



## TRIAL DEFENSE SERVICE FACT SHEET

### Enlisted Separation Board Fact Sheet



#### 1. Board Notice

If you have received Notification of Separation, you have various rights regarding contesting (or not contesting) the process. You need to know what effect separation may have on your rank, benefits, or bonus payments you may have been paid (or are scheduled to receive). Every case is different and this fact sheet does not constitute legal advice nor does it substitute for the advice of a Judge Advocate. Trial Defense Service (TDS) provides defense services for separation boards. However, time is of the essence when it comes to building a strong case in your defense. If you have received a board notice, you may contact this office at 512-782- 6069.

#### 2. Defense Counsel Representation

The JAG appointed to represent a Soldier is typically a Reserve Component (RC) National Guard JAG. As such, they are in an M-Day status 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 JAG will need your assistance in developing your case but at the same time, you need to coordinate your actions with your JAG. Unintended case development, informal discovery, such as obtaining witness statements, pressuring someone to testify, or interfering with other witnesses can damage a case or even be a criminal offense. Typically the Defense Counsel (DC) will want to review the Government case against you and advise you on how strong the Government case is before elaborating on your case. Anything you tell the JAG 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 the JAG 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. So, don't tell your JAG anything you are not willing to testify about in the hearing. Once the DC has reviewed your case, you can decide how to best outline your case for the JAG's 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).

#### 3. General Board Hearing and Conditional Waivers

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. 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 involuntarily extend 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 could make it impossible for your subsequent reentry into the military. There is little to nothing that your JAG can do about that event.

#### **4. Summary of Rights and Matters:**

##### **a. Types of Discharge.**

There are three types of separation in administrative processes: (1) Honorable (2) General, Under Honorable Conditions and (3) Under Other Than Honorable Conditions (OTH). 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 even have to repay any bonus you have received. 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 OTH discharge. To avoid the possibility of receiving an OTH, you may submit a Conditional Waiver offering to accept an Honorable or General, Under Honorable Conditions Discharge. If you 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.

##### **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 or gave proper 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 remedy, 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 JAG 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. Eighteen (18) Year (Sanctuary) 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. determine whether you are guilty) and then decide whether the matter is justification for separation. It is possible for the board to direct separation action to be suspended. The Adjutant General (TAG) may approve the action, may approve recommendations for suspended separation or may disapprove and retain. However, the TAG ordinarily approves the action taken by the board of officers.

**5. The Separation Board Process**

**a. 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 (preferably by email via scanned PDF documents).

**b. Procedure**

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 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 presentation of evidence may merge together but only facts relevant for whether a violation has been proven should be considered by the board.

**c. Submissions to the Board**

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 Section 15's would be used against you and damage your ability to rebut the Government's evidence). After rebutting the Government's evidence, you would be allowed the opportunity to submit any evidence of good military character and bearing that gives reason why you should be retained in the military regardless of the underlying offenses. You can testify yourself and 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.

#### **d. 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, and HOW they know the information they have, HOW come they are involved, etc. If a witness has good facts for your situation, (regardless if they “like” you or not) then please tell your DC that. 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.

#### **e. Statements**

You would want to contact witnesses in your chain of command, past and present, to obtain their statements or have 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 moment's notice during the few hours of the board. 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 a actual defense to the charge.

#### **f. 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. You can and should look for 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 (guesstimate - 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 generally not tell your DC if the tests come back positive as if you tell your DC anything that you might otherwise try to leave out or wrongly testify to at a board will cause me to withdraw from representing you as I cannot promote any false testimony before the board. You should show your DC the negative tests. 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 that angle. Also, you should be aware that drug testing cut off levels are designed to generally eliminate most argument of innocence and unknowing ingestion of drugs. Marijuana brownies, cookies, second hand smoke, and other unknowing ingestion defenses generally are not viable.

**g. 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 whoever can be forced to testify against you. If you bring them to the board, you can expect that the smart recorder will call them to testify.

**h. Just the Facts**

In discussing the case with me, 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).

**6. Requesting Military Representation**

You also must decide whether you desire representation and if you desire military defense then you must contact your DC well before the board date as the later you contact your DC the less of a formal defense that can be organized. You may also hire a private attorney at no cost to the Government. 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 to be returned. 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. Regardless of the information in this memorandum, FOLLOW THE INSTRUCTIONS OF YOUR ASSIGNED DEFENSE COUNSEL.

**7. After the Board Hearing**

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 representation by JAG can exist for you. This fact sheet is subject to change, so get the most current version.