

§ 865.109

32 CFR Ch. VII (7-1-10 Edition)

States. Should preparation of such summary be deemed impracticable by the classifying authority, information from the classified source shall not be considered by the DRB in its review of the case.

(e) Current Air Force numbered publications may be obtained from the Chief, Central Base Administration at any major Air Force installation or by writing:

HQ USAF/DASJL, Washington, DC 20330

or

DA Military Review Boards Agency, Attention: SPBA (Reading Room), Room 1E520, Washington, DC 20310

§ 865.109 Procedures for hearings.

(a) The applicant is entitled, by law, to appear in person at his or her request before the DRB in open session and to be represented by counsel of his or her own selection. The applicant also may present such witnesses as he or she may desire.

(b) There are two types of reviews. They are:

(1) *Record Review*. A review of the application, available service records, and additional documents (if any) submitted by the applicant.

(2) *Hearing*. A personal appearance before the DRB by the applicant with or without counsel, or by the counsel only.

(c) The Government does not compensate or pay the expenses of the applicant, applicant's witnesses, or counsel.

(d) A summary of the available military records of the applicant is prepared for use by the DRB in the review process. A copy of the summary is available to the applicant and/or his or her counsel, upon request.

(e) When an applicant has requested a personal appearance and/or representation by counsel on the DD Form 293, the DRB sends written notice of the hearing time and place to the applicant and designated counsel. Evidence of such notification will be placed in the applicant's record.

(f) Personal appearance hearings shall be conducted with recognition of the rights of the individual to privacy. Accordingly, presence at hearings of individuals other than those whose presence is required will be limited to

persons authorized by the presiding officer and/or expressly requested by the applicant, subject to reasonable limitations based upon available space.

(g) Formal rules of evidence shall not be applied in DRB proceedings. The presiding officer shall rule on matters of procedure and shall ensure that reasonable bounds of relevancy and materiality are maintained in the taking of evidence and presentation of witnesses. Applicants and witnesses may present evidence to the DRB panel either in person or by affidavit or through counsel. If an applicant or witness testifies under oath or affirmation, he or she is subject to questioning by Board members.

(h) There is a presumption of regularity in the conduct of governmental affairs. This presumption can be applied in any review unless there is substantial credible evidence to rebut the presumption.

(i) *Failure to appear at a hearing or respond to scheduling notice*. (1) Except as otherwise authorized by the Secretary of the Air Force, further opportunity for a personal appearance hearing shall not be made available in the following circumstances to an applicant who has requested a hearing.

(i) When the applicant and/or a designated counsel or representative has been sent a letter containing the date and location of a proposed hearing and fails to make a timely response; or

(ii) When the applicant and/or a designated representative, after being notified by letter of the time and place of the hearing, fails to appear at the appointed time, either in person or by representative, without having made a prior, timely request for a postponement or withdrawal.

(2) In such cases, the applicant shall be deemed to have waived his/her right to a hearing, and the DRB shall complete its review of the discharge. Further request for a hearing shall not be granted unless the applicant can demonstrate that the failure to appear or respond was due to circumstances beyond the applicant's control.

(j) *Continuance and postponements*. (1) A continuance of a discharge review hearing may be authorized by the presiding officer of the Board concerned, provided that such continuance is of a

reasonable duration and is essential to achieving a full and fair hearing. Where a proposal for continuance is indefinite, the pending application shall be returned to the applicant with the option to resubmit when the case is fully ready for review.

(2) Postponements of scheduled reviews normally shall not be permitted other than for demonstrated good and sufficient reason set forth by the applicant in a timely manner, or for the convenience of the government.

(k) *Reconsideration.* A discharge review shall not be subject to reconsideration except:

(1) Where the only previous consideration of the case was on the motion of the DRB;

(2) When the original discharge review did not involve a personal appearance hearing and a personal appearance is now desired, and the provisions of § 865.109(j) do not apply;

(3) Where changes in discharge policy are announced subsequent to an earlier review of an applicant's discharge, and the new policy is made expressly retroactive;

(4) Where the DRB determines that policies and procedures under which the applicant was discharged differ in material respects from policies and procedures currently applicable on a service-wide basis to discharges of the type under consideration, provided that such changes in policies or procedures represent a substantial enhancement of the rights afforded an applicant in such proceeding;

(5) Where an individual is to be represented by a counsel/representative, and was not so represented in any previous consideration of the case.

(6) Where the case was not previously considered under the uniform standards published pursuant to Pub. L. 95-126 and application is made for such consideration within 15 years after the date of discharge; or

(7) On the basis of presentation of new, substantial, relevant evidence not available to the applicant at the time of the original review. The decision as to whether evidence offered by an applicant in support of a request for reconsideration is in fact new, substantial, relevant, and was not available to the applicant at the time of the original

review will be based on a comparison of such evidence with the evidence considered in the previous discharge review. If this comparison shows that the evidence submitted would have had a probable effect on matters concerning the propriety or equity of the discharge, the request for reconsideration shall be granted.

§ 865.110 Decision process.

(a) The DRB shall meet in plenary session to review discharges and exercise its discretion on a case-by-case basis in applying the standards set forth in this regulation.

(b) The presiding officer is responsible for the conduct of the discharge review. The presiding officer shall convene, recess, and adjourn the DRB as appropriate, and shall maintain an atmosphere of dignity and decorum at all times.

(c) Each board member shall act under oath or affirmation requiring careful, objective consideration of the application. They shall consider all relevant material and competent information presented to them by the applicant. In addition, they shall consider all available military records, together with such other records as may be in the files and relevant to the issues before the DRB.

(d) The DRB shall identify and address issues after a review of the following material obtained and presented in accordance with this subpart and 32 CFR part 70: available official military records, documentary evidence submitted by or on behalf of the applicant, presentation of testimony by or on behalf of the applicant, oral or written arguments presented by or on behalf of the applicant, and any other relevant evidence.

(e) Application of Standards:

(1) When the DRB determines that an applicant's discharge was improper, the DRB will determine which reason for discharge should have been assigned based upon the facts and circumstances properly before the discharge authority in view of the regulations governing reasons for discharge at the time the applicant was discharged.

(2) When the board determines that an applicant's discharge was inequitable, any change will be based on the