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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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AUG 2 1977

The Honorable Ray Roberts
Chairman, Committee on Veterans' Affairs
House of Representatives

Dear Mr. Chairman:

This is in response to an informal request made by the Chief Counsel of the Committee on Veterans' Affairs, House of Representatives, Mr. Mack G. Fleming, on July 29, 1977.

Mr. Fleming requested our views as to the effect the upgrading of military discharges by action of military discharge review boards (10 U.S.C. 1553 (1970)), would have on the bar to veterans' benefits provided by 38 U.S.C. 3103(a) (1970). Mr. Fleming indicated that the Veterans Administration (VA) has interpreted such upgraded discharges as overcoming that statutory bar to benefits even though there has been no correction of the veterans' military records to remove the underlying reason for the discharge.

As you know, the laws applicable to veterans' benefits, under title 38, United States Code, are administered by the VA and are not within our jurisdiction. Decisions of the Administrator of the VA on any question of law or fact on such matters are final and conclusive, and we have no authority to review his decisions. See 38 U.S.C. 211(a) (1970). Accordingly, the views we are expressing here have no binding effect on the VA.

Section 3103(a) of title 38, United States Code (1970), provides as follows:

> "(a) The discharge or dismissal by reason of the sentence of a general court-martial of any person from the Armed Forces, or the discharge of any such person on the ground that he was a conscientious objector who refused to perform military duty or refused to wear the uniform or otherwise to comply with lawful orders of competent military authority, or as a deserter, or of an officer by the acceptance of his resignation for the good of the service, or (except as provided in subsection (c)) the discharge

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> of any individual during a period of hostilities as an alien, shall bar all rights of such person under laws administered by the Veterans' Administration based upon the period of service from which discharged or dismissed."

Since we lack authority to render decisions on VA benefit entitlements, we have not interpreted the provisions of section 3103(a). However, we have considered the effect of actions to upgrade discharges by military discharge review boards (10 U.S.C. 1553) and boards for the correction of military records (10 U.S.C. 1552), on entitlement to certain military pay and allowances.

For example, in 41 Comp. Gen. 703 (1962) we considered the case of an Army master sergeant, E-7, who was discharged on March 14, 1955 under a court-martial sentence with a reduction in grade to private, E-1, and an undesirable discharge. Thereafter, the character of his discharge was changed to general under honorable conditions by action of the Army Discharge Review Board pursuant to 10 U.S.C. 1553. In considering whether the change in the character of his discharge affected his reduction in grade we stated as follows at pages 704-705:

> "* * * If the reduction in grade was accomplished pursuant to the sentence of a court-martial, the action of the Army Discharge Review Board could have no effect on such reduction. Assuming, however, that the reduction in grade was made pursuant to the mandatory provisions of the Army Regulations requiring such action in the case of a member to be separated with an Undesirable Discharge (see par. 25 of AR 615-366, February 5, 1954; par. 4.1 of AR 615-368, C-1, May 17, 1949; and par. 11 of AR 635-89, January 21, 1955, in effect at the time of Sergeant Orchard's discharge), the change in the character of his discharge from 'Undesirable' to 'General under honorable Conditions' removed the ground for the reduction, rendered that reduction a nullity and

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> required restoration to the grade from which he had been erroneously reduced. See 26 Comp. Gen. 265. In the latter event, there would be no authority for computing his pay and allowances for March 14, 1965, and for the unused leave standing to his credit at that time on any grade other than that in which he was actually serving, master sergeant E-7. * * *"

In 40 Comp. Gen. 280 (1960) we considered several questions concerning the statutory requirement to recoup reenlistment bonuses previously paid if the member "voluntarily or as the result of his own misconduct," does not complete the term of enlistment for which the bonus was paid. In considering what effect an upgrading of the type of a discharge would have on a member discharged for his own misconduct, it was stated in part at page 284:

> "* * * it may be stated that if the separation from the service actually results from the individual's own misconduct, a mere change in the type or nature of discharge from other than honorable to general under honorable conditions or honorable would not be sufficient to overcome the basic reason for separation and in such circumstances recoupment of the unearned portion of reenlistment bonus would be required by law. However, if the military records of the individual concerned in such case are further corrected, under authority of 10 U.S.C. 1552, so as to show that the individual was not separated by reason of his own misconduct, recoupment of the reenlistment bonus would not be required.
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> "The fact that the individual concerned was initially separated from the service with a general discharge would not entitle such person to retain any unearned reenlistment bonus if his separation from the service in fact resulted from his own misconduct. * * *"

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We also stated in part at page 285 as follows concerning whether an upgrade of the discharge would affect the recoupment of the reenlistment bonus of a member separated by sentence of a court-martial:

> "* * * The correction of the military record in the circumstances above outlined which changes the type of discharge from other than honorable to a general or honorable discharge constitutes a rescission of that part of the sentence of court-martial which imposed the original discharge under other than honorable conditions. However, as pointed out above, a mere change in the type of discharge granted without a corresponding correction in the individual's basic military records altering the reason for separation from the service when such separation was, in fact, the result of the person's own misconduct would not give rise to any right to retain a reenlistment bonus. * * *"

In 40 Comp. Gen. 491, 493-494 (1961) also concerning recoupment of reenlistment bonuses, we restated the position taken previously that the right to retain or the liability to refund unearned reenlistment bonuses is governed primarily by the reason causing the early release from the enlistment and is not dependent, in any manner or to any extent, upon the type of character of discharge certificate issued either at the time of separation or as subsequently changed pursuant to the approved findings of a discharge review board. It was stated as follows at page 497:

> " * * * therefore, it may be stated that the mere reference in the findings of a discharge review board (10 U.S.C. 1553) or by a correction of records board (10 U.S.C. 1552) to a particular Air Force (or Army) regulation as constituting the basis on which the former member should have been separated from active service (where the particular regulation to

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> which specific reference is made does not exclusively pertain to involuntary and non-misconduct separations) may not be viewed as effectively relieving such former member of liability to refund unearned reenlistment bonuses if the actual facts of record, remaining unchanged, clearly establish that the early separation was in fact voluntary or the result of the member's own misconduct."

The Court of Claims has held that a change in the type of discharge issued by the board for correction of military records does not in itself change the reasons for the discharge. _____ v. United States, Ct. Cl. No. 187-74, June 16, 1976.

In effect, 38 U.S.C. 3103(a) denies veterans' benefits to: 1) persons discharged under a general court-martial sentence, 2) conscientious objectors who refuse to perform military duties, 3) persons separated for desertion, 4) officers who resign for the good of the service and 5) aliens who request release during a period of hostilities. Since that provision does not predicate denial of benefits on the character or type of the discharge the person receives, it appears that the reasoning in the decisions discussed above would also be applicable to section 3103(a). That is, it appears that a mere change in the character of the discharge would not entitle a person to benefits barred because the person was discharged or dismissed for the reasons or grounds stated in that section. However, if the person's military record were corrected to show that the person was not discharged or dismissed for those reasons or grounds, the bar would no longer be effective.

We note, however, that the VA has stated a contrary conclusion in Administrator's Decision, Veterans' Administration No. 980, May 10, 1962, in which it is concluded, based on the reasoning set forth therein, that a change in the type of discharge by the Board for the Correction of Naval Records removes the bar to payment of VA benefits as contained in 38 U.S.C. 3103(a). A copy of that decision is enclosed.

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In view of the authority of the Director of VA to make determinations regarding veterans' benefits, it appears that any change in his interpretation of section 3103(a), as it relates to changes in discharges could only be effected by legislation.

We trust this serves the purpose of the inquiry. Enclosed are copies of our decisions cited above.

Sincerely yours,

R.F.KELLER

Deputy Comptroller General
of the United States

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