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REPORT

DEPARTMENT OF DEFENSE

NATIONAL DEFENSE AUTHORIZATION ACT FOR FY 1996, SECTION 554

REVIEW OF SYSTEM FOR CORRECTION OF MILITARY RECORDS

I. Introduction

A. The National Defense Authorization Act for FY 96 (NDAA FY 96), Section 554(a) provides that:

> The Secretary of Defense shall review the system and procedures for the correction of military records used by the Secretaries of the military departments in the exercise of authority under section 1552 of title 10, United States Code, in order to identify potential improvements that could be made in the process for correcting military records to ensure fairness, equity, and (consistent with appropriate service to applicants) maximum efficiency.

B. Section 554(b) identified seven areas to address in the review:

(1) The composition of the board and of the support staff for the board;
(2) Timeliness of final action;
(3) Independence of deliberations by the civilian board;
(4) The authority of the Secretary of the military department concerned to modify the recommendations of the board;
(5) Burden of proof and other evidentiary standards;
(6) Alternative methods for correcting military records; and
(7) Whether the board should be consolidated with the Discharge Review Board of the military department.

C. This report is submitted in compliance with Section 554(c), which requires the Secretary of Defense to submit a report, containing recommendations for improving the process for correcting military records, to the Committee on Armed Services of the Senate and the Committee on National Security of the House. Part II of this report discusses the methodology used by the Department of Defense (DoD) to conduct the review required by section 554. Part III provides an overview of the Correction Boards. Part IV compares the Department Correction Boards in the first five areas of review mandated in Section 554(b). Part V contains an analysis of these five areas, reviews alternative methods for correcting military records, and discusses the issue of the consolidation of the Services' Discharge Review Boards with the Correction Boards. The report concludes with recommendations to accomplish the goals of ensuring fairness, equity, and maximum efficiency in the correction of records process.

II. Methodology

On March 20, 1996, the Assistant Secretary of Defense for Force Management Policy asked the Military Departments to provide comments on the seven issues identified in section 554. The Army contracted with a consulting firm, Booz-Allen and Hamilton, Inc. (Booz-Allen), to conduct an independent study of the Army Board for Correction of Military Records (ABCMR) and the Army Discharge Review Board. This study included a comparison of the ABCMR with the other Service correction boards. The Navy created a management efficiency team to prepare a report. The Navy provided responses to the seven issues and submitted a copy of an Efficiency Review of the Board for Correction of Naval Records (BCNR) conducted by a Manpower Analysis Team. The Efficiency Review focused on determining minimum manpower requirements for the BCNR. The Air Force tasked the Air Force Board for Correction of Military Records (AFBCMR) Director and an AFBCMR Chief Examiner to conduct a study of the AFBCMR. The reports submitted by each Department were valuable sources of information in preparing this report.

Representatives of the Office of the Secretary of Defense visited each Department's Board to review procedures, interview personnel, and assess efficiency. Officials in the Military Department Offices of General Counsel and Offices of the Assistant Secretary having oversight over the Boards were also interviewed. Each Board responded to specific questions intended to provide a better basis for comparison among the Boards.

We also asked the Military Departments to submit documents pertaining to each Board, including implementing regulations, standing operating instructions, delegations of authority, management reviews, and instructions to board members. Several Board members were interviewed. We also reviewed available reports, historical documents, law review and legal articles, and case law discussing issues relating to the Boards.

III. Overview of Service Boards for Correction of Military Records

After considerable study, Congress determined in 1946 that the creation of the Boards for Correction of Military and Naval Records would be a fair, practical, feasible, and cost effective substitute for private relief bills as a means of correcting errors or removing injustices in an individual's military records. Section 207 of the Reorganization Act of 1946, 60 Stat. 812 [codified at 10 U.S.C. § 1552], authorizes the Service Secretaries to establish boards "to correct any record of a department [when] necessary to correct an error or remove an injustice." Another provision of the Act eliminated the right to present a private relief bill to correct a military record in either the Senate or the House of Representatives. This legislation grants the Departments broad authority to accomplish by Departmental action what had been previously undertaken through legislative action or private relief bills. The Comptroller General, the Military Department Judge Advocates General, the Attorney General, and the courts have interpreted this legislation as a liberal grant of power to the Boards.

The Office of the Secretary of Defense currently exercises limited oversight over the Correction Boards. DoD Directive 1336.6, Correction of Military Records, establishes policy, assigns responsibilities, and sets forth a procedure for obtaining approval of the procedures and rules established by the Departments for the Boards. Each Military Department has issued regulations governing Board operation and procedures. Army Regulation 15-185, Army Board for Correction of Military Records (1 May 1982), establishes the composition, functions, and responsibilities of the ABCMR. This regulation is currently being revised. Air Force Instruction 36-2603, Air Force Board for Correction of Military Records, (1 March 1996) (codified in Title 32, Code of Federal Regulations, Part 865), defines the Board's authority and sets forth procedures for correction of Air Force records. The Air Force also publishes Air Force Pamphlet 36-2607, "Applicant's Guide to the AFBCMR," to provide information on the corrections process to applicants. The Board for Correction of Naval Records (BCNR) standards and procedures are contained in NAVSO P-473 (November 1977) and codified in Title 32, Code of Federal Regulations, Part 723. A proposed revision to NAVSO P-473 is currently being staffed.

While the Boards have broad authority to correct military records, they do not act on applications involving National Guard records that fall under state jurisdiction, requests for determinations under the Missing Persons Act of 1942, requests for clemency from prisoners and parolees whose sentences are not final, and appeals of court-martial convictions.

The Boards are unique adjudicative mechanisms unlike traditional civil, criminal, or administrative courts. The Boards are not bound by formal rules of evidence. Applicants may request, but do not have the right to, a hearing and do not have the right to compulsory process or discovery.

The decisions by the Boards are reviewable in all federal district courts unless a claim for money exceeding $10,000 is at issue, and in the United States Court of Federal Claims. These courts usually apply an "arbitrary and capricious" standard of review. Courts will not exercise discretion reserved to the military, but will determine if proper procedures were followed by applying the facts to the statutory or regulatory standard. Generally, Service members are required to exhaust remedies by filing first with the Correction Board for their Military Department before seeking judicial review. The statute of limitations applicable to judicial appeals based on personnel actions is six years.

The Boards are not bound by previous Board decisions in other cases, although prior similar cases are considered and given weight. The Boards do not have authority to review and reverse decisions of other tribunals or boards deciding in favor of the applicant. After the Board issues a final decision, it is redacted by removing the name of the applicant and other personal identifiers, and the decision is indexed and sent to a reading room in the Pentagon where it can be reviewed by the public.

IV. Comparison of Military Department Boards for Correction of Military Records

1. The Composition of the Board and of the Support Staff for the Board.

a. Army. The ABCMR falls under a newly created Department of the Army Review Boards Agency (DARBA). The ABCMR staff is headed by a civilian Executive Secretary, who answers to the Deputy Assistant Secretary for Review Boards, who in turn reports to the Assistant Secretary for Manpower and Reserve Affairs. The voting members of the Board are 46 civilian employees, grade level GS-14 or above, who serve on the Board as a collateral duty. There are no active duty military personnel serving as members. Many members, however, have prior military experience and several sitting members are reservists. The Board meets once a week at ABCMR offices in Crystal City, Arlington, Virginia, reviewing an average of between 50 and 100 cases per session. The Board is supported by a permanent staff of 30 civilians.

An Executive Secretary and a Chief Examiner supervise three examination teams each consisting of a branch chief examiner, seven examiners, and a secretary. A three-person staff provides administrative support to the Board. The Army Reserve Personnel Center (ARPERCEN) in St. Louis, Missouri, provides support to the Board in non-active duty cases. The ARPERCEN staff includes a supervisor, two military personnel technicians, one military personnel relations technician, five military personnel status technicians, and ten military personnel clerks. The Army is shifting supervisory responsibility over the ABCMR branch in St. Louis from ARPERCEN to DARBA in Crystal City. Active duty cases are processed by the ABCMR staff in Crystal City.

b. Air Force. The AFBCMR, located at Andrews Air Force Base (AFB), Maryland, is subordinate to the Director of the Air Force Review Board Agency. The Board is comprised of 50 senior civilians (GS-15 or above) from the Air Force Secretariat and Air Staff elements of Headquarters, Air Force. Board service is a voluntary extra duty. The Board meets twice per week, reviewing an average of 22 cases per meeting. There are no active duty military personnel serving as Board members.

The AFBCMR permanent staff consists of 26 personnel; 20 are located at Andrews AFB and 6 are located at Randolph AFB in San Antonio, Texas. The staff at Andrews AFB consists of an Executive Secretary, a four-person administrative support staff, and three examiner teams, each consisting of a Chief Examiner and four examiners. The AFBCMR staff at Randolph receives and conducts an initial review of all applications for the Air Force. The Randolph staff requests records and advisory opinions before forwarding cases to the staff at Andrews for Board action.

c. Navy. The BCNR falls under the Assistant Secretary of the Navy for Manpower & Reserve Affairs. The BCNR is comprised of 46 Navy civilian employees (GS-13 and above) who are appointed to serve as Board members as a collateral duty. Board members have full-time positions with various commands and offices of the Navy and Marine Corps in the

Washington, DC area. The Board, sitting in panels of three members, meets three times per week and reviews an average of 50 cases per meeting.

The BCNR staff consists of an Executive Director, a Deputy Director, and four specialized examination sections: a Discharge Review Section, a Pay Section, a Performance Review Section, and a Physical Disability Section. Five lawyers and ten military personnel management specialists serve on the specialized teams. Fifteen employees provide support to the teams. Seven lawyers on the permanent BCNR staff serve, on a part-time basis, as voting members of the Board in the absence of regularly scheduled members. The BCNR Chairman also serves as the Executive Director of the Board's staff. The Board's permanent staff consists of 32 civilian employees (to be reduced to 31). BCNR offices are located at the Navy Annex.

Comparison of Board Members and Staff

	Army	Air Force	Navy
Board Number of Members and grade	46 (GS-14 or above)	50 (GS-15 or above)	46 (GS-13 or above)
Quorum	3 Members	3 Members	3 Members
Support Staff	Executive Secretary Chief Examiner Chief Examiners (3) Examiners (21) Support staff (6) Total 32	Executive Director Chief Examiners (3) Examiners (12) Support staff (10) Total 26	Executive Director Deputy Director Section Heads (4) Senior Attorney (1) Examiners (10) Support staff (15) Total 32

2. Timeliness of Final Action.

a. Army. In 1995, the ABCMR received 10,867 cases, down from over 15,000 per year in both 1993 and 1994. The ABCMR takes an average of 36 months to process non-active duty applications and six to eight months to decide active duty cases. The Booz-Allen report concluded that the processing of cases by ABCMR "is lengthy and inefficient." Booz Allen found excessive backlogs of cases at ARPERCEN and within sections of the ABCMR and identified inefficiencies in the ABCMR system for processing cases. Booz-Allen found that the ABCMR staff often held cases for inordinate periods before initiating screening actions, failed to request records and advisory opinions or records in a timely fashion, and did not carefully screen pending cases to identify unusual delays in receiving records and advisory opinions. Booz-Allen noted that cases at ABCMR are often subject to several layers of review, causing delays and leading to multiple requests for advisory opinions. Booz-Allen concluded that the Army senior management has not established the correction of military records as a priority. Consequently, resources provided to the Board and the cooperation the ABCMR receives from other agencies has not been sufficient to sustain acceptable case processing times. The Army leadership has recognized that lengthy processing times are unacceptable. The Army has planned several restructuring changes and instituted several immediate actions, including personnel changes in several ABCMR supervisory positions.

b. Air Force. The AFBCMR processes approximately 5,000 cases per year. The processing time average for boarded cases is 10 to 14 months. This includes the time for processing the case from the initial receipt of the application at Randolph through final Board decision. The average processing time for cases with the AFBCMR staff at Andrews AFB is approximately six months.

c. Navy. The BCNR reports an annual caseload of approximately 9,300. It acts on applications from both Navy and Marine Corps personnel. The BCNR average processing time is 8.3 months. Processing times have increased from a low 3.5 monthly average in 1991 to the current 8.3. The Navy attributes the increase to a reduction of staff positions from 41 full-time employees to 32. Also, the BCNR reviewed a large number of relatively routine cases in the years up to 1992 which had the effect of reducing the overall average processing time.

Comparison of Board Case Processing Data

1995 Data	Caseload	Processing Time	Relief Granted Rate	Backlog
Army	10,867	36 months (nonactive) 6-8 months (active)	28%	12,113
Air Force	4,169	10-14 months	33.5%	1,875
Navy	9,300	8.3 months	50%	3,395

3. Independence of Deliberations by the Civilian Board.

a. Army. The functions and duties of staff members in ABCMR cases are detailed in written guidance from the Executive Director. Case examiners at ABCMR play an important role in the decision-making process. The examiner reviews virtually all applications and seeks advisory opinions from the Army staff when deemed necessary. In some cases, ABCMR branch chiefs and ABCMR supervisors review cases and request records and advisory opinions before the file is forwarded to an examiner. There are no written instructions to case examiners to limit their independence to make recommendations. When a hearing is held, case examiners prepare a case file consisting of a summary of the case prepared by the examiner, documentation submitted by the applicant, and advisory opinions.

Panel members do not review case files or case summaries prior to meeting. During deliberations, normally only members of the panel and the Executive Secretary or Chief Examiner are present. Examiners are summoned as needed to answer questions posed by the panel members. Panel members are free to voice dissenting opinions and to prepare minority

reports as to findings, conclusions, or recommendations concerning a specific application. No active duty member is in a position to review, question, or influence the Board or its permanent staff. In almost all cases, the only contact with active Army leadership occurs when the ABCMR staff obtains an advisory opinion. The Army grants total or partial relief in approximately 28 percent of cases.

b. Air Force. All applications to the AFBCMR are sent to Randolph AFB for initial review. The Randolph staff attempts to close cases administratively whenever appropriate and forwards other cases to the staff at Andrews after obtaining supporting documents, military records, and advisory opinions. Upon receipt of the case, AFBCMR case examiners prepare a record of proceedings including a statement of the requested relief, a summary of the facts, Air Force staff advisory opinions, the applicant's comments to the opinions, and supporting documents. To facilitate cases involving medical issues, a medical doctor (General Practitioner) spends approximately 90 percent of his or her time supporting the Board. The Director reviews approximately 95 percent of the opinions involving medical issues. The remainder of such medically related cases is referred to specialists. The examiner's summary does not include a draft decision or recommendation. The case file and summary are sent to panel members for review one week in advance of meeting. Advisories are provided to the Board to enable it to reach informed decisions.

Panel members review the application and supporting documentation and deliberate in executive session. Case examiners are usually present during panel meetings to take notes and answer questions. They do not, however, present a briefing, recommend a course of action, or participate in the decision-making process. The panel's decision is based on an independent assessment of facts and reached by a majority vote. After the panel's decision, the examiner prepares a decisional document containing the panel's decision and rationale. The document is sent to the panel chairman for concurrence and signature. On average, the AFBCMR resolves about 35 percent of the applications favorably to the applicant. There are no instructions or guidelines that dictate the outcome of any case or limit the evidence the AFBCMR can consider. The fact that the Board grants relief in about 21 percent of cases in which the Air Staff recommends denial demonstrates the Board's independence.

c. Navy. The BCNR's deliberations and action are governed by NAVSO P-473 and a BCNR Procedures Manual. The BCNR records section screens all applications for the Navy and Marine Corps and requests records before forwarding the case to one of the four examination sections. The section head of the applicable section receives the application and service record and other records and assigns the case to an examiner. The examiner prepares a case file and a summary for the panel's review. The summary does not contain a recommended disposition.

The examiner's case file and summary are not sent to panel members for review prior to the meeting. Staff examiners attend panel sessions and present briefings to members. Panel members may request additional evidence after the case is presented. Case decisions are based on a majority vote. The examiner drafts a decisional document based on the proceedings in the case. The decisional document is not sent to panel members for review, but is signed by the section head who was present at the proceedings and the Executive Director in relief cases. The

decisional document in a denial case is a letter to the applicant signed by the Executive Director. The Board routinely solicits advisory opinions from military staff agencies. It is not unusual for panel members to reject the recommendations set forth in the advisory opinions. There are no instructions, policy directives, or guidelines that dictate a desired outcome. Approximately 50 percent of the applications decided by the BCNR receive some type of corrective action.

4. The Authority of the Secretary of the Military Department Concerned to Modify the Recommendations of the Board.

a. Army.. The Secretary of the Army (SA) has delegated to the ABCMR broad authority to take final action to deny cases except when a hearing request is granted. The SA has also delegated authority for the Board to take final favorable action to correct common record errors. This authority is limited to those cases in which the action is consistent with the recommendation of the Army staff, the panel decision is unanimous, and the subject matter falls into one of nine specified categories. These cases are: 1) restoration of leave; 2) promotion retroactively of applicants who would have been promoted during regular promotion cycles; 3) adjustment of enlisted grades and promotion of applicants to grades held immediately prior to reenlistment; 4) awards of certain allowances; 5) authorizing participation under the Survivor Benefit Plan where failure to elect to participate was due to inadvertence; 6) placement in a temporary or permanent disability retired status; 7) award of certain bonuses; 8) change of home of record; and 9) award of reserve participation credit. The decision of the ABCMR is final and binding in cases falling within the delegated authority. The Secretary has retained authority to act in cases in which a hearing is granted and final favorable action is recommended in cases falling outside the nine areas specified in the governing Army regulation. The Secretary has delegated this decisional authority to the Assistant Secretary of the Army for Manpower and Reserve Affairs, who has further delegated the authority to the person currently serving as the Acting Director of the ABCMR. In these cases, the Secretary's designee is not bound by the ABCMR's findings, conclusions, or recommendations and retains the ultimate authority to overrule the Board.

b. Air Force. In the Air Force, the Board acts for the Secretary and its decision is final when it denies applications (except under 10 U.S.C. §1034, Whistleblower Protection). The Secretary acts as the final decisional authority in all other cases and on military whistleblower cases. The Secretary may direct such action as she deems appropriate in each case, including return to the Board for further consideration. By Secretarial Order No. 253.1, dated June 2, 1994, the Secretary of the Air Force has delegated authority to review AFBCMR cases to the Assistant Secretary of the Air Force (Manpower, Reserve Affairs, Installations & Environment)(SAF/MI). Under this authority, the Board and the Director, Air Force Review Boards Agency, have delegated authority to deny an application when denial has been recommended by a unanimous vote of the Board or to grant relief on an application when the corrective action has been recommended by the Air Staff, has been recommended by a unanimous vote of the Board, and does not involve promoting an officer requiring Senate confirmation. The SAF/MI may grant an application for relief when corrective action has been recommended by a unanimous or majority vote of the Board. SAF/MI may also grant or deny an application for relief when denial or corrective action has been recommended by a majority vote of the Board. It is extremely rare, however, for SAF/MI to overrule or modify the recommendation of the Board.

c. Navy. The Secretary of the Navy has delegated to the Board broad authority to deny applications if it determines that insufficient relevant evidence has been presented to demonstrate the existence of probable error. BCNR is also authorized (under Para 6e, NAVSO P-473) to take final corrective action on behalf of the Secretary in nine categories of cases if the relief granted is consistent with that requested by the applicant, recommended by proper authorities, and is agreed to by the Board. These cases include: 1) restoration of leave; 2) promotion retroactively of applicants who would have been promoted during regular promotion cycles; 3) adjustment of enlisted grades and promotion of applicants to grades held immediately prior to reenlistment; 4) awards of certain allowances; 5) authorizing participation under the Survivor Benefit Plan where failure to elect to participate was due to inadvertence; 6) placement in a temporary or permanent disability retired status; 7) award of certain bonuses; 8) change of home of record; and 9) award of reserve participation credit. The Assistant Secretary of the Navy (Manpower and Reserve Affairs) is the Secretary's designee for BCNR matters and has authority to change or modify the Board's decisions that do not fall within the scope of its delegation. Other than the procedures contained in NAVSO P-473, no additional policy statements or written guidance has been issued to the Board by the Secretary or his designee.

5. Burden of Proof and Other Evidentiary Standards.

a. Army. The ABCMR review process is based on a presumption that government officials act in accordance with law and regulation and in good faith. The burden of rebutting the presumption of regularity and proving the existence of a material error or injustice rests with the applicant. The presumption of regularity prevails unless the applicant presents sufficient relevant evidence to demonstrate the existence of probable error or injustice. Applicants may obtain reconsideration of an earlier ABCMR decision by providing newly discovered material evidence, not available to the Board when it first considered the application. The ABCMR staff examiner reviews the matter to determine if the evidence is new and appears to warrant reversal of the original action. If so, the case is forwarded to the Board for action. The ABCMR estimates that approximately 50% of applicants request formal hearings. The ABCMR staff makes the decision on whether or not to grant requests for hearings. The ABCMR conducts more formal hearings than the other Military Department Correction Boards, averaging approximately five per year. The ABCMR has historically exercised a liberal waiver policy concerning the three-year statute of limitations. The ABCMR considered changing this practice, but concluded that waiving the statute of limitations whenever an application presented an otherwise meritorious case best honors the intent of the statute.

b. Air Force. The Air Force places the burden on the applicant of providing sufficient evidence of material error or injustice. The AFBCMR estimates that 20% of applicants request a formal hearing. The Board normally does not grant a request for a hearing unless an issue involving credibility of the applicant or a decision-maker exists and averages less than one formal hearing per year. The AFBCMR will grant a request for reconsideration based on newly discovered relevant evidence. The request is sent to the examiner who reviewed the case to determine if the matter submitted by the applicant is new. If the matter is new, the request is sent to the panel that originally considered the case for determination on the merits. The panel also

considers whether an untimely application should be considered in the interests of justice. The AFBCMR liberally waives the three-year time limitation.

c. Navy. The BCNR starts with the presumption that official records are correct. The burden is on the applicant to overcome this presumption by producing evidence of error or injustice. The BCNR denies applications if it determines that insufficient relevant evidence has been presented to demonstrate the existence of probable material error or injustice. The BCNR panel decides whether or not to grant a request for a hearing. The Board grants an average of 1 to 2 formal hearing requests per year. The BCNR estimates that up to 10% of applicants request a formal hearing. The BCNR routinely waives the three year statute of limitations. Applicants have the right to request reconsideration based on newly discovered evidence. The request for reconsideration is screened by the examiner and the Section Head who initially reviewed the case to determine if the matter presented is new and material. If new and material matter has been submitted, the case is forwarded to the Board for action.

Comparison of Board Standards

	Burden of Proof	Reconsideration
Army	Applicant has burden of presenting sufficient evidence demonstrating the existence of probable material error or injustice	Newly discovered relevant evidence not previously considered
Air Force	Applicant has burden of providing sufficient evidence of probable material error or injustice	Newly discovered relevant evidence not previously considered
Navy	Applicant has burden of providing sufficient relevant evidence of probable material error or injustice	New material, and relevant evidence submitted that was not available in the record when application considered

V. Discussion and Analysis

1. Composition of Board and Support Staff.

a. Compliance with Statute. The composition for all three Service boards complies with the enabling statute. The leadership of the Boards review nominated members for compliance with statutory criteria and submit questionable nominations to the Services' Office of General Counsel for legal review. An issue that has surfaced occasionally is whether civilians employed in Field Operating Agencies (FOA) of the Services are "civilians from the executive part of the departments." The Military Departments' Offices of General Counsel have determined that the Members nominated from FOAs of the Service Secretariat or Headquarters staff comply with the statutory criteria.

b. Composition of Board. The Board composition in all three Departments is comparable. The large pool of potential members gives the Boards flexibility to assemble diverse panels with a broad range of experience and background. The major differences in comparison among Board composition is that the Navy allows civilians in grade GS-13 to serve,

the Army requires a minimum GS grade of 14, and the Air Force minimum grade for members is GS-15. Because the civilian work force differs in the Departments, some flexibility should be granted in setting standards for members to best meet the goal of creating a diverse, experienced panel. An issue raised by the civilian bar is the propriety of appointing large numbers of reserve officers, retired officers, and retired enlisted personnel as members. For example, in the BCNR, 19 members are reservists or have retired from the service. Prior military experience has proven valuable in reaching informed decisions quickly. Board leadership should, however, ensure that the pool of potential panel members provides diversity in experience, gender, and race.

c. Use of Professional and Expert Staff. The permanent staffs of the Boards are experienced, competent, and impartial. They exercise an important role in the decision-making process for all three Service Boards. There is no evidence that permanent staff exerts an improper influence on Board members or the decision-making process. The role exercised by the staff in the preparation of case files and its involvement in deliberations varies among the Boards. Service Secretaries should not be required to adopt a uniform role for staffs absent a compelling reason for such uniformity.

d. Specialized Staff Members. The Army has reorganized its Review Board Agency so that a military physician, currently an orthopedic surgeon, supports the Board. A general practitioner on the staff also provides support to the AFBCMR. Permanent staff lawyers are used by some of the Service Boards. The increased involvement of staff professionals allows for greater Board control over case processing, reduces the need for advisory opinions, and generally enhances the quality of the decision-making process. The AFBCMR does not use permanent staff lawyers. Legal opinions are obtained from the Air Force Personnel Center Staff Judge Advocate; the Chief, General Law Division, Headquarters; United States Air Force, and the Office of the General Counsel of the Air Force.

e. Permanent Staff as Board Members. BCNR civilian staff attorneys and the Executive Director infrequently sit as panel members when a regularly scheduled member is unavoidably not able to sit and has not been able to find a replacement. While the United States Court of Appeals for the District of Columbia specifically upheld this practice in Viles v. Secretary of the Navy, 872 F. 2d 491 (1989), using permanent staff to fill in for absent panel members can raise a perception of excessive staff control over the process.

f. Screening for Conflicts. None of the Service Boards has institutionalized a system of screening Board members for potential bias or conflicts. In practice, most members raise the possibility of a conflict on their own. The BCNR and AFBCMR generally allow panel members to decide whether or not they can act impartially in a given case. The Army will normally refer a case to another panel if a panel member raises a potential conflict issue. The ABCMR has recently adopted a formal recusal policy requiring recusal whenever there is an actual or apparent conflict of interest.

g. Training. The training provided to Board members varies among the Services. At the AFBCMR, new members are briefed on the correction of records process and attend Board sessions as observers before being scheduled to participate as voting members. AFBCMR

members also visit the Air Force Personnel Center in San Antonio to receive briefings from military personnel experts about personnel policies. Additionally, the AFBCMR conducts an annual conference for Board members and staff to receive briefings from military personnel experts and legal advisors on changes in Air Force policies and on recent court decisions that may impact on the correction process. At the BCNR, the Executive Director and Section Heads brief new board members and provide them with written reference materials. New members sit as observers in at least three sessions before they sit as voting members. The ABCMR has not established formal training programs for Board members.

h. Length of Tour of Duty. None of the Service implementing regulations addresses the length of service and removal of Board members. While there is no evidence of improper or questionable removals, a specified tour of duty and protection against arbitrary removal could enhance the independence and integrity of the process by insulating members from arbitrary dismissal.

2. Timeliness.

a. Processing Times. All of Military Department Corrections Boards generally use a first-in, first-out system of review, except that they will expedite review to prevent hardship to an applicant, such as in deathbed cases. The Boards should not be held to a rigid system for all cases because justice requires expediting action in some instances. Some Service Boards express frustration over reduced staffing and funding during the last few years and attribute these factors as causes for some delays. Lack of sufficient funding, for example, appears to have precluded the Boards from taking advantage of the latest advances in information technology. While reduced funding and staffing have presented special challenges, it appears that many delays are primarily attributable to inefficiencies in case processing practices and procedures. Boards should consider implementing measures to reduce delays, such as adding professionals, including lawyers and doctors, to support the Boards, aggressively screening open cases, removing unnecessary layers of review, and following up frequently on requests for records and opinions. Adopting the best practices employed by other Boards also offers potential for reducing overall case processing times. It is recognized that some areas of case processing are particularly challenging to attaining expeditious review of cases. For example, each Board encounters some inherent delays in obtaining military records. Records for Air Force members and non-active duty Army members are located great distances from the Boards. The BCNR must work with both Navy and Marine Corps records centers. Obtaining advisory opinions is also challenging to the Boards because they have no direct control over the staff providing the opinions. While Board control in these areas is limited, better supervisory controls and aggressive monitoring of cases can reduce delays.

b. Efforts to Reduce Delays. The Military Departments agree that timeliness of resolving cases is a matter of paramount importance. The Army leadership acknowledges that the timeliness of resolving cases, particularly in the case of non-active duty applicants, is a problem. The Army leadership has taken immediate steps to reduce the backlog of cases and decrease the time for Board action. The Army agreed with the Booz-Allen conclusion that the ARPERCEN delays in processing non-active duty applications are unacceptable. The parts of

ARPERCEN dedicated to supporting the ABCMR and the Discharge Review Board will be brought under the purview of DARBA. The DARBA management will assume full management control of the ARPERCEN branch which supports the Board. The Army is also restructuring the DARBA to streamline the processing of cases. An Application Screening Team will be responsible for initial screening and log-in of all applications and will be established to support both ABCMR and the Army Discharge Review Board (ADRB). The Army leadership has expressed a commitment to making improvements to streamline its internal processes to include instituting better record retrieval systems, enhanced screening of cases, eliminating case processing steps, and reducing redundant data entry requirements. The ABCMR is also considering purchasing new information technology, examining the use of bar-coding cases, and instituting procedures to expedite the administrative correction of records. The AFBCMR and the BCNR are also reviewing case processing with a goal of reducing unnecessary delays. The Navy has instituted a system of bar-coding cases to increase efficiency and reduce delays. The Navy also conducted a Manpower Analysis Team review of the BCNR process in early 1996. This report identified a number of streamlining measures to improve efficiency, such as increasing the use of automation and standardizing word processing software. The AFBCMR is reviewing implementation of a bar-coding system and information technology enhancements to reduce delays in case processing. Use of information technology systems is a prime area for Boards to share best practices to improve efficiency of operations.

c. Mandatory Time Limits. The 1989 Coast Guard Authorization Act requires the Coast Guard Board for Correction of Military Records to amend its regulations so as to ensure a final decision is rendered on an application within ten months. The correction of records process involves numerous time-consuming steps, such as records retrieval and obtaining advisory opinions, that cannot be completely controlled by the boards. The imposition of mandated deadlines could have undesirable consequences, such as deterring boards from raising issues on their own motion, reducing the number of advisory opinion requests and formal hearings, and reducing the time for applicant comment on advisory opinions.

3. Independence of Board.

a. Improper Exercise or Existence of Influence. No credible evidence suggests that any Military Department's Board is or has been compromised by undue influence by uniformed members or by reason of possible pressure. The Departments have not issued standing guidance or policy directives to influence Board action in any category of cases. Moreover, the Secretarial designees for each Department rarely exercise discretion to modify or reverse Board decisions. While the military staff for each Department plays an important role in providing advisory opinions, Boards have demonstrated consistently their independent judgment.

b. Appearance of Lack of Independence. While there is no evidence of compromised independence, procedures adopted in some of the boards could give rise to an appearance of a lack of independence. In the Army, for example, the case examiner prepares a draft decisional document that the panel members do not review until meeting in executive session. While requiring staff examiners to reach a conclusion in a given case has the advantage of forcing them to review critically the evidence and issues in the case, panel members generally have little time

to delve into the details of cases. Thus, their exercise of independent judgment can be significantly influenced by the summarized information and advice provided by the staff. It is not unusual, therefore, that panel members rarely disagree with the examiner's proposed decision. This procedure raises an appearance that panel members merely act as a "rubber stamp" for the examiner. The AFBCMR practice of providing members with case files in advance and not furnishing staff recommendations appears to cause members to engage more actively in the decision-making process.

4. Authority of the Secretary.

There is no credible evidence that the Military Departments or Service leadership has attempted to exert improper influence over the boards, generally or in specific cases. Moreover, there is no discernible trend in board actions that would tend to suggest a problem of improper influence from the Military Department Secretaries.

The Secretaries and designees of the Military Departments rarely modify recommendations of the Boards. Providing some discretion over Board decisions to the Military Department Secretaries is appropriate to ensure that the various panels produce uniform results in similar cases. Further, there are isolated cases in which Board members grant relief based on a disagreement over established personnel policies which are within the discretion of the Service. Without Secretarial review, Boards could unduly limit the prerogative of Military Department Secretaries and undermine lawful personnel policies through action on individual cases. In the rare cases that a Military Department Secretary might exceed his or her authority in establishing a personnel policy, applicants could challenge the action through the courts. Judicial review, with enhanced procedural rights for both parties, is an appropriate method to consider and resolve systematic attacks against established personnel policies that could possibly have far-reaching consequences for readiness and morale.

5. Burden of Proof.

a. Standard for Granting Relief. The review process for all Military Department Corrections Boards begins with the presumption that government officials act in good faith and in accordance with law and regulation. The burden of rebutting the presumption of regularity and proving the existence of a material error or injustice rests with the applicant. The presumption of regularity prevails unless the record contains sufficient relevant evidence to demonstrate the existence of probable material error or injustice. This standard requires that an applicant submit sufficient evidence that, when considered with the record, a reasonable person would conclude that, in all probability, a material error or injustice occurred. The analogous standard used in judicial tribunals and a variety of administrative agencies is the preponderance of evidence standard. The standard applied by the Boards is appropriate to ensure that evidence meets reasonable bounds of credibility, relevancy, and materiality and has been repeatedly upheld by the courts in the 50-year history of the boards. This standard is adequately expressed in each Service's implementing regulations and has been properly applied in the vast majority of cases.

b. Procedures for Obtaining Evidence. Placing the burden of proof on applicants is appropriate if applicants understand the evidentiary burden they must meet to obtain relief and have fair access to relevant evidence. In the vast majority of cases, it is the applicant who is in the best position to know what documents and evidence relate to the issue in question. The Freedom of Information Act and the Privacy Act provide effective procedures for applicants to obtain documents not already in their possession. The limited evidence-gathering role of the Boards can work to the advantage of an applicant because applicants may submit only favorable documents supporting their position, while the Boards often do not undertake an independent search for adverse evidence. If Board oversight is sufficient to ensure that applicants have fair access to relevant evidence, imposing a higher burden on the Boards to identify, locate, and produce additional relevant evidence is not justified by the great expense and delay it would entail.

In exceptional cases, Board members engage in ex parte communications with officials involved in the dispute. These communications are often not reduced to writing and are not forwarded to applicants for comment prior to action. This may be perceived as a lack of fairness in the system.

c. Standards for Granting Requests for Hearings, Requests for Reconsideration, and Untimely Applications. The standards and procedures for acting on requests for hearings, requests for reconsideration, and untimely applications vary. All of the Corrections Boards retain the sole discretion to grant hearing requests. There is no articulated standard for granting or denying a hearing in any of the implementing regulations. The Military Departments Corrections Boards grant a very small percentage of the hearings requested. The BCNR and AFBCMR rarely grant requests for hearings while the ABCMR grants approximately five hearing requests per year. The denial of hearing requests in most cases has generated criticism from applicants and the bar. Most of the adverse personnel actions taken by the Services trigger due process rights, including notice and an opportunity to be heard. Thus, the record of these proceedings should be sufficiently developed to allow for a full and fair review of the actions taken in most cases.

Procedures for acting on requests for reconsideration also differ. The BCNR staff screens requests for reconsideration solely to determine if the information submitted is new and material. BCNR panels, however, decide whether the request has merit. Similarly, the AFBCMR screens such requests solely to determine if the information is new. If it is, the case is forwarded to a panel to decide the case on the merits. The staff at the ABCMR not only screens the request, but also decides whether the request has merit.

All three Military Department Boards apply a liberal waiver policy toward the three-year statute of limitations. The statute of limitations does, however, provide the Corrections Boards with a mechanism to encourage timely applications and to deny applications that do not have merit and demonstrated good cause for delay in filing.

d. Advisory Opinion Procedures. Each Military Department relies heavily on other Offices and Agencies within the Department to render advisory opinions. These opinions provide Boards with expertise and insight into the issues raised in an application. The advisory

opinions are not binding on the Board, but are followed in the majority of cases. The BCNR and AFBCMR send adverse advisory opinions to the applicant prior to Board action. Unless requested, ABCMR does not generally forward advisory opinions to applicants for review and comment. The applicant learns of the advisory opinion after the Board decides the case. The ABCMR, however, routinely grants requests for reconsideration if the applicant raises an issue based on an adverse advisory opinion. Providing adverse opinions to the applicant with an opportunity to respond should enhance the perception of fairness and should reduce the number of requests for reconsideration.

e. Information Provided to Applicants. Because most applicants do not retain counsel, it is imperative that Boards provide them with information on how the system works. Explaining the burden of proof, the standard that will be applied for granting a request for a hearing to applicants, and the Board procedures to applicants during the initial stages of a case should increase confidence in the fairness of the system and could expedite processing of cases. The AFBCMR uses a standard pamphlet to provide information on the process to applicants. The Army provides some information on the ABCMR process in its initial letter to the applicant.

6. Alternative Methods for Correcting Military Records.

a. Create an Administrative Board for Correction of Records.

A possible alternative to the current boards might be to create an Administrative Board, similar to the Merit Systems Protection Board or the Equal Opportunity Commission. This would entail the appointment of administrative law judges and enlarge or create rights to discovery, compulsory attendance of witnesses, full hearing, and a personal right of appearance to comply with the Administrative Procedures Act. Creating enhanced procedural rights would be costly and probably lead to a greater backlog of cases. This would take away a major advantage the current system offers to applicants -- the ability to have simple cases and administrative errors resolved expeditiously in most instances. Another advantage of the current system is that the great majority of applications are resolved at virtually no cost to the applicant. Quasi-judicial review would encourage greater reliance on the services of counsel at the applicant's expense. The Boards currently have the authority to grant formal hearing requests to resolve complex cases, develop an incomplete or ambiguous record, or make credibility determinations. Finally, the right to appeal adverse decisions to the courts provides applicants a complete review of the record.

b. Creation of a Centralized Board.

Another alternative to the existing Military Department Correction Boards would be to create a centralized DoD records correction system. The development of uniform procedures and standards through a DoD Board offers the potential for enhancing the independence of the correction of record process and providing consistent relief in similar cases among the Services. Staff reductions, particularly in supervisory positions, may generate savings. It is unlikely, however, that a centralized DoD Board could provide more expeditious review of cases. It would, for example, have no greater ability to control many of the delays now encountered by the

Service Boards, such as obtaining service records and advisory opinions and delay based on requests for extension of time from applicants and counsel. The startup costs for the Board would be considerable and would undoubtedly entail development of information technology and communications systems capable of accommodating records, data, and information from all of the Services. Assembling a staff with the knowledge and expertise of unique Service personnel procedures, which is essential to an informed decision-making process, would pose a tremendous challenge.

A DoD Board may also have other disadvantages. The current Boards play an important role for each Service by spotting trends and problems in personnel actions of which leadership can be quickly apprised. For example, the ABCMR recently informed Army leadership of a potential problem it spotted in the way evaluation reports for classified personnel were being prepared and considered. A DoD Board probably could not provide this function as effectively. Finally, Military Department Secretaries must have some discretion to adopt those personnel policies that best ensure readiness, discipline, and morale in the force. A DoD Board may open these policies up to second-guessing and eliminate the Service oversight role necessary to ensure that Board decisions do not inappropriately overturn valid policies. The discretion presently accorded the Service Secretaries in this area is appropriate.

c. Remove Final Decisional Authority from Services.

Another alternative would be to add another level of review and elevate final decisional authority to the DoD level. This would help to ensure that standards are uniformly applied. The creation of another level of review, however, would require establishing a support staff and increase overall costs. The support staff at the DoD level would need to have a broad range of expertise to conduct reviews of the various Service personnel policies. This system would also reduce the discretionary authority of the Service Secretaries to establish and protect personnel policies. It is unlikely that DoD review would produce better results, given the very few cases in which the Service Secretaries or designees overrule Board decisions. Depending on how this extra administrative review meshes with the opportunity for judicial review, ultimate resolution could be delayed.

d. Make Systemic Changes within Current Framework.

Maintaining the present structure for the Correction Boards seems to offer the greatest potential for providing fair, responsive, and expeditious correction of military records. In 1995, the Service boards received 25,273 applications, took Board action on 12,901 applications, and corrected 13,449 military records administratively. Despite this heavy caseload, few cases are successfully appealed in the courts. During their 50-year history, the boards have offered service members an inexpensive and fair review of grievances concerning military records.

There is room for improvement in some areas. Some additional uniformity among Service Board procedures and practices would enhance the probability that similarly situated service members are treated alike. In appropriate areas, uniform standards could be articulated in the DoD Instruction concerning correction boards. A greater oversight role for the Office of the

Secretary of Defense (OSD), perhaps through mandatory annual reporting, could lead to greater uniformity.

Processing times should be improved. Delays experienced in some cases are excessive. The Service Secretaries should develop procedures to ensure efficiency that best suit the needs of the Service and provide fair treatment to the individual. The various personnel systems, automation programs, records storage locations, and force structure make it virtually impossible to mandate uniform processing procedures.

e. Modify Judicial Review.

Concerns about the lack of a coherent system for judicial review of administrative military personnel actions have existed for several years. Several legislative proposals have been introduced in recent years seeking to modify the current scope and method of judicial review of Board cases. Section 551 of the National Defense Authorization Act for Fiscal Year 1996 directed the Secretary of Defense to establish an advisory committee to consider issues relating to an appropriate forum for judicial review of Department of Defense administrative personnel actions. The Committee established by the Secretary of Defense pursuant to Section 551 recently submitted a report to Congress. The Committee found that the current system of judicial review of military personnel actions is complex, confusing, and, at times, inconsistent. The Committee recommended that the current system be changed through legislation to make the Boards for Correction the primary avenue of review of military personnel decisions with judicial review centralized in the United States Court of Appeals for the Federal Circuit.

7. Whether the Board Should be Consolidated with the Discharge Review Board of each Military Department.

Congress established the BCMRs and Discharge Review Boards (DRB) in separate statutes (10 U.S.C. §§ 1552 and 1553, respectively). There is nothing in the statutes to indicate Congressional intent to have the separate boards operate independently or together. Moreover, the statute governing the Discharge Review Boards does not specify whether the Boards be composed of military or civilians. The Services have traditionally appointed military officers to serve on the DRBs. On the other hand, the statute providing for the establishment of correction boards requires that the Boards be comprised of civilian personnel in the executive part of the Military Department.

Petitioners who apply to the DRB retain a statutory right to apply to the BCMR. Further, a petitioner does not lose the right to apply to the DRB by making an initial application with the BCMR. The statute for DRB review gives applicants the statutory right to appear in person. Most of the Service DRBs conduct hearings at various times and locations to accommodate applicants.

The consulting firm of Booz-Allen recommended in its report to the Army that the two Boards be combined. Booz-Allen commented that the functions for the two Boards are similar and that efficiencies could be attained within the same organizational framework. None of the

Services concurs with this recommendation. The Services believe that maintaining the Boards as separate entities provides advantages, described below to applicants and to the Services. The Army believes improved efficiency can occur by combining the Screening, Examination, and Senior Review Team functions, while maintaining separate boards. The Navy uses a specialized examination team in discharge review cases while the Air Force uses specialized discharge review teams to support both Boards.

Consolidating the two boards would require some legislative changes to address the different statutes of limitation. The statutory time limit for correction boards is three years, whereas the discharge review board limit is fifteen years. Developing a hybrid board, composed of civilians and military personnel, would also require legislative change.

A Consolidated Board would eliminate a potentially beneficial layer of review now available to applicants. The current system enables applicants to seek separate reviews by military officers and civilian employees. Review by civilian employees can offer more consistency in similar cases inasmuch as civilians typically serve on the Boards for longer periods of time and are able to accumulate greater experience than military officers. Furthermore, civilian members may be perceived to be, and may in fact exercise, a greater degree of independence in deciding cases because they are not in the direct military chain of command. On the other hand, it is reasonable to expect that military officers would have a more direct stake in how service is characterized. The opportunity for two independent reviews by different officials provides a beneficial safeguard to applicants to ensure that a fair result is reached. Eliminating this system could therefore be viewed as a significant reduction of procedural protections available to service members to redress errors or injustices associated with their military records. In view of these advantages, the current system of maintaining separate Boards should be retained. Board leadership should, however, consider maximizing efficiency by creating a specialized examination team to support both Boards and share resources and staff wherever possible.

VI. RECOMMENDATIONS

A. Retain Current Board Systems. The current structure for the Correction Boards and the DRBs provides a system for the equitable and efficient review of military records. Military Department Secretaries can refine procedures and practices that best meet the goals of fairness, equity, and efficiency. Changes to existing procedures, such as those described below, can be made to improve the process consistent with these goals.

B. Make Changes to Enhance Efficiency of Operations. The Military Department Secretaries should ensure that the Boards have adequate resources and that board leadership takes measures to increase efficiency of operations and reduce the backlog of cases. The Military Departments should work together to identify and adopt best practices now in use for case processing wherever possible. For example, the Boards should investigate system processing initiatives such as bar-coding and use of enhanced information technology systems.

C. Adopt Measures to Enhance Fairness and Integrity of the System. The leadership of the Boards should work together to adopt practices and policies to enhance fairness and efficiency, such as:

1.) Developing a system for screening Board members for conflicts before acting on a case. To avoid the appearance of impropriety and preserve the integrity of the process, the Boards should consider establishing programs to educate members about standards of impartiality, encourage members to raise potential conflicts, institutionalize procedures to screen for conflicts, and adopt a formal recusal policy.

2.) Adoption of specific terms of service for Board members and protection from dismissal without just cause.

3.) Implementing board member training programs similar to the one in use by the AFBCMR.

4.) Developing measures to make the process more understandable to applicants, for example by publishing an applicant instruction pamphlet similar to the one used by the Air Force.

5.) Adopting precepts for Board members to ensure independence and lack of conflicts.

D. Reexamine Existing Procedures to Enhance the Integrity of the Board Process. The Military Department Secretaries and the leadership of the Corrections Boards should reexamine existing policies and procedures that could impact on the integrity of the decision-making process or create the appearance of impropriety. At a minimum, the following areas require reexamination:

1.) The Military Department Boards' occasional reliance on ex parte communications, particularly when the communications are not documented and forwarded to the applicant for review and comment prior to Board action.

2.) The BCNR's use of permanent staff as Board members.

3.) The practice of not providing case files and supporting documents to members in advance of panel meetings.

4.) The procedure of not providing applicants with adverse advisory opinions prior to Board action.

5.) The ABCMR procedure of preparing decisional documents containing recommendations or proposed decisions to panel members.

6.) The BCNR and ABCMR practice of not providing decisional documents to panel members after Board action for review and concurrence.

E. Establish a DoD Working Group. The DoD should formalize interaction among the Boards by establishing a Working Group consisting of representatives from each of the Military Department's Boards, the Military Departments' Offices of General Counsel, and the Office of the Secretary of Defense to study the standards for granting relief, hearings, requests for reconsideration, and untimely applications. The Working Group should develop recommendations concerning uniform standards and procedures to be included in a revised DoD Instruction on the Correction Boards. The Working Group also should determine if legislative modifications are advisable. The working group should also identify the best practices and procedures being used by the Military Department Boards and recommend uniform adoption where appropriate.