

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

CONLEY MONK, KEVIN MARRET,)
GEORGE SIDERS, JAMES COTTAM,)
JAMES DAVIS, VIETNAM VETERANS)
OF AMERICA, VIETNAM VETERANS)
OF AMERICA CONNECTICUT STATE)
COUNCIL, and NATIONAL VETERANS)
COUNCIL FOR LEGAL REDRESS, on)
behalf of themselves and all others)
similarly situated,)

Plaintiffs,)

v.)

RAY MABUS, Secretary of the Navy,)
JOHN MCHUGH, Secretary of the Army,)
and DEBORAH LEE JAMES, Secretary of)
the Air Force,)

Defendants.)

Civil Action No.
3:14-CV-00260 (WWE)

**DEFENDANTS’ SECOND MOTION FOR A VOLUNTARY REMAND OF THE
INDIVIDUAL PLAINTIFF’S CLAIMS TO THE RESPECTIVE BOARD FOR
THE CORRECTION OF MILITARY RECORDS**

On September 3, 2014, the Secretary of Defense issued a memorandum to the Secretaries of the Military Departments establishing policy guidance for the consideration of discharge upgrade requests submitted by veterans claiming to have Post Traumatic Stress Disorder (“PTSD”). *See* Ex. 1, Memorandum from the Secretary of Defense to the Secretaries of the Military Departments Regarding PTSD Discharge-Upgrade Requests (Sept. 3, 2014). As discussed more fully below, this policy memorandum addresses topics that are at the center of this litigation, and provides a substantial and legitimate

basis for remanding the claims of the individual Plaintiffs (Monk, Marret, Siders, Cottom, and Davis) to the respective military correction board. The proposed remand would allow the boards to consider each individual's claim under the new guidance and determine whether their discharge status should be upgraded.

As required by the Local Rules of Civil Procedure, undersigned counsel for Defendants contacted Plaintiffs' counsel to determine whether Plaintiffs consent to this motion. Plaintiffs' counsel has indicated that Plaintiffs do not consent to this motion.

ARGUMENT

A federal agency's motion for a voluntary remand is commonly granted because it allows an agency to correct its own potential errors without expending the resources of the court in reviewing a record that may be incorrect or incomplete. *See, e.g., Ethyl Corp v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993); *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001); *Citizens Against Pellissippi Parkway Extension, Inc. v. Mineta*, 375 F.3d 412, 417 (6th Cir. 2004); *Sierra Club v. Van Antwerp*, 560 F. Supp. 2d 21, 24-25 (D.D.C. 2008). Courts retain the discretion to remand an agency decision when an agency has raised "substantial and legitimate" concerns in support of remand.

Carpenters Indus. Council v. Salazar, 734 F. Supp. 2d 126, 132 (D.D.C. 2010) (citing *Sierra Club v. Antwerp*, 560 F. Supp. 2d 21, 23 (D.D.C. 2008) (citing cases)).

I. DEFENDANTS REQUEST THAT THE COURT VOLUNTARILY REMAND THE INDIVIDUAL PLAINTIFF'S CLAIMS IN THIS CASE TO THE RESPECTIVE BOARD FOR THE CORRECTION OF MILITARY RECORDS FOR CONSIDERATION UNDER THE NEW POLICY GUIDANCE ISSUED BY THE DEFENSE SECRETARY.

On September 3, 2014, the Secretary of Defense issued a memorandum to each of the Secretaries of the Military Departments providing guidance for considering discharge

upgrade requests by veterans who contend they have Post Traumatic Stress Disorder. *See* Ex. 1. In this Memorandum, the Secretary provides policy guidance on several issues that are at the center of this litigation:

- The Secretary provides “medical guidance” to the correction boards, including general guidance as to how the boards will consider individual petitions seeking a change in characterization of service on the basis of PTSD. The guidance addresses, among other matters, the appropriate consideration that should be given to a determination by the Department of Veterans Affairs (VA) that documents PTSD or PTSD-related conditions connected to military service, as well as the appropriate approach to considering whether PTSD-related conditions existed at the time of service;
- The Secretary provides a statement on the “consideration of mitigating factors,” including, among other matters, the consideration of PTSD or PTSD-related conditions as “potential mitigating factors in the misconduct that caused the under other than honorable conditions characterization of service”;
- The Secretary also provides procedural guidance for considering discharge upgrade applications from veterans who claim to have PTSD, including guidance on waiving the statute of limitations and on the possibility of obtaining an advisory opinion from Department of Defense mental health care professionals on assessing the “presence of PTSD and its potentially mitigating effects relating to the misconduct that formed the basis for the under other than honorable characterization of service.”

In light of the Secretary of Defense's new policy memorandum, Defendants request that the Court remand the individual Plaintiff's claims in this case to the respective military correction board so that each individual's claim can be evaluated under the new guidance. If remand is granted, the boards will fully and carefully consider all evidence each individual applicant would like to submit, and evaluate this evidence in accordance with the Secretary's policy memorandum. If the correction boards find in favor of a particular Plaintiff, then that favorable decision will moot each individual Plaintiff's claim in this case and will eliminate the need for this Court to rule on many, if not all, of the legal issues presented in Defendants' motion to dismiss and Plaintiffs' motion for class certification. If the correction boards do not decide in favor of a particular Plaintiff, then that individual Plaintiff can decide whether to seek review of the unfavorable decision applying the new policy guidance.

In addition, as Defendants have previously explained in their first motion for remand, a remand would serve other useful purposes for several of the individual Plaintiffs in this case: A remand would allow BCNR members themselves to evaluate Plaintiff Marret's and Plaintiff Sider's applications (rather than the Executive Director), and allow the ABCMR to consider Plaintiff Cottam's separation documents and medical records that were not before the ABCMR when it denied his application. *See* ECF No. 18. The ABCMR will provide copies of the separation documents and medical records to Cottam in the event this case is remanded.

CONCLUSION

For the foregoing reasons, Defendants request that the Court voluntarily remand the claims of the individual Plaintiffs in this case to the respective board for the

correction of military records. Defendants further request that the Court dismiss this case without prejudice. In the event an individual Plaintiff receives an adverse decision from the correction board on remand and would like to pursue judicial review of that decision, he may pursue such review by filing a separate civil action. A proposed order is attached.

Dated: September 9, 2014

Respectfully submitted,

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CERTIFICATION OF SERVICE

I hereby certify that on September 9, 2014 the foregoing motion was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Matthew A. Josephson
Matthew A. Josephson