

the proposed class members were subsequently unable to perform their assigned military duties. Eventually, each was discharged under other than honorable conditions.

In the decades since their service, Mr. Shepherd, VVA members, and the proposed class members have experienced homelessness, prolonged unemployment, and severely damaged family and social relationships. Isolated and impoverished, they have struggled to cope not only with their war wounds but also with the shame of a bad discharge. Because of their stigmatizing discharges, many of these veterans are ineligible for the disability compensation and other benefits that their service has otherwise earned.

Over the last several decades, medical research has illuminated the causes and severe consequences of PTSD. The military now is better able to recognize and treat the injury than it was before 1980, when the diagnosis did not exist. For instance, today servicemembers reasonably alleging PTSD must receive a medical examination and, potentially, a medical discharge. However, the Secretaries of the Army, Navy, and Air Force have refused to review or upgrade the discharge statuses of the thousands of Vietnam War Era veterans with service-related PTSD. The Secretaries have also failed to put in place medically appropriate standards to ensure adequate consideration of service-related PTSD when Mr. Shepherd, VVA members, and others have applied to the administrative board empowered to upgrade discharge statuses. In so doing, the Secretaries have violated the Administrative Procedure Act, the Fifth Amendment Due Process Clause, and Section 504 of the Rehabilitation Act.

Mr. Shepherd's experience exemplifies the problem. He served in combat in Vietnam in 1969. For his courage in attacking and destroying an enemy bunker when his unit was under fire, he received the Bronze Star with Valor Device, one of the Army's most distinguished combat awards. Soon after, he witnessed the killing of a senior officer. As a result of his

experiences, Mr. Shepherd was gravely wounded with PTSD, which went undiagnosed at the time and interfered with his ability to perform his duties. The Army eventually separated him under other than honorable conditions. For decades, Mr. Shepherd struggled to earn a living, maintain relationships with family and friends, and simply survive. In 2004, a U.S. Department of Veterans Affairs (“VA”) physician diagnosed him with severe PTSD caused by his military service. A Yale School of Medicine psychiatrist later confirmed this diagnosis. Since 2005, Mr. Shepherd has applied three times to the Army Board for Correction of Military Records (“ABCMR”), requesting that his status be upgraded because his poor performance in 1969 was attributable to undiagnosed PTSD. The ABCMR has rejected all three applications.

Mr. Shepherd, acting on behalf of himself and others similarly situated, and Plaintiff VVA, acting on behalf of itself and its members who fall within the proposed class, now bring this class action for declaratory and injunctive relief. These veterans served their country, but they were discharged at a time when their combat wounds were not yet recognized. They are now elderly, disabled, and often indigent. They seek the implementation of medically appropriate standards for consideration of their service-related PTSD in the discharge upgrade review process and an upgrade in their statuses that will allow them, in their final years, to receive the respect, recognition, and assistance that their service long ago earned.

JURISDICTION AND VENUE

1. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1343, and 2201. This action arises under the Fifth Amendment of the U.S. Constitution, the Administrative Procedure Act, 5 U.S.C. § 706, and the Rehabilitation Act of 1973, 29 U.S.C. §794(a).

2. Venue lies in this district pursuant to 28 U.S.C. § 1391(e)(1)(C) as Plaintiff John W. Shepherd, Jr., resides in the District of Connecticut, VVA has chapters and members in the

District, no real property is involved in the action, and Defendants John McHugh, Michael Donley, and Ray Mabus, are sued in their official capacities as Officers of the United States.

PARTIES

3. Plaintiff John W. Shepherd, Jr., is a veteran of the United States Army. He is a citizen of the United States and currently resides in Connecticut.

4. Founded in 1978, VVA is the only national Vietnam veterans' organization congressionally chartered and dedicated to the needs of Vietnam veterans and their families. VVA's membership includes approximately 65,000 Vietnam veterans, including veterans with service-related PTSD who received other-than-honorable discharges.

5. VVA's mission is to promote and support the full range of issues important to Vietnam veterans, to create a new identity for this generation of veterans, and to change the public perception of Vietnam veterans. VVA promotes this mission in part by advocating for the rights of Vietnam veterans with PTSD and other mental health disabilities through policy advocacy, legislative advocacy and litigation.

6. VVA has been injured as a direct result of Defendants' failure to utilize consistent and medically appropriate standards for considering the impact of service-related PTSD when determining whether to upgrade the discharge statuses of Vietnam War Era veterans; and Defendants' failure to upgrade the discharge statuses of members of the proposed class. VVA's interests are adversely affected because it must expend resources advocating for members and other Vietnam veterans who are harmed by Defendants' actions.

7. VVA also brings this action on behalf of its members who form a part of the alleged class. Because of the nature of the claims alleged in this Second Amended Complaint

and the nature of the relief sought, the individual participation of each affected VVA member is not indispensable to the proper resolution of this lawsuit.

8. Defendant John McHugh, Secretary of the Army, is sued in his official capacity. Defendant is empowered to act through a board of civilians to change any military record of a former member of the Army when necessary to correct an error or to remove an injustice.

9. Defendant Ray Mabus, Secretary of the Navy, is sued in his official capacity. Defendant is empowered to act through a board of civilians to change any military record of a former member of the Navy or Marine Corps when necessary to correct an error or remove an injustice.

10. Defendant Michael Donley, Secretary of the Air Force, is sued in his official capacity. Defendant is empowered to act through a board of civilians to change any military record of a former member of the Air Force when necessary to correct an error or remove an injustice.

FACTS AND PROCEEDINGS

Allegations as to Class Representative Mr. John Shepherd, Jr.

11. On July 5, 1968, Mr. Shepherd volunteered to serve in the U.S. Army. While at Fort Gordon, Mr. Shepherd received a leave to visit his family and then was absent without leave for an additional three weeks. After voluntarily returning to Fort Gordon, he accepted responsibility for his actions and received a court-martial. The Army suspended his sentence of confinement, and the commanding officer at Advanced Individual Training later described Mr. Shepherd as an “outstanding soldier.”

12. Two months later, Mr. Shepherd was deployed to Vietnam and stationed at Fire Support Base Dirk in Dinh Tuong Province, which frequently came under deadly mortar and rocket attack.

13. Photographs of Mr. Shepherd confirm his 1969 deployment in Vietnam:



14. On February 17, 1969, Mr. Shepherd rushed into enemy fire and threw a grenade into an enemy bunker, killing all the soldiers inside except one, who was captured. For his

courage in this battle, Mr. Shepherd received the Bronze Star with Valor Device, specifically for “heroism in ground combat against a hostile force.”

15. A short time later, Mr. Shepherd witnessed the fatal shooting of a senior officer. Military records reflect that Second Lieutenant Fred Kulicke III, an infantry unit commander in Mr. Shepherd’s company, was killed by gunshot or small-arms fire on February 22, 1969.

16. In the weeks after these events, Mr. Shepherd’s mental condition deteriorated and he eventually reached a breaking point, refusing orders go out into the field and secure his gear.

17. On August 4, 1969, Mr. Shepherd was administratively discharged from the Army under other than honorable conditions for a “pattern of shirking.”

18. Upon discharge, Mr. Shepherd struggled to make sense of his traumatic experience in Vietnam. He began to abuse alcohol and had trouble controlling his anger.

19. Mr. Shepherd applied to the Army Discharge Review Board (“ADRB”) for a discharge upgrade, but on August 10, 1972, the ADRB denied his petition.

20. In July 2004, a VA psychiatrist diagnosed Mr. Shepherd with PTSD based on multiple combat-related stressors from his service in Vietnam. In November 2004, VA deemed his PTSD service-connected and began providing him healthcare. However, VA separately denied Mr. Shepherd’s application for disability compensation benefits, on the sole ground of his insufficient discharge status.

21. In 2005, Mr. Shepherd applied to the ABCMR *pro se* for review of his discharge status and was denied. Assisted by *pro bono* counsel, Mr. Shepherd moved for reconsideration and was again denied.

22. On April 21, 2011, represented by his current counsel, Mr. Shepherd filed a Complaint with this Court, seeking judicial review of the ABCMR decisions. Earlier this year, the parties agreed to a remand to the ABCMR. (ECF No. 39.)

23. Mr. Shepherd timely resubmitted his application to the ABCMR and requested a hearing. On or about June 29, 2012, Mr. Shepherd received a decision from the ABCMR dated June 11, 2012, and postmarked June 26, 2012, denying his application. (Exhibit A.) The decision was signed by three members of the Board who had allegedly considered the application. One page of the decision, containing much of the Board's reasoning, was missing. The decision questioned Mr. Shepherd's account of his wartime service and dismissed the credentials of the Yale School of Medicine psychiatrist who had evaluated him.

24. On July 12, 2012, Defendant McHugh's counsel provided a second ABCMR decision to Mr. Shepherd. (Exhibit B.) This decision—also dated June 11, 2012 and bearing identical but photocopied signatures—differed in numerous material respects from the one previously sent. Critically, it omitted paragraph thirteen of the first June 11, 2012 decision and altered two paragraphs relating to the death of Mr. Shepherd's officer, the key factual dispute on which the ABCMR found Mr. Shepherd lacked credibility and therefore denied his application.

25. In an e-mail, Defendant McHugh's counsel later stated that the first June 11 decision was a draft and the second June 11 decision was the official decision of the ABCMR.

26. Both June 11 decisions fail to utilize accepted and appropriate standards to evaluate the evidence of Mr. Shepherd's service-connected PTSD and its impact on the alleged conduct that led to his discharge. And, as with 98% of applications submitted by Vietnam veterans who served in theater and developed PTSD, the ABCMR denied the application.

27. Both of the ABCMR's June 11 decisions stated that the ABCMR's analyst could find no record of the death of the senior officer killed beside Mr. Shepherd. Because the analyst could not confirm this detail, the ABCMR dismissed Mr. Shepherd's account as well as the psychiatric evaluation based in part on this account. However, the decisions nowhere addressed the death of Second Lieutenant Kulicke.

28. In addition, the analyst relied on records and evidence to which Mr. Shepherd and his counsel did not have access, denying Mr. Shepherd notice of critical evidence and any opportunity to be heard as to that evidence.

29. Both June 11 decisions failed to distinguish authority cited by Mr. Shepherd in which a record correction boards had excused misconduct or redressed punishment because of PTSD. They also failed to address Mr. Shepherd's argument that a discharge upgrade should be granted to remove an injustice based on the totality of his life and circumstances, or because under current policies and procedures, he would not have received an undesirable discharge.

30. Mr. Shepherd has exhausted all administrative remedies available to him.

Allegations as to the Class

31. Approximately nine million U.S. military personnel served on active duty during the Vietnam War Era, with more than one-third serving in the Southeast Asia Theater.

32. More than 250,000 veterans, about three percent of those who served in Vietnam, were discharged under other than honorable conditions. A veteran with an other-than-honorable discharge is generally ineligible for numerous benefits to which he or she otherwise would be entitled, including disability compensation, education benefits, a military burial, and benefits for surviving family members.

33. Many veterans who served in the Vietnam theater during the Vietnam War Era and were discharged under other than honorable conditions have PTSD. PTSD is a psychiatric disorder that can develop in a person who experiences, witnesses, or is confronted with a traumatic event, often an event that is life-threatening. It is the most prevalent mental disorder arising from combat experience. Its symptoms include flashbacks or nightmares of the traumatic event, avoidance of anything associated with the trauma, and increased arousal, often manifested by difficulty concentrating and by irritability.

34. None of the Vietnam veterans with service-related PTSD who were discharged under other than honorable conditions before 1980 were, or could have been, diagnosed with PTSD at the time of discharge, since the diagnosis did not exist at that time.

35. The National Vietnam Veterans Readjustment Study and other scientific reports estimate that 860,000 Vietnam veterans—almost one-third of veterans who fought in Vietnam—have suffered from PTSD. The study also indicates that incident rates of PTSD in 1990 were significantly elevated for veterans with high levels of warzone exposure.

36. Approximately one third or more of the over 250,000 Vietnam veterans discharged under other than honorable conditions—more than 80,000 veterans—have PTSD.

37. The military discharged these service members under other than honorable conditions based on poor conduct such as unauthorized absence without leave, shirking, using drugs, or lashing out at comrades or superior officers, but this behavior is typical of those who have recently experienced trauma. This conduct was in fact a symptom of the veterans' underlying undiagnosed PTSD.

38. Today, in recognition of the fact that PTSD can cause behavior that might otherwise appear as deliberate misconduct, the military's own regulations require that members

of the armed forces “reasonably asserting post-traumatic stress disorder” receive a medical examination prior to administrative separation. Vietnam War Era veterans, in contrast, have been denied this opportunity for appropriate consideration of their PTSD.

39. The military has never conducted a comprehensive review of Vietnam War Era discharges to determine whether it erroneously and unjustly burdened disabled veterans who served in theater with other than honorable discharges, thus barring many of them from the benefits they deserve and to which they would otherwise be entitled.

40. In addition, systemic racial discrimination contributed to the arbitrariness of administrative discharges during the Vietnam era. During this period, the Army punished black soldiers more frequently and more harshly than white soldiers, and black soldiers were approximately twice as likely to receive an undesirable discharge. According to the Department of Defense’s own *Report of the Task Force on the Administration of Military Justice in the Armed Forces* (1972), there was “a discernible pattern reflecting disproportionate numbers of black servicemen involved in military justice actions.” The report attributed this differential treatment to “racism.”

41. Race discrimination in the military discharge system was so pervasive in the Vietnam Era that the Equal Employment Opportunity Commission (EEOC) concluded that an employer could not lawfully apply the requirement that job applicants who had served in the armed forces have an honorable discharge. EEOC Dec. 74-25, 10 F.E.P. 260, 265 (1973) (noting that, according to DoD Task Force, 2.6 percent of white service members’ discharges and 5.2 percent of black service members’ discharges were undesirable in Fiscal Year 1971).

42. Congress has authorized the Secretary of each military branch, acting through each branch’s records correction board (“Board”), to correct any military record when it is

“necessary to correct an error or remove an injustice.” 10 U.S.C. § 1552(a)(1). The Board regularly exercises this power to upgrade the discharge status of a former service member. The Boards have “an abiding moral sanction to determine, insofar as possible, the true nature of an alleged injustice and to take steps to grant thorough and fitting relief.” *Yee v. United States*, 512 F.2d 1383, 1387-88 (Ct. Cl. 1975) (citations omitted).

43. The Secretary of each military branch exercises centralized control over its Board by appointing each Board member from among senior civilian employees of that branch. Board members review and make recommendations regarding each request for an upgrade in discharge status.

44. The work of the Boards passes through several stages of hierarchical review. Boards rely on a small corps of full-time senior analysts to prepare cases for review and draft opinions. The work of these analysts is closely supervised by a senior supervisor who reviews the analysts’ work product before presenting it to board members for consideration. After the board members make a recommendation, all upgrade approvals and any recommendations that include a dissenting opinion are approved or disapproved by the Deputy Assistant Secretary, acting for the Secretary.

45. When Vietnam veterans have duly applied to the Boards to upgrade an other-than-honorable discharge, the military has systematically denied applications involving evidence of service-related PTSD.

46. The ABCMR’s record is illustrative. Since 2003, of approximately 145 applications for upgrades of other-than-honorable discharges submitted by Vietnam veterans claiming PTSD, the ABCMR has approved two—a 1.4% approval rate.

47. By contrast, in recent years the ABCMR's overall grant rate for all discharge upgrade applications has been 46%, according to the National Veterans Legal Services Program.

48. When denying such applications, the ABCMR has frequently ignored the veterans' PTSD claims entirely or discredited their PTSD diagnoses because there was no evidence of PTSD from the time of the veteran's service, disregarding the fact that PTSD was not a recognized mental illness before 1980.

49. The experiences of individual Vietnam veterans who have applied for discharge upgrades reveal the ABCMR's failure to adequately consider PTSD claims and its discriminatory and near-categorical refusal to grant upgrades in such cases.

50. For example, "John Doe 1" served in the Army and was honorably discharged from his first tour of duty in 1965. He reenlisted two months later and was deployed to Vietnam. While there, he accepted nonjudicial punishment (NJP) for going AWOL and for dereliction of duty. He was also punished by special court-martial for four days' AWOL.

51. In 2011, "John Doe 1" applied to the ABCMR seeking a discharge upgrade, submitting six letters from VA medical personnel in support of his claim. At least one VA letter stated that the other-than-honorable discharge was likely due in part to PTSD. Disregarding the six VA medical letters, the Board rejected the application, stating "no evidence shows the applicant was having mental problems in 1967 that interfered with his ability to perform his military duties or that were the underlying cause for the misconduct that led to his discharge."

52. "John Doe 2" also served in Vietnam. He completed two tours of duty and fought in four campaigns, including the Tet Counteroffensive, the Vietnam Counteroffensive Phase VI, and the Vietnam Counteroffensive Phase VII. He earned an Air Medal with Valor Device for "heroism while participating in aerial flight into Laos on February 8, 1971."

53. VA clinical records from 1968 show that upon returning from his first tour, “John Doe 2” was hospitalized for “transient stress reaction . . . manifested by anxiety, insomnia and fear of death” and that the external precipitating stress of these symptoms was “severe, combat duty in Vietnam.” During his third tour of duty, Mr. Doe 2 began threatening and striking other soldiers. On July 31, 1973, he was separated with an other-than-honorable discharge.

54. In 2009, “John Doe 2” applied to the ABCMR for an upgrade to his discharge status on the basis of service-connected PTSD. He submitted records from his 1968 hospitalization and others demonstrating a VA diagnosis of service-connected PTSD. The ABCMR nevertheless denied his application, stating that “there were no disqualifying mental or physical defects sufficient to warrant disposition of the applicant through medical channels prior to, or at the time of his discharge.”

55. “John Doe 3” was honorably discharged from the Army in 1971 having earned numerous decorations, including an Army Good Conduct Medal. He reenlisted in 1975 but went AWOL in 1976 for two years and was discharged under other than honorable conditions.

56. In 2009, the VA confirmed that “John Doe 3” had service-connected PTSD. That same year, he applied to the ABCMR for a discharge upgrade, claiming that his discharge was the result of PTSD related to his service in Vietnam and submitting the VA’s decision as evidence. Nevertheless, the ABCMR denied the application, stating, “There is no available evidence and the applicant did not provide any evidence that he was suffering any disabling effects from PTSD at the time of the discharge or at the time he went AWOL.”

57. The military has failed to apply consistent and medically appropriate standards to assess the impact of service-related PTSD on the conduct that led to discharge, resulting in the

Defendants' discriminatory and near-categorical denial of discharge upgrade applications by Vietnam veterans who served in theater and developed PTSD.

The Proposed Class Satisfies the Requirements of Rule 23

58. This is a class action seeking equitable relief under Rule 23(b)(2) of the Federal Rules of Civil Procedure, on behalf of Plaintiffs and other similarly situated individuals.

59. The proposed class for Claims I (Violation of Administrative Procedure Act), II (Violation of Procedural Due Process), and III (Violation of the Rehabilitation Act of 1973) includes all veterans of the Vietnam War Era who: (a) were deployed in the Vietnam theater to support military operations; (b) were discharged under other than honorable conditions (also referred to as an undesirable discharge); (c) have not received a discharge upgrade to honorable or to general (affirmed under uniform standards); and (d) have been diagnosed with PTSD related to his or her service by a licensed physician or licensed psychologist.

60. The members of the proposed class are so numerous that joinder of all members is impracticable.

61. The members' injuries derive from a unitary course of conduct by a single centralized, hierarchical system supervised and controlled by Defendants.

62. The members are elderly and suffer the serious physical and psychological consequences of long-term PTSD.

63. There are questions of law and fact common to the proposed class, including but not limited to:

a. Whether the Defendants have failed to utilize consistent and medically appropriate standards when assessing how service-related PTSD impacted class members' ability to perform their duties when considering whether to upgrade their discharge statuses upon

application or the Defendants' own initiative, in violation of the Fifth Amendment, the Administrative Procedure Act, and Section 504 of the Rehabilitation Act;

b. Whether the Defendants have abused their discretion and acted arbitrarily and capriciously, in a manner unauthorized by law, when determining whether to upgrade the discharge statuses of class members and by failing and refusing to upgrade such discharge statuses, upon application or the Defendants' own initiative, in violation of the Administrative Procedure Act;

c. Whether the Defendants' failure and refusal to recognize the effects of class members' service-related PTSD, upon application or the Defendants' own initiative, has deprived class members of their property and liberty rights in violation of the Fifth Amendment;

d. Whether the Defendants have, solely by reason of the class members' disability, excluded class members from the participation in, denied class members the benefits of, or subjected class members to discrimination under any program or activity receiving federal financial assistance, in violation of Section 504 of the Rehabilitation Act;

e. Whether the Defendants have failed to make reasonable modifications in their policies, practices, and procedures that are necessary to avoid discrimination against class members, in violation of Section 504 of the Rehabilitation Act; and

f. Whether class members have suffered impermissibly the stigmatizing effects of a less than honorable discharge, which Defendants have refused to upgrade.

64. The claims of Mr. Shepherd and VVA are typical of the claims of the proposed class members.

65. Mr. Shepherd, VVA, and their counsel will fairly and adequately protect the interests of the proposed class.

66. Defendants have acted or refused to act on grounds that apply generally to the class, and therefore final injunctive relief and/or corresponding declaratory relief is appropriate respecting the class as a whole.

LEGAL CLAIMS OF THE CLASS

**Count I
Violation of Administrative Procedure Act**

67. Plaintiffs reallege and incorporate herein all previously alleged paragraphs in the Complaint.

68. Plaintiffs, on behalf of themselves and the proposed class, reallege and incorporate herein by reference as though fully set forth, each and every allegation contained in Paragraphs 1 through 66 of this Complaint.

69. By failing and refusing to adequately review or reconsider the discharge statuses of Plaintiffs and all proposed class members, whether upon application or the Defendants' own initiative, which failure and refusal stigmatizes each class member, interferes with their employment prospects, and bars them from VA benefits they deserve and to which they would otherwise be entitled, Defendants and the record correction boards through which they operate have abused their discretion and engaged in arbitrary and capricious action that is unauthorized by law.

**Count II
Violation of Procedural Due Process**

70. Plaintiffs, on behalf of themselves and the proposed class, reallege and incorporate herein by reference as though fully set forth, each and every allegation contained in Paragraphs 1 through 66 of this Complaint.

71. Defendants have failed and refused to utilize consistent and medically appropriate standards in assessing the impact of class members' service-related PTSD when determining whether to upgrade their discharge statuses and has failed to correct class members' wrongful other-than-honorable discharges. This failure and refusal stigmatizes each class member, interferes with their employment prospects, and bars them from VA benefits they deserve and to which they would otherwise be entitled. Defendants and the record correction boards through which they operate have unconstitutionally infringed upon Plaintiffs' property and liberty rights protected by the Due Process Clause of the Fifth Amendment.

Count III
Violation of Section 504 of the Rehabilitation Act

72. Plaintiffs, on behalf of themselves and the proposed class, reallege and incorporate herein by reference as though fully set forth, each and every allegation contained in Paragraphs 1 through 66 of this Complaint.

73. Section 504 of the Rehabilitation Act of 1973 ("Section 504") provides that "no otherwise qualified individual with a disability . . . shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." 29 U.S.C. § 794(a).

74. An "individual with a disability" is defined as a person who "has a physical or mental impairment which substantially limits one or more of such person's major life activities." 29 U.S.C. § 705(20)(B).

75. Mr. Shepherd, VVA members, and the members of the proposed class have mental impairments that limit their major life activities under Section 504.

76. Defendants' program or activity of reviewing military records to determine whether to upgrade the discharge statuses of former service members has received substantial federal financial assistance at all relevant times and is a program or activity of a federal agency.

77. Defendants discriminate against Plaintiffs and the proposed class members on the basis of disability by failing to utilize consistent and medically appropriate standards for consideration of PTSD when reviewing the military records of Vietnam veterans to determine whether to upgrade their discharge statuses and in their near-categorical refusal to upgrade the discharge statuses of class members. As a result, Vietnam veterans with service-related PTSD cannot receive the benefits of Defendants' review processes, including upgrades of their discharge statuses, and the benefits associated with such upgrades.

78. The regulations implementing Section 504 prohibit entities receiving federal financial assistance from utilizing "criteria or methods of administration (i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap, (ii) that have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the recipient's program or activity with respect to handicapped persons" 34 C.F.R. § 104.4(b)(4).

79. Defendants' criteria and methods of administration of their programs for reviewing military records to determine whether to upgrade the discharge statuses of former service members fail to utilize consistent and medically appropriate standards for consideration of Plaintiffs' PTSD. This failure results in the near-categorical denial of applications from Vietnam veterans with PTSD, subjects Plaintiffs and proposed class members to discrimination, and defeats the purposes of the Defendants' review processes, which include the review and

correction of any military record when necessary to correct an error or remove an injustice, all in violation of Section 504.

80. Defendants are also violating Section 504 by failing to make reasonable modifications in their policies, practices and procedures that are necessary to avoid discrimination against Vietnam Veterans with service-related PTSD. Specifically, Defendants have failed to modify their procedures to include consistent and medically appropriate standards for assessing the impact of service-related PTSD when determining whether to upgrade the discharge statuses of such veterans.

LEGAL CLAIMS OF MR. SHEPHERD ONLY

Count IV

Violation of Administrative Procedure Act

81. Plaintiff Shepherd realleges and incorporates herein by reference as though fully set forth, each and every allegation contained in Paragraphs 1 through 66 of this Complaint.

82. The ABCMR's decision on the merits in Mr. Shepherd's case was arbitrary, capricious, unsupported by substantial evidence, contrary to law, and an abuse of discretion.

83. The ABCMR's decision relied on evidence that it did not share with Mr. Shepherd or his counsel. The ABCMR thus denied him notice or an opportunity to be heard as to such evidence.

84. The ABCMR denied his request for an in-person hearing, despite using undisclosed evidence against him.

85. The ABCMR's decision discredited Dr. Westphal for failing to tender a curriculum vitae. Dr. Westphal's credentials were obvious from his signature block. Moreover,

if the analyst or Board wanted to confirm those credentials, they could have easily contacted Dr. Westphal or the Yale Department of Psychiatry, or performed an online search.

86. The ABCMR ignored that the senior officer killed beside Mr. Shepherd shortly after the bunker attack had been involved, before his death, in nominating Mr. Shepherd for the Bronze Star with Valor Device. The reason the man cannot be identified is because the Army has, by its own fault, failed to keep the records detailing who nominated Mr. Shepherd for this rare honor and for what action he received the award.

87. The decision is also arbitrary and capricious because it relies on an ABCMR analyst's search of Army records, which are incomplete in significant ways. The ABCMR nowhere addresses the death from gunshot or small arms fire on February 22, 1969, of Second Lieutenant Frederick Kulicke III of Mr. Shepherd's Company. If the analyst's search did find records of the death of Second Lieutenant Kulicke, it was arbitrary and capricious not to disclose those records and to consider them in the ABCMR's decision.

88. The decision is also arbitrary and capricious because it failed to address Mr. Shepherd's separate argument that an upgrade is warranted to correct an error in light of modern-day understandings of PTSD, and to remove an injustice based on the totality of Mr. Shepherd's life and circumstances.

89. The Board's decision also failed to address Mr. Shepherd's argument that an upgrade is warranted to correct an error or remove an injustice because if current Army regulations regarding PTSD had been in place at the time of his discharge, he would not have been discharged under other than honorable conditions.

90. The Board's decision was also arbitrary and capricious in failing to distinguish or even address Board authority cited by Mr. Shepherd in which misconduct was excused or a punishment redressed where the underlying cause was PTSD.

Count V
Violation of Procedural Due Process

91. Plaintiff Shepherd realleges and incorporates herein by reference as though fully set forth, each and every allegation contained in Paragraphs 1 through 66 of this Complaint.

92. The Due Process protections of the Fifth Amendment of the U.S. Constitution require that an administrative agency provide a petitioner notice and an opportunity to be heard regarding facts that are dispositive in ruling on his petition.

93. In denying Mr. Shepherd's application for a discharge upgrade on remand, the ABCMR found it dispositive that its analyst could not find records of the death of the senior officer killed by enemy gunfire beside Mr. Shepherd shortly after the bunker attack.

94. The records upon which the ABCMR analyst relied were never disclosed to Mr. Shepherd or his counsel before the Board made its decision. Thus Mr. Shepherd had no notice or the opportunity to be heard regarding facts potentially dispositive in adjudicating his application.

95. To this date, Mr. Shepherd has received neither a copy of the analyst's report nor the records from which the ABCMR concluded that Mr. Shepherd's account of his service was unsupported by the record.

96. The ABCMR denied his request for an in-person hearing, despite using undisclosed evidence against him.

97. The Due Process protections of the Fifth Amendment of the U.S. Constitution require that an administrative agency provide notice and an opportunity to be heard, and that it must conduct adjudications in a fair and orderly manner.

98. The ABCMR issued two decisions regarding Mr. Shepherd's application that bear the same date and signatures but marked differences in reasoning, as well as style.

99. Both decisions failed to address legal arguments advanced by Mr. Shepherd, including arguments that an upgrade is warranted to correct an error in light of modern-day understanding of PTSD and to remove an injustice based on the totality of Mr. Shepherd's life and circumstances.

100. Neither decision addressed Mr. Shepherd's argument that an upgrade is warranted to correct an error or remove an injustice because if current Army regulations regarding PTSD had been in place at the time of his discharge, he would not have been discharged under other than honorable conditions.

101. Both decisions also failed to distinguish authority cited by Mr. Shepherd in which misconduct was excused or a punishment redressed where the underlying cause was PTSD.

102. The Army's use of secret information and perversion of the normal adjudication process violated Mr. Shepherd's due process rights.

Count VI
Violation of Section 504 of the Rehabilitation Act

103. Plaintiff Shepherd realleges and incorporates herein by reference as though fully set forth, each and every allegation contained in Paragraphs 1 through 66 of this Complaint Both a VA doctor and a Yale School of Medicine psychiatrist have diagnosed Mr. Shepherd with service-connected PTSD stemming from his combat experiences in Vietnam.

104. Defendant McHugh, acting through the ABCMR, discriminated against Mr. Shepherd on the basis of his disability of service-connected PTSD by failing to utilize consistent and medically appropriate standards for consideration of PTSD when reviewing his military records to determine whether to upgrade his discharge status. Defendant McHugh also

discriminated against Mr. Shepherd by refusing to correct his other-than-honorable discharge, which was given as a result of conducted stemming from then-undiagnosed PTSD.

105. As a result of this discrimination, Mr. Shepherd has been denied the benefits of Defendants' review processes, including an upgrade of his discharge status and the benefits associated with such an upgrade.

106. The ABCMR did not address or consider the evidence provided by Mr. Shepherd of his service-connected PTSD. Instead, it questioned the credentials of the Yale School of Medicine psychiatrist who diagnosed him with PTSD.

107. The ABCMR's failure to utilize medically appropriate standards for consideration of Plaintiff Shepherd's PTSD has subjected Mr. Shepherd to discrimination and defeated the purposes of the Defendants' review processes, which include the review and correction of any military record when necessary to correct an error or remove an injustice, in violation of Section 504.

108. Defendant McHugh, acting through the ABCMR, has also violated Section 504 by failing to make reasonable modifications to the ABCMR's policies, practices and procedures that are necessary to avoid discrimination against Vietnam veterans with service-related PTSD, such as Mr. Shepherd.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully requests that the Court:

Relief for the Class:

(1) Grant all appropriate equitable relief to address past injury and to restrain future injury of Plaintiffs and members of the proposed class by Defendants.

(2) Direct, by issuance of an injunction, measures sufficient to ensure that Defendants utilize consistent and medically appropriate standards for considering the effects of class members' service-related PTSD when determining whether to upgrade the discharge statuses of Vietnam veterans with service-related PTSD.

(3) Direct, by issuance of an injunction, that the Defendants cease to discriminate solely on the basis of disability, and make reasonable modifications in their policies, practices and procedures that are necessary to avoid discrimination, against Vietnam veterans with service-related PTSD.

(4) Grant any other relief that the Court deems just and proper.

Relief for Plaintiff Shepherd Only

(5) Direct, by issuance of an injunction, that Mr. Shepherd's discharge be upgraded to Honorable or, alternatively, to General (Under Honorable Conditions) affirmed under uniform standards.

(6) In the alternative, vacate the decision of the ABCMR and remand with instructions that the Board: (a) provide Mr. Shepherd with all information obtained by the Board but not provided to him, including but not limited to military records obtained by the ABCMR and a copy of the analyst's report; (b) afford Mr. Shepherd a meaningful opportunity to respond to this additional information; (c) address Mr. Shepherd's separate legal arguments that (i) his discharge status is erroneous or unjust because under current Army PTSD regulations, he would not have been discharged under other than honorable conditions and (ii) the totality of his life's circumstances render his discharge status unjust; and (d) address, and distinguish if appropriate, Board authority cited by Mr. Shepherd in which relief was granted based on an applicant's post-misconduct diagnosis of PTSD.

(7) Grant any other relief that the Court deems just and proper.

Dated: December 3, 2012
New Haven, Connecticut

Respectfully Submitted,

By: _____ /s/ _____
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