the “Tucker Act” applies and jurisdiction lies with the U.S. Court of Federal Claims. The Court of Federal Claims runs the 6-year limitation from the date of the applicant’s discharge or separation, where she has been discharged or separated. Thus, if your client’s separation or discharge date is nearing the Court of Federal Claims’ 6-year limitation, consider filing suit in that court to preserve the action. The Department of Justice may agree to suspend the suit and send the matter to the BCMR for final decision.

The U.S. District Court for the District of Columbia runs the 6-year limitation period from the date of the BCMR’s final decision. For other U.S. district courts, review the caselaw.

3. Military Whistleblower Protection Act.

Provides for special BCMR review and action, including an evidentiary hearing. *See* 10 U.S.C. § 1034(f).

4. Injunctive Relief.

The BCMRs cannot issue injunctive relief such as prevention of discharge or assignment and applications do not stop personnel actions.

5. Court martial convictions.

There is no BCMR “collateral review” of court martial convictions. The BCMRs may change (“upgrade”) a discharge characterization awarded by a General Court Martial based on clemency.

6. Secretarial Review.

The secretaries of the military departments and their delegates can overrule BCMR recommended decisions and sometimes do, favorably and unfavorably.

S. Thoughts and Observations on BCMR Practice.

1. Create no expectations of a successful outcome and try to keep client expectations in check, even where claims appear very strong.

2. Explain the process in detail to clients: (a) obtain records; (b) legal research; (c) fact investigation; (d) memorandum preparation; (e) delay of months between submission and receipt of advisory opinion(s) (if any); (f) right to respond to advisory opinions within 30 days; (g) personal appearance hearing highly unlikely; (h) more months waiting for final decision after response to advisory opinions.
3. Ensure clients are aware that it will take at least 10 months for a decision in most cases, and up to 18 months in others.
4. Understand that, with the exception of the Air Force board, a staff analyst is the decision-maker, for all practical purposes. That is the person you are trying to convince.
5. In the Coast Guard, two of the three staff analysts are lawyers.
6. In my experience, the BCMRs see their roles as defending the actions of the military, not as impartial adjudicators, *i.e.* the process is adversarial, though not intended to be and without the procedural safeguards of an adversarial process.
7. Members of Congress can offer no meaningful assistance to applicants.
8. Standards concerning zealous and effective advocacy apply.
9. Clients should not communicate directly with the boards without consulting you first.
10. Clients should take no actions in reliance on an expectation of a favorable BCRM decision.
11. Prepare a declaration for your client to sign addressing the relevant facts. You also can have your client sign a declaration stating he or she has reviewed your memorandum and that the facts asserted therein are true and correct.

II. JUDICIAL REVIEW.

BCMR decisions are final agency actions subject to judicial review. The US District Court applies the standards of review of the APA. The US Court of Federal Claims applies a similar standard, with some notable differences. *See Loomis v. United States*, 68 Fed. Cl. 503, 508 (2005).

Judicial review under the APA and the Court of Federal Claims standards is inherently deferential. BCRM decisions, because they involve the military, are given even greater deference. Judicial deference is a shackle. The government, naturally, plays it up.

A. Statute of Limitations:
28 U.S.C § 2401 (6 years).

B. Standards of Review.

In US District Court, the standards of 5 U.S.C. § 706 are applied. The US District Courts refer to this generally as the “arbitrary and capricious” standard. A decision will be upheld under the APA standard unless the plaintiff can show that the BCRM’s

decision was arbitrary, capricious, unsupported by substantial evidence, or contrary to law or mandatory procedure.

A typical statement of the applicable standards in the US District Court for the District Columbia is (from *Hill v. Geren*, 2009 U.S. Dist. LEXIS 10237):

The Secretary of the Army may act through a civilian board to correct any Army record when he "considers it necessary to correct an error or remove an injustice." 10 U.S.C. § 1552(a)(1). Courts review the decisions of military corrections boards "under an 'unusually deferential application of the arbitrary or capricious standard' of the Administrative Procedures Act." *Cone v. Caldera*, 343 U.S. App. D.C. 117, 223 F.3d 789, 793 (D.C. Cir. 2000) (quoting *Kreis v. Sec'y of the Air Force*, 275 U.S. App. D.C. 390, 866 F.2d 1508, 1514 (D.C. Cir. 1989)). A party seeking review of a Board decision bears the burden of overcoming "the strong but rebuttable presumption that administrators of the military, like other public officers, discharge their duties correctly, lawfully and in good faith." *Frizelle v. Slater*, 324 U.S. App. D.C. 130, 111 F.3d 172, 177 (D.C. Cir. 1997) (quoting *Collins v. United States*, 24 Cl. Ct. 32, 38 (1991), *aff'd*, 975 F.2d 869 (Fed. Cir. 1992)). Courts must "defer to the Board's decision unless it is arbitrary and capricious, contrary to law, or unsupported by substantial evidence." *Id.* at 176.

C. *Kreis v. Sec'y of the Air Force*, 866 F.2d 1508 (D.C. Cir. 1989).

The inherently deferential standard of review of the APA was expanded in military cases by the D.C. Circuit in *Kreis*. BCMR decisions will be upheld under *Kreis* if the court concludes the board has "examined the relevant data" and "articulated a satisfactory explanation for its action including a rational connection between the facts found and the choice made." The reason for the additional deference is Congress' use of the word "may" in 10 U.S.C. § 1552(a). According to *Kreis*:

It is simply more difficult to say that the Secretary has acted arbitrarily if he is authorized to act "*when he considers it necessary* to correct an error or remove an injustice," 10 U.S.C. § 1552(a) (emphasis added), than it is if he is required to act whenever a court determines that certain objective conditions are met, *i.e.*, that there has been an error or injustice.

Thus, even if the court concludes there is error or injustice, it will uphold the decision if it determines that it was not "arbitrary and capricious." *Kreis* acknowledges the adverse impact of its holding on service members and veterans: "Perhaps only the most egregious decisions may be prevented under such a deferential standard of review."

Kreis raises several questions:

- (1) How can *Kreis* be squared with the duty of the military to adhere to statutes and its own regulations, and the courts' duty under *Marbury v. Madison* to determine and remedy legal violations? In other words, how can legal violations be sustained under a judicial doctrine of deference?
- (2) How do the courts decide where cases fall on the "egregious" continuum?
- (3) What distinguishes egregious from non-egregious (but bad) decisions?

D. U.S. Court of Federal Claims.

*Does not have review authority under the APA.

*The "Tucker Act," 28 U.S.C. § 1491, gives the court jurisdiction.

*May correct military records only incidental to monetary relief.

*There must be a money-mandating statute, typically the Military Pay Act, 37 U.S.C. § 204.

*The amount of money due must exceed \$10,000 for Tucker Act jurisdiction.

*Six-year statute of limitations runs from date of discharge or involuntary separation/retirement, not from the date of final BCMR decision, as in the district court.

*Oral argument almost always held.

See e.g. Brookins v. United States, 75 Fed. Cl. 133, 138-39 (2007), for discussion.

The Court of Federal Claims tends to give more detailed consideration of BCMR cases than do the US District Courts. While the court also is deferential to military decisions, it reviews claims of legal error without deference. Some commentators have suggested that the court be designated the sole forum for judicial review of military decisions.

III. DISCHARGE REVIEW BOARDS.

The DRBs are authorized by 10 U.S.C. § 1553. They consist of 5 military members. An applicant may request a review based on documents submitted and obtained or a personal appearance hearing. If a document review is requested and the application is denied, a personal appearance hearing may then be requested. The applicant thus gets two bites at the apple.

The statute of limitations for DRB applications is 15 years and it is not waived. If more than 15 years has lapsed since discharge, the person must apply to the BCMR.

Applications must allege an inequity or impropriety in the discharge. "Inequity" involves a departure from the traditions and policies of the service. "Impropriety" refers to factual or legal error, *e.g.*, a veteran did not suffer from physical or mental disorder, or did not commit an act of misconduct.

The DRBs do consider the applicant's overall service and post-discharge conduct in deciding whether to change a discharge characterization, and good service/conduct should be emphasized and documented. They do not necessarily result in a change to the discharge without other evidence of inequity or impropriety.

The DRBs may change a discharge characterization or dismissal resulting from a special court-martial conviction based on clemency. They have no authority to address general court-martial matters—the BCMRs do based on clemency.

Contrary to popular belief, there are no automatic discharge upgrades, upgrades are not easy to obtain, and there is no waiting period.

A. DRB Regulations.

Army Regulation 15-180
Air Force Instruction 36-3208, Air Force Pamphlet 31-5
SECNAVINST 5420.174D
Coast Guard: 33 CFR Part 51

B. PTSD and Traumatic Brain Injury.

The wars in Iraq and Afghanistan have increased the incidence of PTSD and Traumatic Brain Injury, both of which can be associated with misconduct resulting in early separation from the service and undesirable discharge characterizations. Diagnosis of the conditions by military officials has been spotty. Congress amended 10 U.S.C. § 1553 in 2009 to include the following instructions:

(d) (1) In the case of a former member of the armed forces who, while serving on active duty as a member of the armed forces, was deployed in support of a contingency operation and who, at any time after such deployment, was diagnosed by a physician, clinical psychologist, or psychiatrist as experiencing post-traumatic stress disorder or traumatic brain injury as a consequence of that deployment, a board established under this section to review the former member's discharge or dismissal shall include a member who is a physician, clinical psychologist, or psychiatrist.

(2) In the case of a former member described in paragraph (1) or a former member whose application for relief is based in whole or in part on matters relating to post-traumatic stress disorder or traumatic brain injury as supporting rationale or as justification for priority consideration, the Secretary concerned shall expedite a final decision and shall accord such cases sufficient priority to achieve an expedited resolution. In determining the priority of cases, the Secretary concerned shall weigh the medical and humanitarian

circumstances of all cases and accord higher priority to cases not involving post-traumatic stress disorder or traumatic brain injury only when the individual cases are considered more compelling.

***Anytime you are contacted by a war veteran seeking a discharge upgrade, be sure to ask about his or her exposure to combat and mental health, past and present. Veterans frequently do not share their feelings or symptoms with military personnel or civilians, and conditions may go undiagnosed. Self-medication with alcohol and illicit drugs is not uncommon and has led to misconduct-based discharges. Explaining the relevance of PTSD or TBI symptoms to the DRB process may help them share their experiences with you.

C. Personal Appearance Hearings.

Most clients want a personal hearing with the DRBs, and they can be very useful. Prepare your client as you would for any evidence-based hearing. In the Army, lawyers are potted plants and the DRB president will shut you up—members do the questioning of the client. In the others, lawyers may lead the questioning. Direct questioning from all DRBs is often confrontational and occasionally hostile. Prepare your clients accordingly.

D. Thoughts and Observations on DRB Practice.

The observations about BCMR practice apply equally to the DRBs, with one exception: there are no advisory opinions. Staff analysts play an important role in decisions yet seem less influential than those of the BCMRs. In my experience, board members tend to be very familiar with the facts of the cases.

Again, make sure that client expectations are kept in check, both as to outcome and length of time the DRBs take to process applications. If it is clear that requesting an “Honorable” discharge is unreasonable, advise your client. You can ask for a change to “Honorable” and alternatively request a “General, Under Honorable Conditions.”

DRB decisions may be reviewed in federal court under the APA. Most applicants will appeal to the BCMRs.

