

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF CONNECTICUT

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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)

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**DEFENDANTS’ REPLY MEMORANDUM IN SUPPORT OF THEIR SECOND  
MOTION FOR A VOLUNTARY REMAND**

In their Partial Opposition to Defendants’ Second Motion for a Voluntary Remand, Plaintiffs agree that the policy memorandum issued by Secretary of Defense Chuck Hagel on September 3, 2014 (“Hagel Memorandum”) provides a substantial and legitimate basis for remanding the claims of the individual Plaintiffs to the respective military correction board. *See* ECF No. 41 at 3; ECF No. 41-1. This remand will allow the boards to consider each individual’s claim under the Hagel Memorandum and determine whether their discharge status should be upgraded.

While agreeing that remand of the individual Plaintiff's claims is the proper course, Plaintiffs ask the Court to impose conditions on the remand proceedings: They ask the Court to order each correction board to conduct mandatory in-person hearings for all five of the individual Plaintiffs and to adjudicate all claims in 60 days rather than the 120 days proposed by Defendants. Plaintiffs' request for a mandatory in-person hearing should be denied because the pertinent regulations do not require an in-person hearing and instead grant each board the discretion to determine whether an in-person hearing is necessary. Regarding the timeline for remand proceedings, Defendants submit that 120 days is reasonable, especially in light of the number of applications that may be submitted by other Vietnam veterans seeking review under the Hagel Memorandum.

In addition to requesting remand conditions, Plaintiffs ask the Court to continue to adjudicate the claims of the three organizational Plaintiffs while the remand proceedings of the individual Plaintiffs are ongoing. This request should be denied. To the extent the organizational Plaintiffs seek to assert claims on behalf of their individual members, these members are in a similar position as the individual Plaintiffs, would have the same opportunity to submit an application under the Hagel Memorandum, and should do so before further litigation in this case. To the extent the organizational Plaintiffs seek to challenge general policies and procedures the correction boards use to evaluate discharge applications submitted by those claiming to have PTSD, such a challenge plainly lacks merit for the reasons discussed in Defendants' previous filings. Nevertheless, judicial efficiency counsels in favor of deferring adjudication of this claim until after the boards have adjudicated the individual Plaintiffs' claims under the Hagel Memorandum. This approach will avoid premature and possibly duplicative adjudication.

**I. PLAINTIFFS' REQUEST FOR MANDATORY IN-PERSON HEARINGS AND AN "EXPEDITED SCHEDULE" ON REMAND SHOULD BE DENIED.**

**A. Mandatory In-Person Hearings**

Plaintiffs ask the Court to order each correction board to conduct mandatory in-person hearings for each of the five individual Plaintiffs. *See* ECF No. 41 at 5-6. This request is without legal basis and should be denied.

An applicant does not have a statutory or regulatory right to an in-person hearing before the ABCMR or the BCNR. *See* 32 C.F.R. § 581.3(f) (ABCMR); 32 C.F.R. § 723.3(e)(1) (BCNR). Instead, the ABCMR and the BCNR may, in their discretion, grant a formal hearing in a particular case after considering the pertinent evidence of record. *See* 32 C.F.R. § 581.3(f) (ABCMR); 32 C.F.R. § 723.3(e)(1) (BCNR). Plaintiffs' request for this Court to require the boards to conduct an in-person hearing is thus inconsistent with the discretionary scheme established by the pertinent regulations.

Plaintiffs' request for mandatory in-person hearings also runs afoul of Supreme Court and Second Circuit precedent. As Defendants previously explained (ECF No. 28 at 6-8), the Supreme Court has long made clear that courts are without power to impose procedures on agencies that are not mandated by the Administrative Procedure Act or by other statute or regulation. *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978). "Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them." *Id.* at 524. The Second Circuit, applying the teachings of *Vermont Yankee*, has specifically held that a plaintiff seeking to correct his military record is not entitled to "tailor-made

procedures devised by the court” and instead must use the “procedures provided by relevant statute and regulation.” *Guitard v. U.S. Sec’y of Navy*, 967 F.2d 737, 742 (2d Cir. 1992). Here, in-person hearings are not required by the military record correction statute (10 U.S.C. § 1552), its implementing regulations, and the APA. Plaintiffs’ request for the Court to engraft additional procedural requirements, therefore, is foreclosed by *Vermont Yankee* and Second Circuit precedent.

**B. Expedited Schedule**

Plaintiffs ask the Court to impose an “expedited schedule for adjudication” of the five individual Plaintiffs’ claims on remand. *See* ECF No. 41 at 4-5. In sum, the individual Plaintiffs would prefer to have the boards substantively adjudicate their applications in 60 days rather than 120 days as Defendants have proposed. *Id.* at 4.

Defendants respectfully submit that the 120-day timetable for adjudicating the individual Plaintiff’s applications is reasonable under the circumstances. In light of the policy guidance established by the Secretary of Defense in his recent memorandum, the boards anticipate that other veterans may submit applications seeking an upgrade in their characterization of discharge. In light of the possible submission of (potentially numerous) additional claims, Defendants submit that 120 days is a reasonable timetable for decision.

**II. THE CLAIMS OF THE ORGANIZATIONAL PLAINTIFFS SHOULD NOT BE ADJUDICATED WHILE THE REMAND PROCEEDINGS FOR THE INDIVIDUAL PLAINTIFFS ARE ONGOING.**

In their partial opposition, Plaintiffs ask the Court to adjudicate the claims of the three organizational Plaintiffs while the correction boards adjudicate the applications of

the individual Plaintiffs on remand. ECF No. 41 at 6. Plaintiffs' request should be denied.

Insofar as the organizational Plaintiffs seek to assert the claims of their individual members, these individual members are in a similar position as the individual Plaintiffs, would have the same opportunity as the individual Plaintiffs to submit applications for a discharge upgrade under the Hagel Memorandum, and should do so before further litigation in this case. Like the individual Plaintiffs, the members of the organizational Plaintiffs allege that they submitted applications for a discharge upgrade to their correction board on the basis of their alleged PTSD and received an adverse decision before the Hagel Memorandum was issued on September 3, 2014. *See* ECF No. 34 at 27 (citing Compl. ¶¶ 116, 120, 124, 166-185). At least some of the individual members of the organizational Plaintiffs—like Conley Monk who is both an individual Plaintiff and a member of organizational Plaintiff NVCLR (ECF No. 34 at 28)—are likely to submit another application to their correction board seeking a discharge upgrade under the principles articulated in the Hagel Memorandum. If the individual member obtains relief under the Hagel Memorandum, then their individual claim in this case will likely be moot and the organizational Plaintiff's will have no need to assert that claim on a representational basis. If the individual member does not obtain relief, then that individual and the organization to which he belongs can decide whether to seek judicial review of that adverse decision.

Insofar as the organizational Plaintiffs seek to challenge general policies and procedures the correction boards use to evaluate discharge applications submitted by Vietnam veterans claiming to have PTSD, this challenge fails as a matter of law for the

reasons discussed in Defendants' motion to dismiss and for summary judgment (ECF Nos. 26 & 37) and Defendants' opposition to Plaintiffs' motion for class certification (ECF No. 33). Nevertheless, in the interest of judicial efficiency and in an effort to avoid piecemeal litigation, Defendants submit that it makes sense to defer any adjudication of the organizational Plaintiffs' "system-wide" challenge until after the boards have adjudicated the individual Plaintiff's claims under the Hagel Memorandum. The Hagel Memorandum addresses topics at the center of this litigation, providing guidance to the correction boards for evaluating requests for discharge upgrades on the basis of alleged PTSD. It is plainly premature to consider a legal challenge to the procedures used by the boards to evaluate PTSD before the boards have had an opportunity to implement the guidance established by the Secretary of Defense.

Further, the individual Plaintiffs in this case assert the same three causes of action as the organizational Plaintiffs, *see* ECF No. 1, Compl. ¶¶ 166-185, and each individual Plaintiff has already indicated that, in the event of an adverse decision, he would like to "reinstate his case to this Court's active docket within 30 days of receipt by counsel of the adverse decision." *See* ECF No. 41-1. Thus, if the Court were to proceed with resolving the legal issues raised by the claims of the organizational Plaintiffs, the Court would likely have to revisit those legal issues again in the event an individual receives an adverse decision and seeks subsequent judicial review.

In light of the foregoing, Defendants submit that the most efficient manner of proceeding with this litigation is for the Court to voluntarily remand the claims of the individual Plaintiffs to the respective board for the correction of military records and to dismiss this action without prejudice. If an individual Plaintiff or a member of the

organizational Plaintiffs receives an adverse decision from the correction board under the Hagel Memorandum and would like to pursue judicial review of that decision, then that individual may pursue such review by filing a separate civil action.

**CONCLUSION**

For the foregoing reasons, Defendants request that the Court grant their Second Motion for Voluntary Remand.

Dated: October 8, 2014

Respectfully submitted,

JOYCE R. BRANDA  
Acting Assistant Attorney General

ANTHONY J. COPPOLINO  
Deputy Director, Federal Programs Branch

/s/ Matthew A. Josephson  
MATTHEW A. JOSEPHSON  
GA Bar 367216  
Trial Attorney  
United States Department of Justice  
Civil Division, Federal Programs Branch  
P.O. Box 883  
Washington, D.C. 20044  
Matthew.A.Josephson@usdoj.gov  
Tel.: (202) 514-9237  
Fax: (202) 616-8470

Counsel for Defendants

**CERTIFICATION OF SERVICE**

I hereby certify that on October 8, 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