

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT**

STEPHEN M. KENNEDY,

Plaintiff,

v.

ERIC FANNING, Secretary of the Army,

Defendant.

Civil Action No.: _____

December 8, 2016

COMPLAINT

Steve Kennedy is a United States Army veteran who served his country with distinction in Iraq, led teams despite a junior rank, trained new soldiers how to wage war, and fought valiantly during a year-long deployment to Iraq. Yet Mr. Kennedy's combat service left him with the invisible wounds of war – severe post-traumatic stress disorder and related mental health disorders – which the Army did not fully understand or have the capacity to treat at the time. While continuing to lead his team to top performance marks within his battalion, Mr. Kennedy began abusing alcohol, self-isolating, and self-injuring, ultimately leading him to go absent without leave for two weeks. Upon his return, Mr. Kennedy's command sent him for several psychiatric evaluations, in which he was diagnosed with major depressive disorder; subsequently, the Army discharged him with a General discharge.

Since being thrown out of the military, Mr. Kennedy has sought treatment for PTSD, earned a bachelor's degree, and is now pursuing a Ph.D in a highly selective program in Biophysical Chemistry. However, Mr. Kennedy is forced to continue to live with the stigma and financial burden of a General, rather than Honorable discharge. In 2015, Mr. Kennedy applied to

the Army Discharge Review Board for a discharge upgrade on the basis that his undiagnosed PTSD mitigated the two-week absence that led to his discharge. The Army denied Mr. Kennedy's application in a decision that is arbitrary, capricious, unsupported by the evidence, and contrary to the Army's own rules, in violation of the Administrative Procedure Act and the Due Process Clause of the Fifth Amendment. Mr. Kennedy asks the Court to set aside and hold unlawful the Army decision and grant his discharge upgrade so that his record may finally reflect the character of his service.

JURISDICTION AND VENUE

1. This Court has jurisdiction under 28 U.S.C. § 1331. This action arises under the Administrative Procedure Act, 5 U.S.C. § 706, and the Due Process Clause of the Fifth Amendment.

2. Venue lies in this district pursuant to 28 U.S.C. § 1391(e)(1)(C) as Plaintiff Kennedy resides in the District of Connecticut, no real property is involved in the action, and Defendant Eric Fanning is sued in his official capacity as an officer of the United States.

PARTIES

3. Plaintiff Steve Kennedy is a veteran of the United States Army. He is a citizen of the United States and resides in Fairfield, Connecticut.

4. Defendant Eric Fanning, Secretary of the Army, is sued here in his official capacity. Defendant is empowered to act through the Army Discharge Review Board to change any record of a former member of the Army whenever necessary to correct an error or to remove an injustice.

FACTUAL ALLEGATIONS

5. Mr. Kennedy was born August 22, 1986 in Bay Shore, New York. He grew up in Monroe, Connecticut and currently resides in Fairfield, Connecticut with his wife and two children.

6. Mr. Kennedy joined the Army in May 2006. As Iraq descended into civil conflict and the war in Afghanistan dragged on, he enlisted with the hope of being able to make a positive difference in the world right away.

7. Mr. Kennedy completed basic training in Ft. Benning, Georgia and was initially stationed at Ft. Bragg, North Carolina.

8. Mr. Kennedy served in the Airborne Infantry, MOS 11B1P, in A Company of the 2nd Battalion, 504th Parachute Infantry Regiment in the 82nd Airborne Division.

9. He was deployed to Iraq from June 5, 2007 to July 18, 2008.

10. Mr. Kennedy's exceptional service is exemplified by his record in Iraq. While still a Private First Class, Mr. Kennedy took over when his team leader was on leave, training new soldiers and leading his team to the highest rated training performance in his company. For this accomplishment, he received an Army Achievement Medal on the recommendation of his Company Commander.

11. The Army promoted Mr. Kennedy early to Specialist and appointed him the team leader for a newly created machine gun team. He led his team on hundreds of successful missions. During his tour in Iraq, Mr. Kennedy served as a Humvee turret gunner and machine gun operator.

12. During the first half of his deployment, from July 2007 to March 2008, Mr. Kennedy's unit provided route clearance and supply-convoy security between Western and

Central Iraq, an area where improvised explosive devices (IEDs) were commonplace. In the first months of the mission, his unit's convoys either hit or discovered IEDs at least every other week.

13. From March 2008 to July 2008, his unit was responsible for disrupting al-Qaeda in Iraq supply lines through the desert villages of the Anbar and Saladin Provinces. His unit was engaged in several firefights with al-Qaeda combatants, two of which ended with an insurgent detonating a suicide vest.

14. Mr. Kennedy was awarded the Army Commendation Medal, which is bestowed upon service members who distinguished themselves by heroism, meritorious achievement or service, the Army Achievement Medal, and the Combat Infantryman Badge. Mr. Kennedy and his unit also received National Defense Service Medals, Global War on Terrorism Service Medals, Iraq Campaign Medals, and Overseas Service Ribbons for their deployment.

15. Upon Mr. Kennedy's return to Fort Bragg, he continued his record of excellence. He continued to serve as a team leader and was asked to temporarily step in for another team leader. He led both teams to some of the highest performance ratings in the battalion. His platoon sergeant recommended Mr. Kennedy for promotion for Sergeant as soon as he was eligible, with the full support of his first sergeant.

16. Despite continuing to thrive as a leader, Mr. Kennedy's PTSD symptoms began to emerge after he returned from deployment. He became increasingly self-isolating, had trouble sleeping, avoided stressful situations, and suffered from survivor's guilt and depression. He had no sense of a future, feeling as if he was still waiting for the IED that should have killed him in Iraq. He started to drink heavily, abusing alcohol to soothe his PTSD symptoms.

17. During this time, Mr. Kennedy began to physically harm himself. On several occasions, he walked around Fayetteville late at night, hoping to be mugged or attacked. He also

started to self-mutilate, cutting his hands but making up stories so that his injuries would appear to be the result of an accident.

18. Planning the cutting incidents was therapeutic for him. Orchestrating the cover-up and working up the nerve to do it distracted him from his problems. As his condition worsened, Mr. Kennedy began having suicidal thoughts.

19. After his deployment, Mr. Kennedy was also having serious relationship and financial problems. He tried to conceal his troubles and would self-medicate to avoid the stress of dealing with his problems. Avoidance is a common symptom of PTSD.

20. As part of his effort to mask his growing personal and mental health difficulties, Mr. Kennedy devoted himself to working hard and maintaining his good performance in the Army. It took enormous mental energy to do this, and at the end of each day, he was burned out. After work, he would drink or smoke on his back porch with a friend who was having similar problems.

21. Mr. Kennedy did not seek help for his mental health problems because he feared being labeled weak or losing the trust of members of his unit. He had observed how leadership made targets out of the few soldiers who sought mental health treatment, encouraging junior enlisted soldiers to avoid them and not to trust them.

22. In March 2009, while Mr. Kennedy's mental health issues had grown dire without treatment, his leadership told him that he would be denied leave to attend his own wedding, a leave about which he had informed his squad leader a year prior and which had been informally approved. He was unfamiliar with the process for asking for an individual leave request, and his command did not tell him he needed to complete additional paperwork until they notified him of a training exercise that would prevent him from taking leave for his wedding.

23. Mr. Kennedy feared that he would either lose his wife if he did not return home for his wedding or be rejected if he confronted his leadership. His mental health condition made it impossible for him to resolve this conflict, and he instead responded by injuring himself and considering suicide. He ultimately concluded that his unit did not care about him and would not miss him and so went absent without leave (AWOL) to attend his wedding.

24. Upon his return to the base, Mr. Kennedy's Company Commander sent him to see a psychologist because going AWOL was uncharacteristic for him. After a twenty-minute examination, the psychologist diagnosed Mr. Kennedy with major depressive disorder, which has many of the same symptoms as PTSD. The psychologist also informed him that the Army did not have the resources to provide him with therapy and recommended that he be administratively discharged.

25. After receiving his diagnosis, Mr. Kennedy was ordered to meet with a psychiatrist, who prescribed antidepressants and sleeping pills to alleviate his suicidal thoughts and other depressive symptoms. He did not meet with any other mental health professionals or receive any other treatment in the two months between his diagnosis and discharge.

26. Ignoring the clinicians' recommendations, Mr. Kennedy's Command Sergeant Major recommended he be transferred to a new company for a "fresh start." The Command Sergeant Major also canceled Mr. Kennedy's promotion orders and recommended he be demoted to Private First Class. His leadership offered him no treatment other than medication.

27. The Army had scheduled Mr. Kennedy's new unit to deploy to Iraq shortly after his reassignment. His mental health problems had not improved and his new leadership gave him a choice: he could return to combat with his new unit without treatment, or he could accept a General discharge and receive treatment for his mental health condition.

28. Because Mr. Kennedy had gone AWOL, his commander chose to discharge him for the commission of a serious offense and lowered the characterization of his discharge to General.

29. Being a soldier was the center of Mr. Kennedy's identity during his service, and he gave everything he had to do the best job he possibly could. He was proud of his service and his ability to excel in the Army.

30. Leaving the Army with a judgment saying that his service was less honorable than others' caused serious damage to his psyche at a time when he was already struggling with serious mental health issues. It has taken him years to come to terms with his discharge, and he has begun discussing it outside of his family and close Army friends only in the past few months.

31. As a result of his General discharge, Mr. Kennedy is ineligible for education benefits under the GI bill. He paid for his first college semester out of pocket. While he was eventually able to access some VA vocational rehabilitation benefits to help pay for the rest of college, his General discharge reduced the amount of benefits available, forcing him to have to work full-time while pursuing his degree. The difference between the VA benefits he received and the GI benefits he would have been eligible for with an Honorable discharge is approximately \$75,000.

32. In addition, because of his discharge status, Mr. Kennedy was ineligible for state benefits such as property tax exemptions and many non-profit opportunities and scholarships that are open only to veterans with an Honorable discharge.

33. After Mr. Kennedy's discharge, he continued to struggle with depression and was ultimately diagnosed with PTSD by both the VA and private clinicians.

34. VA clinicians described Mr. Kennedy as suffering from numerous PTSD symptoms, including depression, panic attacks in crowds, foreboding feelings and anxiety, sleep disturbances, and intrusive thoughts about incidents he experienced.

35. The VA rated him fifty percent disabled for PTSD.

36. Mr. Kennedy described to his treating therapist that he continues to deal with “intrusive thoughts” of the disfigured bodies of the people that he and his unit killed, as well as images of the faces and mangled bodies of insurgents who had tried to kill his unit with suicide bombs.

37. According to Mr. Kennedy’s treating therapist, he experiences “survivor guilt,” which initially caused him to minimize and avoid his PTSD symptoms.

38. Mr. Kennedy has been in therapy for six years and continues to receive treatment for PTSD through the VA and private providers. He still struggles with hypervigilance, survivor’s guilt, and depression. His survivor’s guilt and depression are closely tied to his discharge status and the trauma of having his identity as a soldier stripped away so harshly.

39. Since receiving treatment, Mr. Kennedy continues to demonstrate the character and excellence that defined much of his service in the Army.

40. Mr. Kennedy legally married his wife before his deployment in early 2007. Their wedding ceremony was performed in May 2009, and they have a daughter born in November 2013 and a son born in May 2016.

41. In May 2012, Mr. Kennedy received a Bachelor of Science degree from the University of Massachusetts Boston, which he earned while working full time.

42. Following graduation, Mr. Kennedy began graduate work at a highly selective program at New York University in Biophysical Chemistry. He passed his Qualifying Exam with distinction and expects to publish two research papers and graduate in 2017.

43. Mr. Kennedy is active in veterans' organizations. He is the founder and team leader of the Iraq and Afghanistan Veterans of America, Connecticut Chapter.

44. Mr. Kennedy first applied for a records review from the Army Discharge Review Board (ADRB or Board) in November 2010. The Board rejected his application.

45. On February 18, 2015, Mr. Kennedy renewed his application, requesting a personal appearance.

46. Despite presenting documentation to the Board of his diagnoses of PTSD from the VA, Mr. Kennedy's treating therapist, and a psychologist, in October 2015 the Board denied his application again, concluding only that Mr. Kennedy was "diagnosed with a depressive disorder not otherwise specified." A copy of the decision is attached as Exhibit 1.

47. The ADRB rejected Mr. Kennedy's application without mention of binding guidance regarding PTSD cases issued in 2014 by then-Secretary of Defense Chuck Hagel.

48. The ADRB decision did not respond to several issues raised by Mr. Kennedy, including that his service was otherwise exemplary, that family and personal problems resulting from the denial of leave to attend his wedding affected his ability to serve satisfactorily, and that he was not properly diagnosed with PTSD by the Army in part because his "survivor's guilt" caused him to minimize and avoid his PTSD symptoms.

49. Additionally, the ADRB decision failed to explain why the Army mental health evaluations were more persuasive than the psychologist evaluation, therapist evaluation, and VA

decision submitted by Mr. Kennedy establishing that he suffered from PTSD and that his decision to go AWOL was a direct result of his PTSD and depression.

STATUTORY AND REGULATORY BACKGROUND

50. Upon discharge, military personnel receive a certificate that characterizes their service as Honorable, General (Under Honorable Conditions), Other Than Honorable, Bad Conduct, or Dishonorable. 32 C.F.R. §§ 724.109, 724.111.

51. A veteran's discharge characterization affects his or her eligibility for various benefits and support services administered by the U.S. Department of Veterans Affairs, *see, e.g.*, 38 U.S.C. § 101(2); 38 C.F.R. § 3.12, as well as those provided by state laws.

52. To receive VA education benefits and services through the Post-9/11 GI Bill program, a veteran generally must be discharged from service with an Honorable discharge or be discharged or released for a service-connected disability. 38 U.S.C. § 3311(b)-(c).

53. Congress has authorized the Secretary of the Army, acting through the ADRB, to correct the improper or inequitable discharge of any former member of the Army. 10 U.S.C. § 1553.

54. A veteran applying for a discharge upgrade at the ADRB has a right to two types of reviews: a documentary record review and a personal appearance hearing. Each applicant is entitled to one of each. 32 C.F.R. § 70.8(b)(3).

55. The ADRB reviews discharges for propriety and equity. *Id.* § 70.9.

56. On September 3, 2014, then-Secretary of Defense Chuck Hagel directed the ADRB and other records correction boards to give "liberal consideration" to discharge upgrade

applications submitted by veterans who have been diagnosed with PTSD. Memorandum dated Sept. 3, 2014, Secretary of Defense Chuck Hagel (“Hagel Memo”) (copy attached as Exhibit 2).

57. The Hagel Memo also directs military boards to consider PTSD and “PTSD-related conditions” as “potential mitigating factors in the misconduct that caused the under other than honorable conditions characterization of service.” *Id.*

58. The ADRB must respond to all issues that provide a basis for the decision of whether there should be a change in the character of or reason for discharge. 32 C.F.R. § 70.8(d); DoD Instruction 1332.28, Discharge Review Board Procedures and Standards (April 4, 2004).

59. When the ADRB makes a factual determination after considering contradictory evidence in the record, it must explain in its decision “why the information relied upon was more persuasive than the information that was rejected.” *Id.*

60. Federal courts may review ADRB decisions under the Administrative Procedure Act. 5 U.S.C. § 706.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF Administrative Procedure Act

61. The allegations of the preceding paragraphs are incorporated by reference as if fully set forth herein.

62. Defendant’s denial of Mr. Kennedy’s application for a discharge upgrade is a final agency action that is arbitrary, capricious, and an abuse of discretion, in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), because the Defendant failed to give “special consideration” to Mr. Kennedy’s diagnosis by the VA or to give “liberal consideration” to diagnoses by private practitioners, as directed by the Hagel Memo.

63. Defendant failed to consider important evidence that demonstrated PTSD existed at the time of discharge and that Mr. Kennedy's PTSD or PTSD-related condition mitigated the misconduct that allegedly led to his discharge.

64. Defendant failed to follow its own rules by failing to apply the Hagel Memo to Mr. Kennedy's application.

65. Defendant failed to follow its own rules by not responding to all the issues raised in Mr. Kennedy's application.

66. Defendant failed to provide a decision that demonstrated a rational connection between the evidence presented and the facts found, which makes the ADRB decision arbitrary, capricious, and an abuse of discretion, in violation of the APA. 5 U.S.C. § 706(2)(A).

SECOND CLAIM FOR RELIEF
Fifth Amendment to the U.S. Constitution,
Violation of Procedural Due Process

67. The allegations of the preceding paragraphs are incorporated by reference as if fully set forth herein.

68. The due process protections of the Fifth Amendment to the U.S. Constitution require that federal administrative agencies conduct adjudications in a fair and orderly manner.

69. Defendant did not conduct a fair adjudication of Mr. Kennedy's discharge upgrade application because the ADRB failed to apply the Hagel Memo to his claim.

70. Defendant also failed to conduct a fair adjudication of Mr. Kennedy's discharge upgrade application because the ADRB failed to provide Mr. Kennedy with a decisional document that articulated the reasons for his denial based on the evidence presented.

71. The due process protections of the Fifth Amendment also require that federal administrative agencies follow their own regulations and sub-regulatory guidance in conducting their adjudications.

72. Defendant failed to follow its own rules by failing to apply the Hagel Memo to Mr. Kennedy's application.

73. Defendant failed to follow its own rules by not responding to all the issues raised in Mr. Kennedy's application.

74. Defendant also failed to follow its own rules by not explaining why the Army's determination that Mr. Kennedy did not suffer from PTSD was more persuasive than the submitted evidence that Mr. Kennedy did suffer from PTSD.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court grant the following relief:

- (1) Hold unlawful and set aside Mr. Kennedy's October 20, 2015 ADRB decision, and change the characterization of his discharge to Honorable;
- (2) Award attorneys' fees and costs; and
- (3) Grant such other and further relief this Court deems just and proper.

Dated: December 8, 2016
New Haven, Connecticut

Respectfully Submitted,

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