



## **DEPARTMENT OF DEFENSE**

### **Office of the Secretary**

#### **32 CFR Part 73**

**[Docket ID: DoD-2022-OS-0105]**

**RIN 0790-AL57**

### **DoD Discharge Appeal Review Board**

**AGENCY:** Office of the Under Secretary of Defense for Personnel and Readiness

(OUSD(P&R)), Department of Defense (DoD).

**ACTION:** Interim final rule; request for comments.

**SUMMARY:** This interim final rule implements Section 523 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2020, which requires the DoD to provide Service members and their authorized representatives with one final review of requests for an upgrade in the characterization of a discharge or dismissal. This rule establishes the Discharge Appeal Review Board (DARB) as the DoD authority responsible for considering such requests after all other administrative remedies have been exhausted. This rule also details the procedures for a petitioner and their authorized representatives to request this final review, the standards the DARB will apply when considering a petitioner's request, and the procedures the Military Departments will follow after the DARB adjudicates the request. The purpose of DARB review is to ensure uniform standards of review are met for requests for upgrades of a discharge or dismissal regardless of the petitioner's service affiliation.

**DATES:** This interim final rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Comments must be received by [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit comments, identified by docket number and/or Regulation Identifier Number (RIN) number and title, by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

- Mail: Department of Defense, Office of the Assistant to the Secretary of Defense for Privacy, Civil Liberties, and Transparency, Regulatory Directorate, 4800 Mark Center Drive, Attn: Mailbox 24, Suite 05F16, Alexandria, VA 22350-1700.

*Instructions:* All submissions received must include the agency name and docket number or RIN for this Federal Register document. The general policy for comments and other submissions from members of the public is to make these submissions publicly available at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

**FOR FURTHER INFORMATION CONTACT:** Ms. Margarete Ashmore, Office of Legal Policy, 703-697-3387.

## **SUPPLEMENTARY INFORMATION:**

### **A. BACKGROUND**

At the time of discharge or dismissal from the Armed Forces (Air Force, Army, Coast Guard, Navy, Marine Corps, and Space Force), each Service member is issued a DD 214 titled “Certificate of Release or Discharge from Active Duty.”<sup>1</sup> It can include the following information about the Service member and his or her period of active military service:

- Date and place of entry into active duty
- Home address at the time of entry
- Mailing address after separation
- Military service length
- Duty stations and assignments
- Rank and MOS (military occupational specialty)

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<sup>1</sup> Information on how to request a Service member’s military service records (including a DD 214) is available at <https://www.va.gov/records/get-military-service-records/>.

- Decorations, medals, badges, citations, and campaign ribbons
- Military education
- Separation information (type, character of service, authority, separation and reentry codes, and reason for separation)

This separation document is used to verify the Service member's period of active service.

The reasons surrounding a Service member's discharge or dismissal, noted by a separate code, as well as a narrative, and the resulting characterization of service (e.g. honorable, general (under honorable conditions), other than honorable, bad-conduct, dishonorable) may impact the Service member's eligibility for certain Federal and State provided veteran benefits and could affect his or her employment opportunities following separation. For example, a DD 214 generally is needed to qualify for the following:

- Department of Veterans Affairs (VA) guaranteed home loans
- VA education benefits
- Veterans' Preference for civilian employment
- VA Health Care Enrollment
- VA Disability claims
- Social Security benefits
- VA and Department of Labor (DOL) homeless veteran programs
- Federally provided flags and veteran burial benefits
- Certain veteran and military service organizations memberships

The Department of Veterans Affairs uses the DD 214 to determine if the Service member is eligible for the GI Bill, a VA home loan, health care eligibility, and disability benefits. The DOL uses it to determine eligibility for certain unemployment compensation and reemployment rights. The surviving spouse or dependents of a military veteran also need this form to apply for Federal and State provided burial and memorial benefits (i.e., funeral services, headstones, presidential memorial certificates, and burial flags).

Currently, each Military Department, operating through the Military Departments' Discharge Review Boards (DRBs) and Boards for Correction of Military / Naval Records (BCM/NRs) have the authority to upgrade a Service member's characterization of service and to correct the Service member's military record.<sup>2</sup> Service members seeking a change in their discharge may, within 15 years of the date of their discharge (except for a discharge or dismissal by general courts-martial), apply to their respective Military Department's DRB<sup>3</sup>:

- Air Force Discharge Review Board
- Army Discharge Review Board
- Coast Guard Discharge Review Board
- Naval Discharge Review Board

The DRBs may upgrade a Service member's discharge when appropriate based on improprieties or inequities in the discharge.<sup>4</sup> Service members seeking a correction to their military records that were discharged more than 15 years ago, including Service members who were discharged or dismissed by general courts-martial, may make their request directly to their respective Military Department's BCMR/NR<sup>5</sup>:

- Air Force Board for Correction of Military Records
- Army Board for Correction of Military Records
- Coast Guard Board for Correction of Military Records
- Board for Correction of Naval Records

The BCM/NRs are empowered, subject to certain constitutional, statutory, and regulatory limitations, to change a Service member's military record "to correct an error or remove an

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<sup>2</sup> See 10 U.S.C. 1553; see 10 U.S.C. 1552.

<sup>3</sup> See 10 U.S.C. 1553.

<sup>4</sup> 32 CFR 70, Part 70 - Discharge Review Board (DRB) Procedures and Standards is available at <https://www.ecfr.gov/current/title-32/subtitle-A/chapter-I/subchapter-D/part-70>.

<sup>5</sup> 10 U.S.C. 1552; 32 CFR 865 Subpart A (Air Force BCMR), 32 CFR 581.3 (Army BCMR), 33 CFR 52 (Coast Guard BCMR), and 32 CFR 723 (Navy BCMR).

injustice.”<sup>6</sup> Changes to a Service member’s discharge or dismissal as a result of a request to the Military Departments’ DRBs and BCM/NRs may include an upgrade to the character of service, a change to separation and reentry codes, and changes to the narrative reason for separation as reflected on the Service member’s DD 214.

## **B. Previous Regulatory History and Requirements of the 2020 NDAA**

By statute, the DRBs and BCM/NRs are required to review a Service member’s discharge or dismissal upgrade or correction to their military records request based upon combat-related or military sexual trauma (MST)-related post-traumatic stress disorder (PTSD) or traumatic brain injury (TBI) “with liberal consideration” to the Service member that the combat-related or MST-related PTSD or TBI potentially contributed to the circumstances resulting in the discharge or dismissal or to its characterization.<sup>7</sup> The term “liberal consideration” is not statutorily defined, but the DoD has provided the Military Departments an analytical framework for reviewing such cases.<sup>8</sup> Although the DRBs and BCM/NRs have some discretion on how to apply this analytical framework, the policies, procedures, and standards for the review of a discharge or dismissal must be uniform and consistent across the military services.<sup>9</sup>

In a September 2018 House Armed Services Committee hearing, House committee members expressed concerns that the DRBs and BCM/NRs were not providing appropriate upgrades to Service member’s discharges or dismissals or military record corrections for applicants who presented evidence of a service-connected PTSD, a TBI, or being sexually assaulted while in the

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<sup>6</sup> 10 U.S.C. 1552(a)(1).

<sup>7</sup> *See* 10 U.S.C. 1552(h)(2)(B), *see* 10 U.S.C. 1553(d)(3)(A)(ii).

<sup>8</sup> The DoD has issued policy guidance related to the application of liberal consideration in DoD memoranda: Secretary of Defense Memorandum, 3 September 2014, titled “Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming Post Traumatic Stress Disorder (PTSD)” (“Hagel Memo”); Under Secretary of Defense Memorandum, 25 August 2017, titled “Clarifying Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Considering Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions, Sexual Assault, or Sexual Harassment” (“Kurta Memo”).

<sup>9</sup> *See* 32 CFR 70.1.

military.<sup>10</sup> House committee members were also concerned that the DRBs and BCM/NRs were inconsistently applying “liberal consideration” and that the discharge or dismissal upgrade rate for these cases was different across all the military services.<sup>11</sup>

To provide increased oversight and to ensure that the DRBs and BCM/NRs uniformly and consistently apply DoD policies related to the review of a Service member’s discharge or dismissal, Congress passed section 523 of the FY 2020 NDAA, as codified at 10 U.S.C. 1553a on December 20, 2019. This allows for a new level of review for petitioners (or their authorized representatives), with certain limitations, to seek “an upgrade in the characterization of a discharge or dismissal.”<sup>12</sup>

This “final review” is independent from the reviews conducted by the Military Departments’ DRBs and BCM/NRs.<sup>13</sup> Section 523 amended 10 U.S.C. 1553 to include “a request for an upgrade to the characterization of a discharge or dismissal” that was declined “may be considered under section 1552 or section 1553a of this title, as applicable.”<sup>14</sup> Similarly, 10 U.S.C. 1552 was also amended to include “a request for an upgrade to the characterization of a discharge or dismissal” that was declined “may be considered under section 1553a of this title.”<sup>15</sup>

The DoD has the authority to design and implement the process to conduct a “final review of a request for an upgrade in the characterization of a discharge or dismissal.”<sup>16</sup> Congress directed the Secretary of Defense to “use existing organizations, boards, processes, and personnel of the

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<sup>10</sup> Update on Military Review Board Agencies, Hearing Before the Subcomm. on Military Personnel of the H. Comm. on Armed Services, 115th Cong. (2018), <https://www.congress.gov/event/115th-congress/house-event/LC64219/text?s=1&r=326>.

<sup>11</sup> Update on Military Review Board Agencies, Hearing Before the Subcomm. on Military Personnel of the H. Comm. on Armed Services, 115th Cong. (2018), <https://www.congress.gov/event/115th-congress/house-event/LC64219/text?s=1&r=326>.

<sup>12</sup> 10 U.S.C. 1553a(c)(1).

<sup>13</sup> 10 U.S.C. 1553a(a).

<sup>14</sup> 10 U.S.C. 1553(b)(2).

<sup>15</sup> 10 U.S.C. 1552(a)(4)(B).

<sup>16</sup> 10 U.S.C. 1553a(a).

Department of Defense” to the “maximum extent practicable” when establishing this process and it set January 1, 2021, as the deadline for the implementation.<sup>17</sup> The Secretary of Defense is also required to publish annual reports regarding the DoD’s new final review process, to include the number of requests considered, the upgrades granted or declined to the characterization of a discharge or dismissal, and the associated reports must be accessible to the public.<sup>18</sup>

Upon the request of a petitioner who has exhausted all available administrative remedies under 10 U.S.C. 1552 and 1553, the Secretary of Defense must review the findings and decisions of the Military Department’s DRB and BCM/NR and make a recommendation to the Secretary of the Military Department concerned for final action.<sup>19</sup> The term “final review of a request for an upgrade in the characterization of a discharge or dismissal” was also defined as “a request by a petitioner for an upgrade to the characterization of a discharge or dismissal” that was exhausted but not granted by his or her Military Department’s BCM/NR.<sup>20</sup> A “petitioner” means “a member or former member of the armed forces (or if the member or former member is dead, the surviving spouse, next of kin, or legal representative of the member or former member).”<sup>21</sup>

### **C. Progress Since the 2020 NDAA**

Section 523 directed “[t]he Secretary of Defense shall implement section 1553a... not later than January 1, 2021.”<sup>22</sup> To accommodate the timeline set by Congress, the DoD designated the Physical Disability Board of Review (PDBR), an entity established as part of the NDAA for FY 2008 to reassess the accuracy and fairness of the combined disability ratings assigned Service members who were discharged as unfit for continued military service between September 11,

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<sup>17</sup> Pub. L. 116-92, section 523(c).

<sup>18</sup> *Id.* The annual reports can be accessed at [https://boards.law.af.mil/OSD\\_DARB.htm](https://boards.law.af.mil/OSD_DARB.htm).

<sup>19</sup> *See* 10 U.S.C. 1553a(b).

<sup>20</sup> 10 U.S.C. 1553a(c)(1).

<sup>21</sup> 10 U.S.C. 1553a(c)(2).

<sup>22</sup> Pub. L. 116-92, section 523.

2001, and December 31, 2009, to assume responsibility while its statutory mission was concluding and later take over the duties for this new review process under this rule. The DoD also established policies for implementing internal requirements while beginning work on this rule. The DoD issued two internal Deputy Secretary of Defense (DepSecDef) Memoranda<sup>23</sup> and one Directive-Type Memorandum (DTM),<sup>24</sup> to provide the process and procedures for conducting a final review. This rulemaking is the final step in establishing the DARB.

#### **D. Process for Petitioning the DARB**

It should be noted per statute that the DARB is strictly a document review board.<sup>25</sup> Any new evidence a petitioner wishes to introduce must first be reviewed and a determination made by the respective Military Department's DRB and BCM/NR.<sup>26</sup> After reviewing a Service member's case file records, the DARB may make a recommendation to upgrade the characterization of discharge or dismissal based on their de novo review.<sup>27</sup> If the DARB recommends an upgrade, this recommendation will be sent to the Secretary of the Military Department concerned for final action.<sup>28</sup>

In most cases, the current or former Service member petitions the DARB for an upgrade to the characterization of his or her discharge or dismissal. If the Service member is deceased or incapacitated, the surviving spouse, next of kin, or legal representative may apply for a final

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<sup>23</sup> The first DoD Memorandum, "Department of Defense Implementation of Section 523 of the National Defense Authorization Act for Fiscal Year 2020," published January 29, 2021, was updated on May 17, 2022, by DoD Memorandum, "Update to Department of Defense Appeal Review Board Procedures." These DoD Memoranda can be accessed at <https://afrba-portal.cce.af.mil/#board-info/darb/navbar>.

<sup>24</sup> The Directive-Type Memorandum ("DTM"), "DoD Discharge Appeal Review Board," published May 5, 2023, and is available on the DoD Directives Division website and can be accessed at <https://www.esd.whs.mil/Directives/Recent-Publications/>.

<sup>25</sup> See 10 U.S.C. 1553a(b).

<sup>26</sup> 10 U.S.C. 1553a(b), (c).

<sup>27</sup> 10 U.S.C. 1553a; Pub. L. 116-92, section 523.

<sup>28</sup> 10 U.S.C. 1553a(b)(2).

review on the Service member's behalf.<sup>29</sup> Petitioners are eligible for a DARB review when all four criteria below are met:

- The Service member's date of discharge or dismissal was on or after December 20, 2019;<sup>30</sup>
- The Service member received a less than honorable characterization of service;<sup>31</sup>
- The petitioner has exhausted all remedies available at the respective Military Departments' DRB and BCM/NR;<sup>32</sup> and
- The petitioner's request for an upgrade in the characterization of a discharge or dismissal was denied or it was only partially granted at their respective Military Department's BCM/NR.<sup>33</sup>

Petitioners can request a DARB discharge review by sending a written request by email to [saf.mr.darb@us.af.mil](mailto:saf.mr.darb@us.af.mil) or by mail to Air Force Review Boards Agency, SAF/MRBD (DARB), 3351 Celmers Lane, Joint Base Andrews, MD 20762-6435. To learn more about DARB and the process for petitioning for a final discharge review, visit the Air Force Review Board Agency Website located at <https://afrba-portal.cce.af.mil/#board-info/darb/navbar>.

## **II. Expected Impact of this Interim Rule**

### **A. Baseline**

If requesting a discharge upgrade within 15 years of the date of discharge (except discharges by general courts-martial), the Service member must first apply to their respective Military

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<sup>29</sup> 10 U.S.C. 1553a(c)(2).

<sup>30</sup> See 10 U.S.C. 1553a; see Pub. L. 116-92, section 523; see also DTM, "DoD Discharge Appeal Review Board," published May 5, 2023, and is available on the DoD Directives Division website and can be accessed at <https://www.esd.whs.mil/Directives/Recent-Publications/>. If this portion of the rule is held to be invalid by a court, the remainder of the rule should be considered severable and not affected by such determination.

<sup>31</sup> See 10 U.S.C. 1553a(c)(1).

<sup>32</sup> 10 U.S.C. 1553a(c)(1)(B).

<sup>33</sup> See 10 U.S.C. 1553a(c)(1).

Department's DRB to review their discharge and the resulting characterization of service.<sup>34</sup> A Service member who is not satisfied with the DRB's findings and decision regarding their request may also seek relief from their respective Military Department's BCMR/NR.<sup>35</sup> Service members who were discharged more than 15 years ago<sup>36</sup> and Service members requesting an upgrade of their dismissal or discharge by general courts-martial should seek review of their discharge or dismissal directly to their respective Military Department's BCMR/NR.<sup>37</sup>

Between October 1, 2016, and September 30, 2021, approximately 23,176 individuals requested an upgrade to the characterization of a discharge or dismissal at their Military Department's BCM/NR.<sup>38</sup> Of the 23,176 upgrade requests, the BCM/NRs fully granted 15% of their requests for an upgrade to the characterization of their discharge or dismissal on average.<sup>39</sup>

Military Department BCM/NRs are currently the highest level of administrative review for the review of a discharge or dismissal, and their decisions constitute final agency action on a request for an upgrade to the characterization of a discharge or dismissal. As this is a new congressionally mandated additional review, there is no pre-established baseline cost of comparison for this rule.

## **B. Policy**

DoD's solution is to use existing DoD board personnel who are familiar with established review processes to conduct a final review of a request for an upgrade in the characterization of a

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<sup>34</sup> See 32 CFR 70; see 10 U.S.C. 1553.

<sup>35</sup> 10 U.S.C. 1552.

<sup>36</sup> There is a three-year deadline to apply to a BCM/NR from the date of the discovery of an alleged error or injustice, but the time limit can be waived in the "interest of justice." 10 U.S.C. 1552(b).

<sup>37</sup> 10 U.S.C. 1553.

<sup>38</sup> The Navy's data was included in this number but its case tracking systems for data was based on an in-house database that was inconsistent before mid-2019, and as a result, it is reasonable to assume that the total numbers may be higher.

<sup>39</sup> If an applicant received a partial upgrade at the BCM/NR, this data would not be included in the 15% unless the applicant requested and received a partial upgrade at the BCM/NR. Additionally, the Army could not provide the total number of applicants who received the upgrade requested without a case-by-case review, and as a result, it was not included when determining the average percent of upgrades granted by the military departments.

discharge or dismissal – PDBR, as provided under 10 U.S.C. 1554a. The OUSD(P&R) which is responsible for overseeing the Military Department’s DRBs and BCM/NRs also oversees the PDBR. This solution was chosen because it provides petitioners with a fair and equitable review and it meets Congress’ direction for establishing and implementing a process using existing DoD “organizations, boards, processes, and personnel” to the “maximum extent practicable.”<sup>40</sup> By using existing PDBR personnel, similar processes, and infrastructure to conduct a similar discharge review, it is the most cost-effective approach, based on the analysis in this section.

Congress directed the establishment of the PDBR in 2008 to review a Service member’s request for an upgrade in the disability rating of their medical discharge.<sup>41</sup> The PDBR requires at least three members to conduct the review. Service members who were separated from the Armed Forces, who received a disability rating of 20 percent or less, and were found not eligible for retirement, could request a review of their disability rating under the process. The PDBR reviews the Service member’s medical records and the Military Department’s disability determination and makes a recommendation to the Secretary of the Military Department concerned on whether to upgrade the disability rating. The PDBR was created to review Service member’s medical discharges between a set period, ending on December 31, 2009, and the PDBR will cease operating on October 1, 2024.

Because PDBR personnel are familiar with discharge upgrades from the Military Departments, including Service member medical issues and the related benefits available, the personnel would be able to quickly take on this new congressionally mandated discharge review. The PDBR caseload is dwindling and any remaining cases or requests for a disability upgrade review received after October 1, 2024, will be transferred to their respective Military Department BCM/NRs, so the existing PDBR personnel, processes to conduct comparable reviews, and infrastructure would

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<sup>40</sup> Pub. L. 116-92, section 523.

<sup>41</sup> Pub. L. 110-181; 10 U.S.C. 1554a.

be fully utilized in the intake of requests and conducting the final reviews. A three-member panel also ensures that a petitioner has a fair process that will allow an opportunity for a thorough and thoughtful review of the Military Department's findings and decisions.

### **1. Estimated Final Review Requests**

Pursuant to 10 U.S.C. 1553a, any Service member who has been discharged or dismissed with a less than honorable discharge characterization,<sup>42</sup> whose request for an upgrade in the characterization of their discharge or dismissal was denied or only partially granted by their respective Military Department BCM/NR, and who exhausted all available remedies with their respective Military Department's DRB and BCM/NR, may petition the DARB for a final review. Because section 116-92 of the FY 2020 NDAA and 10 U.S.C. 1553a became effective on December 20, 2019, the DARB requires that the Service member was discharged or dismissed on or after December 20, 2019, to be eligible for this additional review. The eligibility date aligns with the language in section 523 of the NDAA for FY 2020 and allows for faster action while also affording finality to prior, and potentially long-resolved, Military Departments' decisions on requests for upgrades, which would in turn permit earlier intervention by a civilian court. Additionally, it provides for clear eligibility determinations by establishing an explicit date-certain timeframe for eligibility.

As of June 30, 2022, there were approximately 63,294 former Active-Duty Service members who had been discharged or dismissed on or after December 20, 2019 and received a less than honorable discharge characterization.<sup>43</sup> Petitioners however are not eligible for a DARB final

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<sup>42</sup> A less than honorable discharge characterization includes dismissals, a general, other than honorable, uncharacterized, bad-conduct, and dishonorable discharges.

<sup>43</sup> Active-Duty Service members include members of the Army, Navy, Marine Corps, Coast Guard, Air Force, and Space Force. Additionally, while Reserve Service members may be eligible for a final review, Active-Duty Service member data were used here because they primarily petition the DRBs and BCM/NRs, and they are more likely to qualify for Veterans Benefits if their discharge characterization is upgraded as they meet the length-of-service criteria needed for veteran status (38 U.S.C. 5303A(b); 38 CFR 3.12a(a)(1)).

review until they fully exhaust all their administrative remedies at their respective Military Department's DRB and BCM/NR.

The time to fully exhaust their administrative remedies varies significantly based on the complexity of their case, the military service involved, and whether they request a documentary record review or a personal appearance hearing. Based on internal records, the DoD anticipates it will take at least 18 months from their date of discharge or dismissal to fully exhaust their available remedies at their Military Department's DRB and BCM/NR but it could take much longer than this. Individuals who have requested an upgrade to a discharge or dismissal and are not satisfied with their result at their Military Department's BCM/NR may then consider petitioning the DARB for a final review. The DARB requires a petitioner to request a final review within 12 months of receipt of their BCM/NR decision. Thus, it will take a minimum of 18 to 30 months from the date of a discharge or dismissal for the DARB to receive a petitioner's final review request.<sup>44</sup>

Based on the BCM/NR data analyzed previously in the baseline, approximately 23,176 individuals requested an upgrade to the characterization of a discharge or dismissal at the Military Department's BCM/NRs over a five-year period, which equates to 4,635 requests a year. Assuming the BCM/NR will fully grant 15% of these requests to fully upgrade the characterization of discharge or dismissal, this results in an estimated 3,940 petitioners a year who will be eligible for a final review. Because the process for a petitioner to request a final review is straight-forward and some petitioners may not be interested in a further appeal as they may have received partial relief and be satisfied with that result, the DoD assumes that 75% of these eligible petitioners a year will petition for a final review. As a result, we estimate that the DARB will receive 2,955 final review requests a year.

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<sup>44</sup> In fiscal year 2022, the DoD received 4 requests for a final review under this process, but none of the petitioners were eligible for a final review. The petitioners were not eligible because they were seeking an upgrade to a discharge or dismissal that was issued before December 20, 2019, or they failed to first exhaust their administrative remedies at their respective Military Department's DRB and BCM/NR.

## 2. Costs of Policy

In determining whether to petition the DARB for a final review, we estimate that it would take a petitioner up to 2 hours to view case file records and the BCM/NR decision to decide whether to request a final review, and an additional 5 to 30 minutes on average to submit a request for a final review. Assuming 2.5 hours in total at the median hourly rate of \$24.95 based on data from the Bureau of Labor Statistics (BLS),<sup>45</sup> the cost of this activity is \$62.38. While representation by an attorney is not necessary, a Service member may decide to consult with an attorney when determining whether to request a final review. Because the DARB conducts only a record review and a Service member may already have an attorney who represented them in their DRB and BCM/NR proceedings, any consultation with the same attorney for the purposes of conducting this additional DoD review will be minimal.

The cost to a petitioner or an authorized representative for submitting a request for a final review itself will vary based on whether the request is submitted electronically or by mail. The DARB is not authorized to accept new information in support of a petitioner's request for a final review, so the resulting cost to the petitioner may only be minimal printing, scanning, photocopying, and postage. The DARB encourages electronic submission of requests for final reviews by email as the processing will be faster and such a request will be at no cost to the petitioner. If a petitioner elects to mail a request, a basic letter requesting a final review and any supplementary evidence of a relationship to a Service member, if required, would cost the petitioner \$0.55 in postage. A petitioner submitting a request by mail will likely choose to use certified mail, requiring additional postage of \$3.75, and may add a return receipt, that is an additional \$3.05 for a mail receipt or \$1.85 for an electronic return receipt. After a petitioner submits a request for a final review, the DARB will download the relevant case file records from

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<sup>45</sup> According to the Bureau of Labor Statistics, the median weekly earnings for full-time wage and salary workers in 2021 was \$998.00, for an hourly rate based on a 40-hour workweek of \$24.95. (<http://www/bls.gov/cps/cpsaat39.htm>.)

the BCM/NR and this request to transfer records will be at no cost to the petitioner. As a result, we estimate the total cost to a petitioner to request a final review would be \$6.24 to \$69.35, as shown in Table 1.

**Table 1: Estimated Public Cost for DARB Review**

<b>Activity</b>	<b>Hours</b>	<b>Rate</b>	<b>Total Cost</b>
Review case	0 to 2.00	\$24.95	\$0 - \$49.90
Submit petition	0.08 to 0.50	\$24.95	\$6.24 to \$12.48
Additional cost to submit petition via mail		Postage at \$0.55	\$0.55
		Certified Mail at \$3.75	\$3.75
		Mail Return Receipt at \$3.05	\$3.05
		Electronic Return Receipt at \$1.85	\$1.85

<b>Total Cost</b>	<b>\$6.24 to \$69.73</b>
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Next, we estimate the costs associated with

the intake, review, and processing of a final review request, which is illustrated in Table 2. Once the DARB receives a final review request, it is anticipated that it will take approximately 4 hours of time for intake procedures such as data entry for case creation, verifying BCM/NR case information, receiving case file records, bookmarking key documents in the record, sending acknowledgement letters to petitioners, and assigning the case to a three-member panel.

Assuming a GS-11 at the step 5 salary rate of \$84,941 based on the 2022 Washington D.C., locality pay table, which is equivalent to an effective rate of \$81.40 (hourly rate of \$40.70 plus benefits at 100%), the cost for this case management activity per final review request is \$325.60 (effective rate of \$81.40 multiplied by 4 hours of work).

While the complexity of a case will vary and significantly change the time of review, we estimate that approximately 30 hours in total would be spent by board members reviewing the case file records, voting, and drafting a recommendation on whether to upgrade the characterization of the discharge or dismissal. Assuming a GS-14 at the step 8 salary rate of \$155,687 based on the 2022 Washington D.C. locality pay table, which is equivalent to an

effective rate of \$149.20 (hourly rate of \$74.60 plus benefits at 100%), the cost for the review of a petitioner’s request is \$4,476.00.

Additionally, if a petitioner’s case involves a mental health issue, a military or civilian healthcare provider will review the case file records to determine if an advisory opinion was required and included by the BCM/NR. We anticipate this medical review will take about 1 hour on average. Assuming a GP-15 at the step 5 salary rate of \$147,942 based on the 2022 General Schedule base pay table with the additional \$20,000 General Medical Officer incentive pay incorporated, which is equivalent to an effective rate of \$141.78 (hourly rate of \$70.89 plus benefits at 100%)), the cost for this case management activity per final review request is \$141.78. Based on data from January 2022 – March 2022, 41% of the cases before the DRBs and BCM/NRs involved Mental Health claims ([https://boards.law.af.mil/stats\\_CY2022.htm](https://boards.law.af.mil/stats_CY2022.htm)).

**Table 2: Estimated Government Sub-Process Cost**

<b>Review Process</b>	<b>Work Hours</b>	<b>Employee Grade</b>	<b>Effective Rate</b>	<b>No. of Employees</b>	<b>Cost per Process</b>
Intake	4	GS-11(5)	\$81.40	1	\$325.60
Board Review	30	GS-14(8)	\$149.20	3	\$4,476.00
Medical Review	1	GP-15(5)	\$141.78	1	\$141.78

Based on the anticipated 2,955 final review requests a year,<sup>46</sup> assuming 41% of these petitions will involve Mental Health claims necessitating a military or civilian healthcare provider review and 59% will not, we estimate the total annual costs for processing and reviewing these requests to be \$14,360,565, as shown in Table 3.

**Table 3: Estimated Total Government Cost**

<b>Review Process</b>	<b>% Petitions</b>	<b>Cases</b>	<b>Process Cost</b>	<b>Total Cost</b>
Intake and Board Review	59%	1,743	\$4,801.60	\$8,369,188.8
Intake, Board Review, and Medical Review	41%	1,212	\$4,943.38	\$5,991,376.56

<sup>46</sup> These are the total number of petitions, prior to any analysis of the merits of the claims, or determination of whether the petitioner properly applied for a final review.

<b>Total Cost</b>	<b>\$14,360,565</b>
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**C. Policy Alternative #1**

The DoD considered using personnel from the BCM/NRs to conduct the final reviews, as these personnel would be fully trained on the review process for a request for an upgrade to the characterization of a discharge or dismissal, but it concluded that this was not the most equitable solution. The BCM/NRs apply military service specific policies in their reviews of discharges or dismissals. While it may be possible to use personnel from each of the BCM/NRs for a consolidated military service review board to conduct these final reviews, utilizing the same personnel who would be reviewing the findings and decisions of the BCM/NRs may present a conflict of interest as these personnel may have an interest in interpreting a DoD policy based on the culture of their military service. Congress also explicitly provided in 10 U.S.C. 1553a that a petitioner must have fully exhausted all remedies available at their respective Military Department’s DRB and BCM/NR before they are eligible for a final review, which indicates that congress intended the final review process to be separate and distinct from the existing DRB and BCM/NR review processes.

This also may not be the most cost-effective approach because, unlike the PDBR mission, the BCM/NRs caseload is not expected to diminish. If the BCM/NRs took on this congressionally mandated additional review, it would add the estimated cost of \$14,455,783 per year to their budget and may create inefficiencies due to the increase in workload.

Accordingly, the DoD concluded that a distinct board focused on applying DoD-level policies was a better policy alternative, as it could ensure the review of a request for an upgrade to the characterization of a discharge or dismissal was consistent with both military service specific policies and DoD policies. The PDBR is a more cost-effective approach because of its dwindling cases, existing infrastructure and resources, and experience conducting military reviews.

**D. Policy Alternative #2**

The DoD also considered using another existing DoD review board to conduct the final reviews, the Defense Office of Hearings and Appeals (DOHA), but it concluded that it would not be a cost-effective approach. The DOHA holds due process hearings and appeals of security clearance cases. Contractor employees who are applying for or seeking to retain their security clearances can request a hearing, and it will be held and decided before a DOHA Administrative Judge.

Although DOHA's review is different from the review of a request for an upgrade in the characterization of a discharge or dismissal, it was considered as a policy alternative because its board was familiar with applying DoD-level policies and standards of review. The DoD ultimately decided that the PDBR was a better policy alternative than the DOHA because it would take a significant amount of time to train existing DOHA personnel on the review process for a request for an upgrade to the characterization of a discharge or dismissal. It would also require additional personnel, new processes, and infrastructure for the DOHA to conduct these reviews in addition to its security clearance reviews.

## **II. Regulatory Compliance Analysis**

### **Interim Final Rule Justification**

As discussed in the **SUPPLEMENTARY INFORMATION** section, the DoD is issuing this rule as an interim final rule because it is a procedural rule that relates to "agency organization, procedure, or practice" within the meaning of 5 U.S.C. 553(b)(A). As such, this rule is exempt from the prior notice and comment and delayed effective date (see 5 U.S.C. 553(d)) requirements. Additionally, pursuant to 5 U.S.C. 553(b)(B) and (d)(3), there is also good cause to issue this interim final rule and make it immediately effective because delay for notice and comment would be impracticable and unnecessary, and delay in effectiveness is not needed in this circumstance.

Congress' statutory direction and intent was for the DoD to establish and implement a process to conduct a final review of a request for an upgrade in the characterization of a

discharge or dismissal. This rule merely concerns the DoD's procedures and practice for conducting a final review and directs how those requests should be submitted. To comply with congressional requirements, DoD is issuing this rule to establish the DARB as the administrative body to conduct a final review of a petitioner's request for an upgrade in the characterization of a discharge or dismissal. The DARB does not change the substantive standards applicable to requests for an upgrade. The DARB simply reviews the Military Department's decisions to ensure uniform discharge review standards are applied, regardless of the Service member's service affiliation in its review, and it may facilitate an upgrade to the discharge or dismissal characterization.

A Service member's discharge or dismissal characterization may have a significant impact on their personal, financial, and professional future (and by extension, upon their families). Entitlement to educational benefits under the G.I. Bill, for instance, is limited to Service members who separated from active duty with an honorable characterization of service (even separation under general (under honorable conditions) does not qualify). Service members who separate under other than honorable conditions (OTH) are not automatically eligible for VA disability compensation, access to VA home loans, or medical care at VA facilities."<sup>47</sup>

Additionally, many employers request the discharge characterization from individuals who list military service on their resume and may be reluctant to hire individuals who were discharged with a less than honorable characterization of service. Finally, spouses and dependents of Service members may also be impacted by this rule because they may be eligible for additional benefits based on the Service member's characterization of service.

The consequences of delaying an upgrade in the characterization of service can therefore be hugely significant to former Service members and their families. The need to avoid delay in establishing final-review procedures that may result in an upgrade is reflected in Congress'

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<sup>47</sup> Service members who are discharged under other than honorable conditions may apply to the VA for consideration of these benefits and the VA makes this eligibility determination on a fact-specific basis.

directive that the Department establish a final review process not later than January 1, 2021. Between the statutory deadline and the issuance of this rule, the DoD established the policies and procedures for conducting a final rule and its process was provided in a DTM, “DoD Discharge Appeal Review Board,” which was available to the public in May 2023.<sup>48</sup> The DARB is currently operating pursuant to that issued memoranda. The DoD has considered the necessity for immediate implementation against providing affected parties more time for notice and comment on this rule and concluded that, because the rule continues an existing policy and only changes the procedures within the Departments, it is in the best interest of affected Service members and their families to comply with Congress’s direction to act expeditiously. Moreover, because the rule provides for continuity with existing policy, time is not needed for parties to plan or adjust their behavior, and there is good cause to implement the rule now, without waiting for a delayed effective date.

**A. Executive Order 12866, “Regulatory Planning and Review,” as amended by Executive Order 14094, “Modernizing Regulatory Review” and Executive Order 13563, “Improving Regulation and Regulatory Review”**

Executive Order 12866, as affirmed by Executive Order 13563 and amended by 14094 (88 FR 21879, April 11, 2023), directs agencies to assess all costs, benefits and available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, safety effects, distributive impacts, and equity). These Executive Orders emphasize the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated significant, under section 3(f) of Executive Order 12866, as amended by Executive Order 14094.

**B. Congressional Review Act (5 U.S.C. 801 et seq.)**

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<sup>48</sup> The DTM, “DoD Discharge Appeal Review Board,” published May 5, 2023, is available on the DoD Directives Division website and can be accessed at <https://www.esd.whs.mil/Directives/Recent-Publications/>.

Pursuant to subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996, also known as the Congressional Review Act, the Office of Information and Regulatory Affairs has determined that this rule does not meet the criteria set forth in 5 U.S.C. 804(2).

**C. Public Law 96-354, “Regulatory Flexibility Act” (5 U.S.C. 601)**

The USD(P&R) certified that this rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities. Therefore, the Regulatory Flexibility Act, as amended, does not require us to prepare a regulatory flexibility analysis.

**D. Sec. 202, Public Law 104-4, “Unfunded Mandates Reform Act”**

Section 202 of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1532) requires agencies to assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of \$100 million in 1995 dollars, updated annually for inflation. This rule will not mandate any requirements for State, local, or Tribal governments, and will not affect private sector costs.

**E. Public Law 96-511, “Paperwork Reduction Act” (44 U.S.C. Chapter 35)**

While there are no new information collection requirements associated with this rule, two existing collections under the Paperwork Reduction Act are already in use. The DoD does not believe rule changes the data elements, cost, or burden associated with these collections as the DARB is not authorized to accept new information in support of a petitioner’s request for a final review. There is no standardized format for requesting a DARB discharge review. .

- The DARB will review BCM/NR case file records which may include DRB case file records. This is associated with DD 149 titled “Application for Correction of Military Record Under the Provisions of Title 10, U.S. Code, Section 1552,” OMB Control Number. 0704-0003.<sup>49</sup>

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<sup>49</sup> Information regarding this collection – including all supporting materials – can be accessed at [www.reginfo.gov](http://www.reginfo.gov) and providing either the title or number of the collection.

- The DRBs have an active collection associated with DD 293 titled “Application for the Review of Discharge From the Armed Forces of The United States,” OMB Control Number. 0704-0004.<sup>50</sup>

The DoD has Privacy Act System of Records Notices (SORNs) associated with these collections are as follows:

Army (<http://dpcl.d.defense.gov/Privacy/SORNsIndex/DOD-wide-SORN-Article-View/Article/569931/a0015-185-sfmr.aspx>)

Navy and Marine Corps (<http://dpcl.d.defense.gov/Privacy/SORNsIndex/DOD-wide-SORN-Article-View/Article/570411/nm01000-1/>)

Air Force (<https://dpcl.d.defense.gov/Privacy/SORNsIndex/DOD-wide-SORN-Article-View/Article/569833/f036-safcb-a/>)

Defense Finance and Accounting Service (<http://dpcl.d.defense.gov/Privacy/SORNsIndex/DOD-wide-SORN-Article-View/Article/570192/t7340b/>)

Coast Guard (<https://www.gpo.gov/fdsys/pkg/FR-2013-10-02/html/2013-23991.htm>)

Official Military Personnel Files:

Army (<http://dpcl.d.defense.gov/Privacy/SORNsIndex/DOD-wide-SORN-Article-View/Article/570054/a0600-8-104-ahrc.aspx>)

Navy (<http://dpcl.d.defense.gov/Privacy/SORNsIndex/DOD-wide-SORN-Article-View/Article/570310/n01070-3/>)

Marine Corps (<http://dpcl.d.defense.gov/Privacy/SORNsIndex/DOD-wide-SORN-Article-View/Article/570626/m01070-6/>)

Air Force (<http://dpcl.d.defense.gov/Privacy/SORNsIndex/DOD-Component-Article-View/Article/569821/f036-af-pc-c/>)

Coast Guard (<http://www.gpo.gov/fdsys/pkg/FR-2011-10-28/html/2011-27881.htm>)

#### **F. Executive Order 13132, “Federalism”**

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a rule that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has federalism implications. This rule will not have a substantial effect on State and local governments.

#### **G. Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments”**

Executive Order 13175 establishes certain requirements that an agency must meet when it promulgates a rule that imposes substantial direct compliance costs on one or more Indian

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<sup>50</sup> See [www.reginfo.gov](http://www.reginfo.gov) to access the most current version of this information collection – including all supporting documentation.

Tribes, preempts Tribal law, or effects the distribution of power and responsibilities between the Federal Government and Indian Tribes. This rule will not have a substantial effect on Indian Tribal governments.

### **List of Subjects in 32 CFR Part 73**

Administrative practice and procedure, Military personnel, Veterans, Health professions.

Accordingly, 32 CFR part 73 is added to read as follows:

### **PART 73–DOD DISCHARGE APPEAL REVIEW BOARD (DARB)**

Sec.

73.1 Purpose.

73.2 Definitions.

73.3 Membership and designation.

73.4 Responsibilities.

73.5 Application procedures.

73.6 Review procedures and standards.

73.7 Final action.

73.8 Annual reporting requirements.

**Authority:** 10 U.S.C. 1553a.

#### **§ 73.1 Purpose.**

(a) This part establishes the DARB as the administrative body to conduct a final review of a petitioner's request for an upgrade in the characterization of a discharge or dismissal, pursuant to 10 U.S.C. 1553a. This part also provides the procedures for Service members (or their representatives) to request a final review, the standards that the DARB will apply when it reviews a petitioner's request, and the procedures following the DARB's recommended disposition of a request.

(b) The DARB ensures that DoD-level policies, procedures, and standards related to the review of discharges and dismissals are uniformly and consistently applied across the military services. Reporting of the number of upgrades granted or denied pursuant to this final review process will also be made available for public inspection through the DoD Reading Room

available at <https://boards.law.af.mil>. The term “Military Department” as used here in this part includes the Coast Guard. The terms, “Military Services,” and “Armed Forces,” refers to the Army, Navy, Marine Corps, Coast Guard, Air Force, and Space Force.

### **§ 73.2 Definitions.**

*Case file records.* All records that members of the BCM/NR have access to, not limited to what the BCM/NR analyst presents to the DARB. These records necessarily include the record of proceedings, exhibits, and findings and decisions of both the BCM/NR and DRB.

*Characterization of a discharge or dismissal.* The characterization of a discharge or dismissal is a determination reflecting a Service member’s conduct and performance of duty while in military service during a specific period of military service. Administrative discharges can be characterized as honorable, general (under honorable conditions), other than honorable conditions, or can be described as uncharacterized (as in an entry-level separation). If a discharge is adjudged at a court-martial, the assigned characterization may be a bad-conduct discharge, or dishonorable discharge, or a dismissal. The term characterization of a discharge or dismissal is also referred to as a “character of discharge” or “character of service.”

*Characterization of less than honorable.* A characterization that is less than honorable includes a general under honorable conditions, other than honorable conditions, uncharacterized, bad-conduct discharge, dishonorable discharge, or a dismissal.

*DARB member.* A person authorized to review a DARB request and make a recommendation to the DARB president on whether the petitioner’s request for an upgrade to the characterization of a discharge or dismissal should be granted, partially granted, or denied.

*Discharge Appeal Review Board (DARB).* An administrative board constituted by the Secretary of Defense and vested with the authority to conduct a final review of a request for an upgrade in the characterization of a discharge or dismissal under the provisions of 10 U.S.C. 1553a.

*Exhausted all remedies available.* Petitioner requested an upgrade in the characterization of a discharge or dismissal and presented all evidence and arguments in support of their request to their respective Military Department's DRB and BCM/NR, including any materials not previously presented or considered by the board in making such determination when requesting reconsideration by the Military Department BCM/NR.

*Final review.* The process by which a petitioner's request for an upgrade to the characterization of a discharge or dismissal that was not granted at the respective Military Department's DRB and BCM/NR after the petitioner exhausted all remedies available to the petitioner is evaluated.

*New information.* Material not previously presented to, or considered by, the appropriate Military Department's BCM/NR.

*Petitioner.* A member or former member of the Armed Forces whose request for an upgrade to the characterization of a discharge or dismissal was not granted by the relevant Military Department's DRB and BCM/NR. If the member or former member is deceased or legally incompetent, the term "petitioner" includes the surviving spouse, next-of-kin, or legal representative who is acting on behalf of the member or former member. The term "petitioner" also includes a member or former member of the Armed Forces' counsel.

*Preponderance of the evidence.* A standard of proof, evidence which as a whole shows that the fact sought to be proved is more probable than not.

*Record review.* A review of the Service member's case file records.

*Service member.* A member or former member of the Armed Forces.

### **§ 73.3 Membership and designation.**

The DARB is set up independently from the Military Departments' DRBs and BCM/NRs. The DARB is comprised of civilian government employees and consists of a President, Deputy Director, and at least three members for each panel. The DARB President and Deputy Director are appointed as inferior officers by the Secretary of Defense. The Secretary of

the Air Force (SECAF), as the designated lead agent for the DARB, appoints DARB members and assigns them to a panel(s).

#### **§ 73.4 Responsibilities.**

(a) The USD(P&R) is responsible for directing the implementation of the DARB and serves as the Principal Staff Assistant with oversight of the DARB process, policies, procedures, and standards for the final review of a request for an upgrade in the characterization of a discharge or dismissal under 10 U.S.C. 1553a. The USD(P&R) must:

(1) Ensure that petitioners are afforded an opportunity to request a final review of their requests for an upgrade to the characterization of a discharge or dismissals consistent with 10 U.S.C. 1553a;

(2) Ensure that Secretary of Defense appoints the DARB President and DARB Deputy Director as inferior officers;

(3) Review and approve any DARB or DARB-related policies or procedures that the Secretaries of the Military Departments or the DARB President develops before implementation of such policies or procedures;

(4) Resolve all issues concerning the DARB that cannot be resolved between the DARB President and the Secretaries of the Military Departments; and

(5) Modify or supplement this part as necessary.

(b) The Secretaries of the Military Departments have the authority to approve, partially approve, or disapprove a DARB's recommendation to upgrade or partially upgrade a petitioner's characterization of a discharge or dismissal. The Secretary of the Military Department's decision is the final agency action. If an upgrade or partial upgrade is approved, the Secretary of the Military Department is responsible for ensuring that all necessary administrative actions are taken to effect the change, including issuance of a new or corrected DD 214.

(c) SECAF is responsible for the formation, operation, and management of the DARB. The SECAF must:

(1) Appoint DARB members to a panels and assign cases to ensure reviews are conducted in an impartial manner;

(2) Appoint other staff as necessary for intake procedures;

(3) Respond to all inquiries from private individuals, organizations, or public officials about DARB matters. When the specific Military Service can be identified, refer such correspondence to the appropriate Secretary of the Military Department; and

(4) Ensure the timely online publication of annual reports as required by section 523 of the FY 2020 NDAA, Public Law 116-92.

(d) The DARB President is responsible for administrating and overseeing the DARB. The DARB President may delegate their authority to the Deputy Director of the DARB, but no further delegation is authorized. The DARB President shall:

(1) Review a DARB panel's recommendation and provide the final adjudication of the DARB recommendation regarding a petitioner's request for an upgrade to the characterization of a discharge or dismissal.

(2) Develop policy, procedures, and evaluation standards for the DARB, subject to review and approval by the SECAF and the USD(P&R) before implementation of such policy, procedures, and evaluation standards.

(e) The DARB Deputy Director is responsible for managing the DARB's day-to-day operations.

(f) A DARB panel considers a petitioner's final review request properly brought before it, is responsible for performing a record review, applying DoD policies and standards, and if appropriate will make a recommendation to the DARB President on whether a petitioner's request for an upgrade to the characterization of a discharge or dismissal should be granted, partially granted, or denied.

### **§ 73.5 Application procedures.**

(a) *Who is eligible for a final review?* To be eligible for a final review, the following criteria must be met:

(1) The Service member's date of discharge or dismissal was on or after December 20, 2019;

(2) Service member received a less than honorable characterization of service at the time of discharge or dismissal;

(3) All remedies available have been exhausted at the respective Military Department's DRB and BCM/NR; and

(4) The request for an upgrade in the characterization of a discharge or dismissal was denied or it was only partially granted at the respective Military Department's BCM/NR.

(b) *Who may request a final review?* (1) In most cases, the petitioner is the Service member, and the final review relates to their military service records.

(2) If the Service member is deceased or legally incompetent and incapable of acting on their own behalf, a spouse, next of kin, or legal representative may be able to act on behalf of the Service member.

(c) *When can a petitioner request a final review?* (1) Petitioners must first exhaust all available remedies at their respective Military Department's DRB and BCM/NR before requesting a final review. The DARB will return an unexhausted request to the petitioner without considering it.

(2) After exhausting their administrative remedies, Petitioners must request a final review within 365 calendar days after the date of receipt of their respective Military Department's BCM/NR decision. The DARB may deny an untimely request.

(d) *How does a petitioner make a final review request?* (1) A request must be made in writing, but the completion of a DoD form is not required to request a final review. An email or letter requesting a final review is sufficient to make a request. Sample templates to request a final review can be accessed at <https://afrba-portal.cce.af.mil/#application-submission-darb>.

(2) The contents of a request must include the following:

(i) the petitioner's name, address, telephone number, and email address;

(ii) the Service member's name if represented by counsel or a representative; and

(iii) the BCM/NR docket number to assist the DARB in obtaining records from the respective Military Department's BCM/NR. If this information is not provided, the DARB may return the request without considering it.

(3) Additional documentation may be needed in support of a request for review by the DARB. If requesting a final review on behalf of a Service member, proof of status or relationship documents are required and must be enclosed or attached to a request for a final review. Proof of status or relationship documentation may include a death certificate, marriage license, divorce decree, birth certificate, notarized power of attorney, and court appointment of conservatorship or guardianship. The DARB will return the request to the petitioner without considering it when a proper relationship to a Service member has not been shown.

(4) If there is new information in support of a request to upgrade the characterization of a discharge or dismissal, the DARB cannot review it. If the petitioner has new information, the petitioner must first seek reconsideration from the appropriate Military Department's BCM/NR to exhaust all remedies available.

(e) *Where do petitioners send a final review request?* Petitioners may submit a request for a final review by mail or email. Requests by email are preferred and should be sent to the following address: saf.mr.darb@us.af.mil. Requests by mail should be sent to the following address: Air Force Review Boards Agency, SAF/MRBD (DARB), 3351 Celmers Lane, Joint Base Andrews, MD 20762-6435.

(f) *How do petitioners withdraw a final review request?* Petitioners may withdraw a request for a final review in writing at any time before the DARB panel's scheduled review.

## **§ 73.6 Review procedures and standards.**

(a) *Intake of final review requests.* (1) Before conducting a final review, DARB personnel will review submitted requests to ensure eligibility for a final review.

(2) DARB personnel will provide notification to the petitioner to confirm receipt of the final review request. If it is determined that the petitioner is ineligible for a final review, DARB personnel will also notify the petitioner in writing of the reason(s) their request did not qualify for a final review.

(3) Once a case intake is complete, DARB personnel will access or request case file records from the respective Military Department's BCM/NR and assign a DARB panel to consider the final review request.

(4) If it is determined that a petitioner's case involves the adjudication of a Mental Health condition, a military or civilian health care provider will review the case file records to determine if a medical advisory opinion is required and missing. If the case file is missing a medical advisory opinion or other pertinent information the case will be returned the Military Department's BCM/NR for reconsideration or a document request.

(b) *Consideration of final review requests—(1) Scope of review.* The DARB's review is limited to the case file records related to a petitioner's request for an upgrade in the characterization of a discharge or dismissal. The DARB is not authorized to review or address new information provided by a petitioner in support of a request for an upgrade in the characterization of a discharge or dismissal.

(2) *Standard of review.* In considering a petitioner's request for an upgrade in the characterization of a discharge or dismissal, the DARB will review the Military Department's BCM/NR decision *de novo*. The DARB independently reviews the case file records, applies DoD discharge review polices and standards and applicable Military Service policies, and recommends an upgrade, if appropriate. This new review occurs without giving any deference to the Military Department's BCM/NR findings and decision.

(3) *DARB panel adjudication.* The DARB panel will consider the petitioner's request and case file records, examine pertinent DoD and Military Service regulations and policies, discuss the case and issues, and vote to determine whether a petitioner's request for an upgrade in the characterization of a discharge or dismissal should be granted, partially granted, or denied.

(4) *DARB panel recommendation.* A majority vote constitutes the recommended action of the DARB panel. The DARB panel will provide a written recommendation including the number of votes and any minority votes and their reason(s) for their recommendation. The written recommendation must provide a basis for their decision to deny a request to upgrade, to partially upgrade, or to fully upgrade the characterization of a discharge or dismissal. The DARB panel's written recommendation will be submitted to the DARB President.

(5) *Review of the DARB panel's recommendation and the recommendation of the DARB.* The DARB President reviews the DARB panel's written recommendation and makes the recommendation for the DARB. The DARB President will submit the DARB's written recommended action to the SECAF.

(i) If the DARB President approves the DARB panel's recommendation, the recommendation will constitute the recommended action of the DARB.

(ii) If the DARB President disagrees with the DARB panel's recommendation, the DARB President will provide a new recommendation. This new recommendation will be in writing and will include the change to be made and the reasons for rejecting the recommendation of the DARB panel.

(6) *Discretionary review of the DARB's recommended action.* The DARB President's actions are subject to discretionary review by the SECAF.

(i) The DARB's recommended action will be the final recommended action unless the SECAF exercises their discretionary review authority within 30 calendar days after the DARB President submits the recommendation to the SECAF.

(ii) If the SECAF chooses to exercise their discretionary review authority to review the DARB's recommended action within 30 calendar days, and the SECAF changes the DARB's recommended action, the SECAF will provide a written recommendation with supporting reasons and the new recommendation will constitute the final recommended action.

(iii) The SECAF may delegate, in writing, its discretionary authority to act on DARB recommendations to a Presidentially appointed, Senate-confirmed (PAS) official but further re-delegation is not authorized.

(c) *Reconsideration at the BCM/NR.* If it is unclear from the DARB's review whether the appropriate Military Department BCM/NR considered relevant evidence when it denied the requested discharge or dismissal upgrade, the DARB may return a case directly to the BCM/NR for reconsideration. If the Military Department BCM/NR concerned accepts the case for reconsideration, the petitioner will be notified in writing.

#### **§ 73.7 Final action.**

(a) The Secretary of the Military Department concerned will approve or disapprove the DARB's recommended action to upgrade or partially upgrade the characterization of a discharge or dismissal within 90 calendar days. The Secretary of the Military Department must approve the DARB's recommended action unless the Secretary finds that the recommendation is not supported by the preponderance of the evidence.

(b) If the DARB recommends to deny an upgrade to the characterization of a discharge or dismissal and upholds the Military Department's BCM/NR decision, the DARB will notify the petitioner in writing of its final decision. If the DARB recommends to upgrade or partially upgrade the characterization of a discharge or dismissal, the Secretary of the Military Department concerned will notify the petitioner in writing of its final decision.

(1) If the Secretary of the Military Department approves the DARB recommendation, the petitioner will be notified of the approved change and any change to the characterization of a discharge or dismissal will be effective as of the date of discharge.

(2) If the Secretary of the Military Department disapproves the DARB recommendation, the Secretary concerned must provide the petitioner a written explanation detailing its rationale for disapproving the DARB's recommendation.

(c) The Secretaries of the Military Departments may delegate, in writing, the authority to act on DARB recommendations to a PAS official but further re-delegation is not authorized.

(d) The Secretary's or designee's action will be the final action. The petitioner has no right to a further review or to appeal this decision.

### **§ 73.8 Annual reporting requirements.**

(a) The DARB President will submit draft reports to OUSD(P&R) by the 1st of October for the preceding FY (October 1st through September 30th). The first report will be published on October 1, 2022, and the report will contain the DARB data for FY 2022.

(b) The reporting period will be inclusive from the first through the last days of each reporting period.

(c) The report will contain the following information:

(1) The number of requests received;

(2) The number of requests rejected for failure to meet eligibility criteria for a final review;

(3) The number of requests considered;

(4) The number of requests returned to the BCM/NRs for reconsideration;

(5) The number of recommendations to upgrade the characterization of a discharge or dismissal granted by the Secretaries of the Military Departments pursuant to the DARB, to include the most common reasons for such upgrades; and

(6) The number of recommendations to upgrade the characterization of a discharge or dismissal declined by the Secretaries of the Military Departments pursuant to the DARB, to include the most common reasons for such declinations.

(d) The annual reports will be published on a publicly accessible DoD website; the reports can be accessed at [https://boards.law.af.mil/OSD\\_DARB.htm](https://boards.law.af.mil/OSD_DARB.htm).

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