



## ARMY NATIONAL GUARD TRIAL DEFENSE SERVICE

653<sup>d</sup> TRIAL DEFENSE TEAM, WEST REGION  
UTAH NATIONAL GUARD  
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REPLY TO  
ATTENTION OF

NGJA-UT-TDS

6 March 2011

MEMORANDUM FOR Enlisted Soldiers Facing Chapter Separation under AR 135-178.

SUBJECT: Enlisted Separation Board Information (AR 135-178).

1. Board Notice. If you have been provided notice of proposed separation under AR 135-178, then you have various rights regarding contesting or not contesting the process, and making alternate claims for medical discharges, and need to know what affect separation may have on your rank, benefits, or bonus that you may have received. Every case is different, each State manages their separation programs a little differently, and this memorandum does not constitute legal advice, nor substitute for the advice of a Judge Advocate. The Trial Defense Service (TDS) provides defense services for separation boards. Time is of the essence if you have received a board notice. Contact TDS for Defense Counsel (DC) assignment pursuant to your State's resources (TDS or OSJA representation) as soon as possible. If you contact the 653d TDT, use the Request for Counsel (RFC) form, which may be obtained at [www.ut.ngb.mil/jagtds/default.htm](http://www.ut.ngb.mil/jagtds/default.htm).

2. Defense Counsel Representation. Defense counsel appointed to represent a Soldier is typically a National Guard judge advocate. As such they are M-Day and not full time. They typically have significant experience in reviewing legal matters and presenting legal matters to courts of law, as well as Administrative Boards. You will not be their only case, and you must assist in your representation. Your defense counsel will need your assistance in developing your case, but at the same time you need to coordinate your actions with your counsel. Unintended case development, informal discovery, such as obtaining witness statements, or pressuring someone to testify, or interfering with other witnesses, can damage or destroy a case or even be a criminal offense. Typically the defense counsel will want to review the Government case against you and advise you on how strong the Government case is, before you start elaborating on your case. Anything you tell your counsel about your case must be something that you are willing to testify to if you choose to testify. In other words, if you decide to lie under oath and your counsel knows what you have done, they will have to withdraw from your case immediately – during the hearing. If they think you are going to lie based on conflicting statements you have given, they may not be able to put you under oath to give testimony if they think you are going to lie. Once the defense counsel has reviewed your case, then between you and your counsel, you can decide how to best outline your case for further consideration on the merits of any defense. This all may result in the best course of action being to submit a conditional waiver to try to get a better discharge than an Other Than Honorable (OTH).

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3. General Board Hearing, conditional waivers and medical issues. Besides going to the separation board, your primary option is to submit a **CONDITIONAL WAIVER** and thereby offer to accept an Honorable but most likely a General Discharge in lieu of attending the board and putting on a case. A conditional waiver form is a separate document which your DC can provide you to complete and return for processing. If you have a military connected medical disability then a medical discharge may be pursued which takes priority over the separation process. Your ETS date is of critical importance because whatever is going to happen, the Government must complete the board process before your ETS date, and they cannot Flag and keep you past your ETS date unless you are pending courts-martial charges. If you are discharged, regardless of the characterization of discharge, a reenlistment (RE) code may be placed on your record that will make it impossible for your subsequent reentry into the military.

4. Summary of Rights and Matters:

a. Types of Discharge. There are three types of separation in administrative processes: **HONORABLE, GENERAL UNDER HONORABLE CONDITIONS, AND OTHER THAN HONORABLE**. There is great stigma attached to the OTH, lesser in the General discharge, and none with an Honorable, though each discharge certificate reflects the chapter basis for discharge.

b. OTH and Substantial Adverse Effects. If you are subject to an Other Than Honorable Discharge (OTH) and you receive such, then you may encounter and should expect to encounter substantial adverse consequences in civilian life. An OTH also results in an automatic reduction to E1. You may have to repay any 'bonus' you have received, and you will likely lose any military or Veterans rights or benefits. Your original separation notice should tell you whether you may be subject to getting an OTH. If you are facing a board action for substandard duty performance only, then you should be subject only to receiving a general or honorable discharge, though you may have received notice for an OTH. If you have been given notice for an OTH you should still presume that you can get that characterization of discharge.

c. Conditional Waivers. Soldiers at a board often face an **OTHER THAN HONORABLE (OTH)** discharge and to avoid the possibility of receiving an OTH, you may submit a Conditional Waiver offering to accept an Honorable or General Discharge (GD). If you waive your rights to a board and request a conditional waiver of the board and it is approved, then you will not appear before the board and will be separated based on that waiver. Time is generally of the essence in getting a conditional waiver submitted, processed and considered by The Adjutant General before the date of the board. Just because a waiver has been submitted does not mean the board date is off or continued. You need to maintain contact with your DC and check with them just prior to the board date to see if there is a change and whether the conditional waiver has been approved. Unless you are told otherwise, you should appear as directed, in appropriate uniform at the date, time and place of the scheduled hearing.

d. Fraudulent Enlistment. If you are being separated for fraudulent entry then your enlistment may be voided.

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e. Upgrading Discharges from Separation. If you receive a discharge less than honorable, there is no automatic upgrading or review of the discharge by any Government Agency. Upgrading of the character of discharge is only on application to the Army Discharge Review Board (ADRB) or the Army Board of Correction of Military Records (ABCMR). There is no guarantee that a discharge would be upgraded and it should be considered an unlikely event. Once discharged, you would have no rights to military lawyers for assistance, and you would have to file with the ADRB or ABCMR yourself or hire a private attorney to assist you. The first course of action is the ADRB. The ADRB reviews discharges of former soldiers, except those given by reason of a sentence of a General Court Martial or over 15 years since discharge. The purpose of the review is to determine if the discharge was granted in a proper manner, i.e. in accordance with regulatory procedures in effect at the time, and that it was equitable, i.e. giving consideration to current policy, mitigating facts, and the total record. Information on the ADRB is currently located at: <http://arba.army.pentagon.mil/adrb-overview.cfm>.

If after exhausting administrative remedies, you still feel that there is an error or injustice in your record, you may apply to the ABCMR. You may complete an online application at <http://actsonline.army.mil> and send the signature page and evidence as instructed by the online program, or you may print a blank DD Form 149 from the Army Review Boards Agency website at <http://arba.army.pentagon.mil/index.htm> and mail it to the address shown on the reverse of the form. As part of your evidence please provide a copy of documents showing that you have exhausted all administrative remedies.

f. Attorney Client privileged communications. Communications between you and consulting counsel regarding the merits of the separation action are privileged communications between you and the attorney. Other than a Chaplain, and a few other privileged communications under law, anything you say to someone is not privileged and can be used against you. Your best friend can be forced to testify to the things you have told them.

g. AWOL. If the basis for the separation is a continuous unauthorized absence of 180 days or more, a discharge as an OTH is a conditional bar to benefits administered by the Veterans Administration, regardless of any action by the Army Discharge Review Board, or the Army Board of Correction of Military Records.

h. Necessity of Client Soldier's Request for Assistance. A judge advocate cannot represent the soldier before an administrative separation board unless consulting counsel is appointed as counsel for the Soldier for representation and the soldier requests the representation. You must affirmatively contact your assigned DC and request their assistance. If you do not, they are not going to be assisting you. Just because you have received this letter does not form that attorney client relationship until you ask your assigned DC for assistance.

i. Eighteen (18) Year Safe harbor and the Board Decision Process. If you have over 18 years of good time in the service for the purposes of retirement, then any separation action must be approved by HQDA. Otherwise, at the board, the board will make a finding on the BASIS or cause for the action (i.e. whether you are guilty), and then decide whether the matter is justification for SEPARATION, and then whether you should be separated, and if so then

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whether any separation action should be SUSPENDED under terms of PROBATION for up to one year, and the CHARACTERIZATION of discharge, if any to be given at separation. The Adjutant General (TAG) may approve the action, may approve RECOMMENDATIONS for suspended separation, and may disapprove and retain. However, the TAG ordinarily approves the action taken by the board of officers (usually COL, LTC, MAJ).

j. Active Guard Reserve Soldiers. If you are AGR (Active Guard Reserve) separation will cause you to be terminated from your full time employment. The system is not supposed to allow a paper separation from the AGR program, followed by a separation from the MDay Traditional Soldier side, so if the Government wants you out of both then they have to process the Board Separation rather than doing two separate processes. This also means that if the Government separates you from your AGR position and then later uses the SAME events to seek to separate you from your MDay position that such action is inherently wrong and may be a basis to defend against the MDay separation. Those facts, however, can be used in characterization of discharge.

k. Medical Issues. Service Connected Medical Issues and Medical Evaluation Boards. If you have service connected medical issues then you may have an alternative to outright separation. See our separate information memorandum on Medical issues and MEB (Medical Evaluation Boards). You need to make a timely request for this process as it will not stop the board process. The board can proceed and the final decision by TAG made subject to determination of the Medical Review Board process.

5. Discharge Characterization Effects. A General Discharge would have some adverse effect on your military and veteran's rights, but nothing of the nature that an OTH will have. A GD would have an adverse effect on any already accrued military benefits from prior Federal or other State Service though this is subject to change. In any case a GD would have an adverse effect on any educational benefits that you may be looking for from this enlistment and you would have bar to reenlistment against you. In regards to any rights you may lose as a result of discharge characterized as GENERAL or OTHER THAN HONORABLE, you may wish to speak with your J-1, Education Benefits usually at your State Military Department. If you speak with them then tell them your situation and ask generally whether the general discharge will have any effect on your military benefits. Any discharge will likely be accompanied by a bar to reenlistment, and an adverse RE (reenlistment code) and so your re-entry into the military is unlikely, though possible, after separation.

6. The Separation Board Process.

a. A separation board is much like a trial with three Judges. Three officers will consider evidence presented by the Government and the Defense in considering the allegations and then make required recommendations. Generally, the Government's Recorder may present an opening statement and your DC also may present an opening statement. Thereafter the Government presents its written evidence and testimony. Once the Government finishes with their case then the defense presents their case. At the end, the Government gets a closing argument, defense a closing argument and the Government the final word. Pretty much anything

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relevant can come into the board process. The board process is generally a 'bifurcated process' meaning a case on the facts of whether the Government proved its allegations, and secondly on whether discharge is warranted, the characterization of discharge and whether suspension of separation is warranted, and if so then on what terms of 'probation'. The presentation of evidence may merge together but only facts relevant for whether a violation has been proven should be considered by the board in the fact determination portion, and the balance of facts for the other issues if a violation is found.

b. At the board you would have an opportunity to submit any evidence to dispute the Government's evidence against you, though any admissions you may have made or any underlying Article 15's would be used against you and damage your ability to rebut the Government's evidence. After attacking the Government's evidence you would be allowed the opportunity to submit any evidence of good military character and bearing and that, generally, you should be retained in the military regardless of the underlying offenses. This usually works only if you can get your entire chain of command to testify for you, recommending retention or at least getting them to submit statements (preferably affidavits) on your behalf. You can testify yourself and either make a sworn or unsworn statement. If you make a sworn statement then the board recorder (prosecutor) and the board members may ask you questions. Once the evidence is submitted the Board will generally recess to consider the evidence and will make a decision on the basis of the allegations (i.e. guilty or not guilty), make a recommendation of separation or retention and the characterization of discharge, if any.

7. Preparing for the Board. If you wish to go to the board then you need to tell your DC and coordinate with them on actions to take in preparation for the board. You then need to set about obtaining statements, witnesses, and any other positive information (awards, etc) that can be used at the board. Collect up documents and send COPIES to your DC, probably by email by scanned PDF document.

a. Witnesses. You need to tell your DC immediately who could be witnesses on your behalf. Your DC will need their names, telephone numbers, fax numbers, email addresses, mailing addresses, and a general idea of what they would say. The information you provide your DC should be directed to your DC, not copied to anyone else. You should write down the basics of such information, in a format of WHO they are, WHAT they know, WHEN did they know it, WHERE did they come by the information, WHY they are involved, HOW they know the information they have, HOW come they are involved, etc. You will need to tell them that you want them to testify for you and they will then need to coordinate with their command. If they are to testify by phone then they must be available all day of the scheduled board. You would also need to get your Army Service Uniform or Class A Uniform prepared.

b. Statements. You would want to contact witnesses in your chain of command, past and present, to obtain their statements, or their live testimony in your favor at the board. You should be seeking people who know you, like you, and will support your continued service in the National Guard. You can obtain their sworn or unsworn statement, their attendance at the board, or at least a telephone number where we can call them on the date and time for the board. They would need to be reasonably available at a moments notice during the few hours of the board.

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They may or may not be called depending on what happens. Since things can happen and they may not be available, you would want to consider a written statement by them outlining their knowledge of you, their impression of your military service, your military character and bearing, your rehabilitative potential, their desire for you to be retained and possibly the reasons why, and any factual issues that may present an actual defense to the charge.

c. Drug Testing. If your case is a drug case, then you may wish to immediately pursue a 'hair test' whereby your head hair is tested for drug metabolite. Otherwise, a series of Urinalysis, taken randomly from a local lab, over the time from the notice to the board date, can be of assistance. You are free to contact labs to obtain a hair test which will test back over time depending on the length of your hair. We have previously had experience with National Medical Services, 2300 Stratford Ave, Willow Grove, PA, 19090; 800-522-6671; 215-657-4900; fax: 215-657-2972, but no recommendation of their services is made. You can and should look for other reputable labs to perform a hair test. You may also wish to set up with your private health care provider to secure the hair sample, and or a random UA testing process until the board meets. The hair test will reach back probably 2-4 months based on the length of your hair now and whether the hair samples you have now were present when the original test was taken. If the test is taken too late then the test will have no relevance. Random testing is good only to show whether you subsequently use drugs. You should not talk to anyone but your DC and your doctor about the testing. You should show your DC the test results. However, if you have positive tests, and negative tests, you can be sure that the board will ask whether you ever had other positive tests and you cannot lie before the board. All testing costs are up to you, and time is of the essence for you to do a hair test if you wish to pursue it. Also, you should be aware that drug testing cut off levels are designed to generally eliminate most argument of innocent and unknowing ingestion of drugs. Marijuana brownies, cookies, second hand smoke, and other unknowing ingestion defenses generally are not viable.

d. Loose Lips Sink Ships. You should not discuss your case with any third party. Anything you say can and may be used against you. Your best friend, girl or boy friend, or relatives can be forced to testify against you. If you bring them to the board, you can expect that the recorder will call them to testify.

e. Just the Facts. In discussing the case with defense counsel, your DC will ordinarily want to review your case based on the facts that the government has. You need to understand that if you make admissions to your DC, that such admissions are matters that you would have to testify to if you choose to testify. In other words, your DC cannot put you on the stand to testify if you were to opt to lie and such was known to them. If you start lying on the stand the DC will have to call the board to a halt and resign. Also, anything you submit in writing CAN be subject to Discovery and Disclosure to the Government (the RFC and CIS is intended to be protected from disclosure)

8. TIME IS OF THE ESSENCE IN YOUR DEFENSE. You must decide soon whether to submit a conditional waiver or whether to go to the board. If you wish to go to the board then you must consider a defense. You also must decide whether you desire representation and IF YOU DESIRE MILITARY DEFENSE then you must contact your DC WELL BEFORE THE

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BOARD DATE as the later you contact your DC the less of a formal defense that can be organized.

a. You may also hire a private attorney at no cost to the Government.

b. If you desire military defense counsel and want to go before the board, or desire to submit the conditional waiver, please complete the summary information sheet enclosed and return to your assigned DC immediately. **YOUR COMPLETION OF THIS FORM IS VOLUNTARY. THE FAILURE TO COMPLETE THE FORM SIMPLY REDUCES THE DC'S ABILITY TO ASSIST IN YOUR DEFENSE.**

c. **IF YOU DO NOT CONTACT YOUR DC THEN YOUR DC WILL NOT BE REPRESENTING YOU AT THE BOARD.** Do not send your DC anything that you want returned. Ordinarily your DC will destroy all materials at the end of your case not otherwise submitted to the Government. I will not return any materials to you unless at the hearing. You should retain all originals or copies of your originals. Bring your originals to the board hearing if you opt to have a hearing.

9. Regardless of the information in this memorandum, **FOLLOW THE INSTRUCTIONS OF YOUR ASSIGNED DEFENSE COUNSEL.**

10. Upon conclusion of your case, no further representation should be assumed as no continuing attorney client relationship will exist unless express arrangements are otherwise made, required, and allowed by Army Regulation; and if you are separated from the service, no military representation is available. This memorandum is subject to change.

11. POC is the undersigned and may be contacted at [NGUT.JAG.653UT.TDS@ng.army.mil](mailto:NGUT.JAG.653UT.TDS@ng.army.mil).



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