

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

TYSON MANKER, on behalf of himself and
all others similarly situated, and NATIONAL
VETERANS COUNCIL FOR LEGAL
REDRESS, on behalf of itself, its members,
and all others similarly situated,

Plaintiffs,

v.

CARLOS DEL TORO, Secretary of the Navy,

Defendant.

Civil Action No.
3:18-cv-372 (CSH)

OCTOBER 12, 2021

PRELIMINARY RULING ON PROPOSED SETTLEMENT AND CLASS NOTICE

HAIGHT, Senior District Judge:

This is a nation-wide class action under the Administrative Procedure Act, 5 U.S.C. § 706, and the Fifth Amendment Due Process Clause, on behalf of certain U.S. Navy and Marine Corps veterans against the Defendant Secretary of the Navy.

The parties have arrived at a settlement of the action, evidenced by a “Stipulation and Agreement of Settlement” [Doc. 211-2]. The Federal Rules of Civil Procedure require the Court’s approval of the settlement of a class action such as this one. *See* Fed. R. Civ. P. 23(e). The parties now move jointly for preliminary approval of the proposed settlement, and for approval of a notice to class members in the form submitted with the motion.

This Ruling, together with a concurrently filed “Supplemental Order,” resolves that motion.

I

In a Ruling reported at 329 F.R.D. 110 (D. Conn. Nov. 15, 2018) (“the November 15 Ruling”), familiarity with which is assumed, the Court certified a nation-wide class in this action.

The certified class is as follows:

Veterans who served during the Iraq and Afghanistan Era—defined as the period between October 7, 2001, and the present—who:

(a) were discharged from the Navy, Navy Reserves, Marine Corps, or Marine Corps Reserve with less-than-Honorable statuses, including General and Other-than-Honorable discharges but excluding Bad Conduct or Dishonorable discharges;

(b) have not received upgrades of their discharge statuses to Honorable from the NDRB; and

(c) have diagnoses of PTSD, TBI, or other related mental health conditions, or records documenting one or more symptoms of PTSD, TBI, or other related mental health conditions at the time of discharge, attributable to their military service under the Hagel Memo standards of liberal or special consideration.

Manker v. Spencer, 329 F.R.D. 110, 123 (D. Conn. 2018).

In this delineation of the Plaintiff Class, “PTSD” refers to post traumatic stress disorder. “TBI” refers to traumatic brain injury. “NDRB” refers to the Naval Discharge Review Board. “The Hagel Memo” refers to a memorandum issued in 2014 by then-Secretary of Defense Charles Hagel which instructed all military review boards (including the NDRB) to give “liberal construction” to applications indicating that PTSD or PTSD-related mental health conditions may have been “potential mitigating factors” for the misconduct that resulted in a less-than-Honorable discharge.

The Plaintiff Class asserts in its complaint that notwithstanding the quoted directions to military review boards contained in the Hagel memo, the NDRB has continued to reject discharge

upgrades at so high a percentage that its practice and procedures violate the Administrative Procedure Act (“APA”) and the Fifth Amendment. The complaint prays for injunctive relief.

The Defendant Secretary of the Navy denies any wrongdoing by the NDRB in its administration of the class members’ applications for discharge upgrades, and prays for dismissal of the complaint.

The November 15 Ruling appointed as class counsel the Yale Law School’s Veterans Legal Services Clinic and the law firm of Jenner & Block LLP. The Defendant Secretary of the Navy is represented by the United States Attorney for this District, joined by legal advisors to the Department of the Navy.

II

With the lines thus drawn by the pleadings, the parties began to engage in discovery, whose proper bounds were determined by Court rulings with which familiarity is also assumed. Eventually the case was referred to Magistrate Judge Spector, first to supervise discovery , and then, in January 2020, to lead and assist the parties and their attorneys in negotiations for a possible settlement.

Under Judge Spector’s direction and supervision, counsel for the parties conducted a number of settlement conferences. After the COVID-19 pandemic complicated existence, Judge Spector conducted numerous *ex parte* settlement discussions with counsel for one party or another, culminating in a joint settlement conference before him on June 18, 2021. Plaintiffs’ brief in support of the present motion says: “After extensive arms’s-length negotiations and exchange of multiple proposals, Plaintiffs and Defendant reached an agreement in principle to settle the Litigation.” Doc. 211-1, at 18.

The Court accepts this description of the efforts and achievements of all the attorneys

involved for both parties in agreeing upon the broad-form settlement discussed in the next Part. The Court compliments counsel. I further note that this salutary result may be attributed in large measure to the energy, patience, and skill of Judge Spector.

III

The universe of class members is broadly drawn and all-encompassing. The class includes veterans who served during the relevant period, and whose applications for discharge upgrades were refused by the NDRB. The class also includes veterans within its parameters who to date have not applied for discharge upgrades. As for those veterans whose discharge upgrade applications were refused, two sub-classes exist. One sub-class consists of veterans whose applications were refused by the NDRB on or after March 2, 2012. The other sub-class is comprised of veterans whose discharge upgrade applications were refused by the NDRB between October 7, 2001 and March 2, 2012. The March 2, 2012 date is keyed to the six-year statute of limitations for claims under the APA: the class action complaint in this case was filed on March 2, 2018.

The proposed settlement addresses the needs and circumstances of each of these diverse groups of Navy and Marine Corps veterans of the Nation's most recent wars. The following provisions are included in the "Stipulation and Agreement of Settlement":

* The NDRB will automatically reconsider decisions issued on or after March 2, 2012 until the effective date of the settlement which denied an application for a full upgrade to Honorable discharge. *See* Stipulation, Doc. 211-2, ¶ IV.A.1. The Navy will notify the veteran that "the NDRB will reconsider that individual's case without a need for further response from the Applicant," but the veteran may "submit supplemental evidence" if desired. *Id.* ¶ IV.A.3.

* Where the NDRB denied an application for a full discharge upgrade to Honorable in a

decision issued between October 7, 2001 and March 1, 2012, the Navy will notify the veteran that he or she may apply to the Navy for reconsideration of his or her case, and submit medical evidence in support of the application. *Id.* ¶ IV.B.¹

* Plaintiffs note in their brief that “[t]he settlement provides prospective relief to all future NDRB applicants, including but not limited to class members, by requiring the NDRB to incorporate new language and procedures into its Military Review Boards Standard Operating Procedures and decisional document template.” Doc. 211-1, at 29. The “Stipulation and Agreement of Settlement” contains specific provisions in this regard, Doc. 211-2, ¶¶ IV.D.1.-D.2., and also establishes a program for video-teleconference hearings, *id.* ¶ IV.E.; online tracking of applications, *id.* ¶ IV.F.; and training for NDRB members and staff specifically tailored to this sort of case, *id.* ¶ IV.G. The purpose of these provisions is to improve the ongoing quality and accessibility of the Navy Department’s discharge review procedures for all veterans of that service.

IV

This class action is governed by Rule 23 of the Federal Rules of Civil Procedure. Rule 23(e) provides: “The claims” of a “certified class” may be “settled, voluntarily dismissed, or compromised only with the court’s approval.” Fed. R. Civ. P. 23(e). Rule 23(e) “requires court approval of any settlement that effects the dismissal of a class action. Before such a settlement may be approved, the district court must determine that a class action settlement is fair, adequate, and reasonable, and not a product of collusion.” *Joel A. v. Giuliani*, 218 F.3d 132, 138-39 (2d Cir. 2000) (citing *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1079 (2d Cir.1995) and *Grant v. Bethlehem Steel*

¹ The difference in treatment provided by these two paragraphs in text reflects the operation of the statute of limitations in the APA, also noted in text.

Corp., 823 F.2d 20, 22 (2d Cir.1987)).

In the case at bar, the Court grants preliminary approval to the proposed settlement, which is the result of extensive arms-length negotiations between able and experienced attorneys, conducted under the supervision, and with the energetic participation of, a gifted Magistrate Judge. The most striking features of the proposed settlement are that it achieves the class action's principal purpose, the reform of the process by which the NDRB considers discharge upgrade applications, and extends that benefit to the widest possible universe of veterans imaginable. It should also be noted that this settlement, if finally approved by the Court, will be incorporated into and designated as part of an Order of the Court, subject to the Court's continuing jurisdiction. That is the procedure followed in a comparable case involving the Army Discharge Review Board. *See Kennedy v. Whitley*, No. 316-CV-2010 (CSH), 2021 WL 4533198 (D. Conn. Apr. 26, 2021).

The Court will conduct a fairness hearing into whether this proposed settlement should be approved. Class members must be given notice about that hearing and its purpose.

The parties submit with the present motion a proposed notice to class members which includes the proposed settlement, the date and place of the fairness hearing, and instructions about how class members can be heard, in favor of or opposition to the settlement. In substance and form, the proposed notice complies with governing case law. The Court approves it as well.

Careful consideration must be given to the distribution of the notice. This is a nation-wide class of affected veterans, probably numbering in the thousands, scattered throughout the country. The parties undertake to engage in elaborate methods of notification and distribution. The parties will publish the notice, the proposed settlement, and its exhibits in their respective websites. Doc. 211-1, at 34. They will issue a joint press release. *Id.* Class Counsel will engage with traditional

and social media, request elected officials to share the class notice with colleagues and constituents, and distribute the notice and settlement to veterans' organizations, legal services providers, and advocates across the country. *Id.* at 34-35. Proof of these efforts must be made to the Court in advance of the fairness hearing. It is difficult to imagine what additional steps could be taken to give the requisite class notice of the proposed settlement. The intended efforts are certainly sufficient under governing authority.

V

For the foregoing reasons, the "Joint Motion" [Doc. 211] of Plaintiffs and Defendant for preliminary approval of the proposed "Stipulation and Agreement of Settlement" [Doc. 211-2], and approval of the proposed Class Notice, is GRANTED.

The governance of this case will be directed by this Ruling and the separate "Supplemental Order," filed concurrently herewith.

It is SO ORDERED.

Dated: New Haven, Connecticut
October 12, 2021

/s/Charles S. Haight, Jr.
CHARLES S. HAIGHT, JR.
Senior United States District Judge