

**JUDICIAL PROCEEDINGS PANEL
REQUEST FOR INFORMATION SET # 3**

80. Board of Correction of Military Records (BCMRs) –

a. How have BCMRs typically handled applications that specifically contain requests for relief from retaliation for making a protected communication?

USA	<p>The Army Board for Correction of Military Records (ABCMR) considers applications for correction of military records at the request of a member or former member who alleges that unfavorable personnel actions were taken or were threatened to be taken or favorable personnel actions were withheld or were threatened to be withheld in reprisal for making or preparing a protected communication, pursuant to 10 U.S.C. § 1034.</p> <p>In resolving such an application, the ABCMR reviews the Inspector General (IG) report, if any, and any other documents submitted by the applicant and associated documents retained in their Official Military Personnel File (OMPF) or Army Military Human Resources Record (AMHRR). If the applicant references an IG report or criminal investigation, ARBA will request a copy of the report. The ABCMR issues a final decision on an application received under Department of Defense Directive 7050.06 within 180 days after receipt of the application.</p>
USAF	<p>The Air Force Board for Correction of Military Records (AFBCMR) takes great care in the expeditious processing of requests from applicants claiming to be the victim of reprisal in violation of 10 U.S.C. § 1034 (Protected Communications; Prohibition of Retaliatory Personnel Actions). Such cases are flagged upon receipt as reprisal cases as applicants claiming reprisal are afforded expedited processing (180 days) in accordance with DoDI 1332.41, <i>Boards for Correction of Military Records</i>, and AFI 36-2603, <i>Air Force Board for Corrections of Military Records</i>. When such a case is received, the AFBCMR staff secures pertinent military personnel records, service medical records (if applicable), reports of investigation from the IG’s office, and advisory opinions from the appropriate office(s) of primary responsibility, which are essential to the AFBCMR making a reasoned determination as to whether or not the applicant is the victim of an error or injustice under 10 U.S.C. § 1552 (Correction of Military Records; Claims Incident Thereto), and/or the victim of reprisal in violation of 10 U.S.C. § 1034. The AFBCMR has unique responsibilities when it comes to reprisal cases. In cases where the IG substantiates that an applicant was the victim of reprisal, the AFBCMR has the authority to make the necessary corrections to make the victim whole. While the AFBCMR is not ordinarily an investigative body, in adjudicating reprisal cases, it may receive oral argument, examine and cross-examine witnesses, take depositions, and, if appropriate, conduct an evidentiary hearing. Additionally, the AFBCMR may request the IG gather further evidence for their consideration and has done so three times in the last four years. In those cases where the AFBCMR determines that the actions taken against the alleged perpetrator were insufficient, it may recommend to the Secretary of the Air Force that additional disciplinary action be taken.</p> <p><u>References:</u></p> <p>- DoDI 1332.41, <i>Boards for Correction of Military Records</i>, 23 April 2007,</p>

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	<p>http://www.dtic.mil/whs/directives/corres/pdf/133241p.pdf</p> <p>- AFI 36-2603, <i>Air Force Board for Corrections of Military Records</i>, 5 March 2012, http://static.e-publishing.af.mil/production/1/af_a1/publication/afi36-2603/afi36-2603.pdf</p>
USN	SECNAVINST 5420.193, Board for Correction of Naval Records, addresses the requirements for handling Whistleblower Protection Act cases. It mirrors the processing timelines and appellate review requirements contained in DoDD 7050.06, Military Whistleblower Protection. Cases are required to be processed within 180 days and the applicant informed of their right to SECDEF review.
USMC	The BCNR handles all cases within the Department of the Navy, including Marine Corps cases. The U.S. Navy response therefore applies to the Marine Corps.
USCG	The Chair of the BCMR has met with personnel in the Office of the Inspector General to ensure they are aware of the BCMR as an avenue of redress, but the BCMR has not received a whistleblower case in several years. The BCMR has specific regulations for handling such whistleblower cases at 33 CFR part 53.

b. Are there any additional considerations given if an applicant states or provides evidence that he/she has been a victim of sexual assault in the military?

USA	All information provided by an applicant is thoroughly analyzed and considered. If the applicant indicates there was a Criminal Investigation or IG Investigation, ARBA will request those documents. The Army Review Boards Agency (ARBA) staff engages the ARBA Medical Advisor if a medical review could provide the board members with additional relevant insight or clarification on the reported trauma and the effect on the individual. In turn, the ARBA Medical Advisor will coordinate with the Army Office of The Surgeon General (OTSG), as appropriate. Whenever an external advisory opinion is obtained, it is provided to the applicant under “ex parte prohibited” rules for the applicant’s awareness and to provide response or rebuttal, as appropriate in accordance with 10 U.S.C. § 1556. All advisory opinions are included in the case documents for board review and deliberation.
USAF	<p>Yes, in accordance with Section 547 of the Fiscal Year 2015 National Defense Authorization Act (NDAA), the AFBCMR is required to give due consideration to the psychological and physical aspects of an individual’s experience in connection with the sex-related offense and determining what bearing such experience may have had on the circumstances surrounding the individual’s discharge or separation. While these requirements prescribe that a confidential process be utilized in adjudicating such cases, the AFBCMR already complies with these provisions as it provides a confidential process for all applicants where the protection of their privacy is paramount. While the Freedom of Information Act (FOIA) requires the AFBCMR to publish records of proceeding to a public reading room, any personally identifying information is redacted prior to this information being posted.</p> <p><u>References:</u></p> <p>- DoDI 1332.41, <i>Boards for Correction of Military Records</i>, 23 April 2007, http://www.dtic.mil/whs/directives/corres/pdf/133241p.pdf</p>

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	- AFI 36-2603, <i>Air Force Board for Corrections of Military Records</i> , 5 March 2012, http://static.e-publishing.af.mil/production/1/af_a1/publication/afi36-2603/afi36-2603.pdf
USN	If the Board for Correction of Naval Records (BCNR) determines the information provided by an applicant alleging sexual assault is credible, the BCNR will consider that evidence in accordance with FY15 NDAA, Section 547. The BCNR is instructed (1) to give due consideration to the psychological and physical aspects of the individual's experience in connection with the sex related offense; and (2) to determine what bearing such experience may have had on the circumstances surrounding the individual's discharge or separation from the Armed Forces.
USMC	The BCNR handles all cases within the Department of the Navy, including Marine Corps cases. The U.S. Navy response therefore applies to the Marine Corps.
USCG	If the Board received such an application, it would consider the recent Medical Guidance about PTSD issued by DoD for the correction boards on September 3, 2014.

- c. What considerations are given when applicants note they filed a sexual assault report, admittedly engaged in collateral or subsequent misconduct, and the command's adverse action was unfair or an injustice (i.e., a request to change an involuntary administrative discharge to a medical discharge)? If those cases are not treated as retaliatory claims, please explain how BCMRs distinguish those record corrections requests which may imply a causal connection to the sexual assault from those that specifically state the action was in reprisal to filing a report.**

USA	See 80 b above. Additionally, ABCMR staff engages the ARBA Legal Advisor(s) to provide additional guidance, clarification, or context, as it pertains to the governing and applicable laws, policies, and other regulatory guidance. All advisory opinions are included in the case documents for board review and deliberation.
USAF	The AFBCMR has yet to receive a specific request from an applicant claiming that their personnel action was a reprisal for reporting a sexual assault. Rather, they are claiming to be a victim of a sexual assault who was discharged because of their inability to cope with the rigors of the military as a result of the trauma suffered from the assault. In those cases, they are asking the board to consider a medical discharge or medical retirement in lieu of the administrative discharge. They are not stating they were wrongfully discharged. Such cases are reviewed by the AFBCMR Medical Consultant, who, after a complete review of the evidence provided by the applicant, military personnel records, and service medical records, provides a comprehensive advisory opinion for the Board's consideration. The advisory opinion is rendered upon the applicant for review and comment prior to the case being sent to the Board for its consideration. As with any case where an applicant is requesting retirement or discharge for physical disability, the AFBCMR must determine if the evidence provided by the applicant is sufficient to conclude that they should have been found unfit for continued military service at the date of their separation, and, thus, entitled to disability benefits.

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USN	<p>BCNR will use the guidelines contained in FY15 NDAA, Section 547 when considering the case of an applicant who states they are a victim of sexual assault.</p> <p>If an individual does not claim Whistleblower status, the specific facts of the case are the determining factor in whether a case is considered a retaliatory claim. However, BCNR applications that mention Whistleblower status are identified and treated accordingly to the regulatory requirements. Cases that do not mention Whistleblower status but contain facts that support a Whistleblower case are later identified and processed as Whistleblower cases. So if an applicant reports that they were discharged in reprisal for reporting a sexual assault, BCNR will treat it as a Whistleblower case.</p>
USMC	<p>The BCNR handles all cases within the Department of the Navy, including Marine Corps cases. The U.S. Navy response therefore applies to the Marine Corps.</p>
USCG	<p>The BCMR does not receive enough sexual assault cases to generalize (fewer than one per year on average), but the Board normally treats an implication of reprisal the same as an outright allegation of reprisal.</p>

d. What procedures have been developed with DOD IG and/or the Service IGs to help expedited the procedures for victims whose retaliation claims have been substantiated? How does the BCMR coordinate cases with the DOD and Service IGs?

USA	<p>ARBA coordinates with the DoD or Service IGs. Additionally, Whistleblower Cases are given top priority 1 processing. If the BCMR has not received a copy of the IG Whistleblower Investigation Report, one is obtained before processing the case.</p> <p>Normally, the Army Inspector General provides a copy of the report to ARBA as soon as the IG investigation is concluded. ARBA creates a case party and flags it to identify the potential incoming application as Whistleblower Reprisal related. A case party is an electronic identification of an individual in the ARBA Case Tracking System (ACTS). When the actual application is received, the flagged case is immediately brought to the attention of the leadership for further review and processing instructions.</p>
USAF	<p>DoD IG notifies the AFBCMR when an AF member has been found to be the victim of substantiated reprisal allegation. Such notification puts the AFBCMR on notice of the finding so it can be poised to act quickly should the member choose to seek relief from the AFBCMR. Many of these members do not seek relief from the AFBCMR as numerous corrections to military records can be resolved through administrative means. In the last year, DoD IG has notified the AFBCMR of six substantiated cases of reprisal (none involving a sexual assault victim); however, a review of information</p>

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	<p>in our Case Management and Tracking System indicates that only one of these members has sought relief of the AFBCMR. The AFBCMR coordinates with DoD IG as appropriate, but predominantly coordinates with the AF IG. The purpose of this coordination is to secure any pertinent investigative reports that may exist pertaining to an applicant’s claim of reprisal or retaliation and, in the case of substantiated reprisal, includes information on the type of disciplinary action rendered upon the perpetrator(s) of the reprisal.</p> <p><u>References:</u></p> <ul style="list-style-type: none"> - DoDI 1332.41, <i>Boards for Correction of Military Records</i>, 23 April 2007, http://www.dtic.mil/whs/directives/corres/pdf/133241p.pdf - AFI 36-2603, <i>Air Force Board for Corrections of Military Records</i>, 5 March 2012, http://static.e-publishing.af.mil/production/1/af_a1/publication/afi36-2603/afi36-2603.pdf
USN	Navy IG forwards copies of closure letters to BCNR so we can cross check against applications we receive that allege an IG complaint. If BCNR requires a copy of an IG investigation, the Navy IG will provide a copy for inclusion in the record.
USMC	The BCNR handles all cases within the Department of the Navy, including Marine Corps cases. The U.S. Navy response therefore applies to the Marine Corps.
USCG	The Chair of the BCMR has met with personnel in the Office of the Inspector General to ensure they are aware of the BCMR as an avenue of redress, but the BCMR has not received such a whistleblower case in several years.

e. Have the Services’ BCMRs established a separate procedure for sexual assault victims challenging their discharge as required by FY14 NDAA section 547? If so, please describe that confidential process.

USA	<p>A “Sexual Assault” special project category was established in ACTS to signify those cases dealing with sexual assault. This category has the highest processing priority (code 1).</p> <p>Unless consent is granted by the applicant, once a case is decided, it will not be posted on the Department of Defense Boards’ Electronic Reading Room and may not be released in response to a request under the Freedom of Information Act (FOIA). However, these decisions are filed in the individual’s AMHRR as the official Army record.</p>
USAF	See the answer to question 80(b) above.
USN	Yes. BCNR processes ensure all cases are processed confidentially. Applications and case files are tightly controlled internally, shared only by individuals responsible for presenting the case to the Board, and only released on a need to know basis to outside organizations when BCNR seeks an advisory opinion. The only privacy exception to this procedure is the public posting of redacted decision letters to the DoD reading room. However, unlike all other BCNR cases, sexual assault case decision letters are not posted to the DoD reading room to maximize the confidential nature of their cases.

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USMC	The BCNR handles all cases within the Department of the Navy, including Marine Corps cases. The U.S. Navy response therefore applies to the Marine Corps.
USCG	The BCMR has a staff of three, and all BCMR cases are handled confidentially and on a need-to-know basis. In light of section 547, BCMR decisions in sexual assault cases will no longer be posted online.

f. What steps are BCMRs taking to give due consideration to the psychological and physical aspects of an individual’s experience in connection with the sex-related offense and determining what bearing such experience may have had on the circumstances surrounding the individual’s discharge or separation from the Armed Forces as required by FY15 NDAA 547?

USA	<p>ABMCR drafted and is staffing an Army wide directive regarding the Section 547 provision. This information is being incorporated in the ABCMR’s analysis process and board member training. ABCMR is requesting Medical advisory opinions through its internal Medical Advisory office and externally from the Army OTSG.</p> <p>Additionally, the ABCMR consults with the ARBA Legal Advisor as appropriate on the legal aspects of implementing and applying changes to the law contained in the 2015 NDAA, to include Section 547. Advisory opinions become part of the case and are included for the board’s consideration. Whenever an external advisory opinion is obtained, it is provided under “ex parte prohibited” rules for the applicant’s awareness and to provide a response or rebuttal, as appropriate IAW 10 USC §1556. All advisory opinions are included in the case documents for board review and deliberation.</p>
USAF	<p>In the case of an applicant who was the victim of sexual assault requesting an upgrade of their administrative discharge, the AFBCMR is advised of its responsibilities to give due consideration to the psychological and physical aspects of an individual’s experience in connection with the sex-related offense to determine what bearing such an experience may have had on the circumstances of the applicant’s separation. The burden of proof of an error or injustice rests with an applicant and the AFBCMR will appropriately consider evidence provided by an applicant in determining if the applicant was the victim of a sexual assault and whether or not the effects of the assault had a bearing on the misconduct that precipitated the discharge.</p> <p><u>References:</u></p> <ul style="list-style-type: none"> - DoDI 1332.41, <i>Boards for Correction of Military Records</i>, 23 April 2007, http://www.dtic.mil/whs/directives/corres/pdf/133241p.pdf

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USN	Examiners are instructed to remind BCNR members prior to considering sexual assault cases that they must apply the factors required for consideration by FY15 NDAA, Section 547. If the facts of a case raise an issue that requires an expert level of analysis regarding the psychological and/or physical aspect of an individual's experience in connection with a sexual assault and its relationship to that individual's behavior, the Board will request an advisory opinion from a medical expert within the Secretary of the Navy or the Navy Bureau of Medicine and Surgery
USMC	The BCNR handles all cases within the Department of the Navy, including Marine Corps cases. The U.S. Navy response therefore applies to the Marine Corps.
USCG	When the BCMR receives an application from a victim of sexual assault, it will take into consideration DoD's new Medical Guidance about PTSD, and if the applicant received mental health treatment while in the Service, the Coast Guard's advisory opinion for the case will contain the opinion of a psychologist or psychiatrist, in accordance with section 521 of the FY15 NDAA.