

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

MICHAEL LOMAX,

Plaintiff

v.

CARLOS DEL TORO,
Secretary of the Navy,

Defendant

Civil Action No.: _____

COMPLAINT

INTRODUCTION

1. Plaintiff Michael Lomax, a veteran of the United States Marine Corps (USMC or the Marines), brings this action seeking judicial review of a March 28, 2021 decision by the Board for Correction of Naval Records (BCNR), overseen by Defendant Carlos del Toro, that violates Mr. Lomax's rights under both the Administrative Procedure Act (APA) and his Constitutionally-guaranteed rights to due process and equal protection.

2. During his service in the USMC, Mr. Lomax was sexually assaulted by a fellow Marine. He also experienced sexual violence through hazing from a group of Marines.

3. In addition to the military sexual trauma (MST) he experienced, Mr. Lomax, a Black man, was subjected to racial taunts and racially pejorative names. His supervisors treated him and other Black Marines as inferior to white Marines, assigned Mr. Lomax menial duties, and differentially punished him.

4. Mr. Lomax developed symptoms of a mental health condition, including anger, fear, difficulty sleeping, and depression. He collected a record of misconduct, much of which

was the result of his untreated post-traumatic stress disorder (PTSD) due to MST. Other misconduct in Mr. Lomax's record is the result of disparate punishment based on Mr. Lomax's race.

5. In 1984, Mr. Lomax was racially threatened and attacked by two white Marines as he was walking back to his barracks at night. Mr. Lomax defended himself and struck one of his attackers. As a result, the USMC discharged him with an Other Than Honorable character of service.

6. Over the next several decades, the military has recognized that many former service members' less than honorable discharge characterizations were incorrect or unjust, particularly when the discharge was the result of misconduct relating to PTSD, other mental health conditions, or MST. The Department of Defense (DoD) has issued multiple guidance memoranda to the boards for the correction of military and naval records, directing the boards to grant requests to upgrade discharge characterizations when the misconduct is outweighed and mitigated by the service member's PTSD, other mental health conditions, or MST, or when the punishment the service member received was disproportionate or unjust.

7. In 2020, in accordance with these agency guidances, Mr. Lomax petitioned the Board for Correction of Naval Records (BCNR) to upgrade his discharge to an "Honorable" discharge and to amend his "Narrative Reason for Separation" and separation code accordingly.

8. The BCNR however, did not follow the DoD guidance. Instead, it violated the law and constitutional due process by relying on a medical opinion that it refused to provide to Mr. Lomax or permit him to rebut. The BCNR also disregarded DoD guidance by refusing to evaluate Mr. Lomax's evidence and claims about how he received disparate punishment because

of his race and the effects of racial incidents on his mental health symptoms. The BCNR then denied Mr. Lomax's request for a discharge upgrade.

PARTIES

9. Plaintiff Michael Lomax is a veteran of the Marines. He is a citizen of the United States and resides in Montville, Connecticut.

10. Defendant Carlos Del Toro is the Secretary of the Navy and is named herein solely in his official capacity. As the Navy oversees the Marines, Defendant Del Toro has the power to act through the BCNR to change any record of a former Marine when necessary to correct an error or remove an injustice. This authority is conferred by 10 U.S.C. § 1552 and 32 C.F.R. § 723.1, *et seq.*

JURISDICTION AND VENUE

11. This Court has subject-matter jurisdiction under 28 U.S.C. § 1331, as this action arises under the Fifth Amendment to the U.S. Constitution and the Administrative Procedure Act, 5 U.S.C. § 706.

12. The Court also has subject-matter jurisdiction under 28 U.S.C. § 1361, as this is an action to compel an officer or employee of the United States, Defendant Del Toro, to perform a duty owed to the Plaintiff, Mr. Lomax.

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

STATUTORY AND REGULATORY BACKGROUND

Military Discharges

14. Upon discharge, military personnel receive a Certificate of Release or Discharge from Active Duty—*i.e.*, the “Form DD 214”—that characterizes their “Character of Service” as Honorable, General (Under Honorable Conditions), Other than Honorable, Bad Conduct, or Dishonorable. Forms DD 214 also contain a section entitled “narrative reason for separation” which explains why the service member is separating from military service and a separation code that corresponds to a reason for separation.

15. A veteran’s Character of Service affects his or her eligibility for various benefits and support services administered by the U.S. Department of Veterans Affairs (VA), as well as benefits provided by states (*e.g.*, property tax exemptions, burial in state military cemeteries) and non-profit entities (*e.g.*, scholarships).

16. Employers will often request to see a former service member’s DD 214 in the course of the job application process. For example, federal government positions that have veteran preferences in hiring require the veteran to present his or her DD 214 to receive the preference.

Guidance Regarding the Standards for Discharge Review

17. Following discharge, a former service member may seek to correct their military records, including by requesting changes to the Form DD 214 Character of Service, narrative reason for separation, and separation code.

18. A former service member who wishes to correct his military records submits an application to the appropriate Discharge Review Board or Board of Correction for his branch of

service. The appropriate board for a former member for the Marine Corps discharged more than 15 years prior to the date of application is the BCNR.

19. The BCNR is the highest level of administrative review within the Department of the Navy. Its mission is to correct errors and remove injustices from Naval records.

20. On September 3, 2014, then-Secretary of Defense Chuck Hagel issued mandatory guidance (the “Hagel Memo”) to the boards for correction of military and naval records, including the BCNR. The Hagel Memo instructed the boards to consider upgrades to discharges based on previously unrecognized PTSD, which the Secretary recognized was often not diagnosed until “decades after service was completed.” Secretary Hagel recognized that in cases of undiagnosed PTSD, service records alone may be insufficient to show a “basis for mitigation in punitive, administrative, or other legal action” or a nexus between PTSD and “the misconduct underlying the service member’s discharge.”

21. The Hagel Memo instructed the boards to give “special consideration” to discharge upgrade applications founded upon PTSD diagnoses by the VA and “liberal consideration” to applications citing PTSD diagnoses by a civilian provider, and stated that when PTSD or related conditions “may be reasonably determined to have existed at the time of discharge, those conditions will be considered potential mitigating factors in the misconduct that caused the under other than honorable conditions characterization of service.”

22. On February 24, 2016, then-Acting Principal Deputy Under Secretary of Defense Brad Carson issued further mandatory guidance (the “Carson Memo”) to “ease the burden for all Veterans seeking redress” and ordered all boards for records correction to “renew and re-double our efforts to ensure that all Veterans who have sacrificed so much in service to our great Nation receive all the benefits that the Supplemental Guidance [Hagel Memo] may afford.” The Carson

Memo instructed the boards to conduct de novo review of prior decisions involving PTSD claims that had not benefitted from the guidance in the Hagel Memo.

23. On August 25, 2017, Rear Admiral A.M. Kurta, performing the duties of the Under Secretary of Defense for Personnel and Readiness, issued still further mandatory guidance to all boards for records correction (the “Kurta Memo”). The Kurta Memo noted that “invisible wounds. . . are some of the most difficult cases” and that “standards for review should rightly consider the unique nature of these cases” and that the boards should ensure “fair and consistent standards of review.”

24. The Kurta memo reiterated that in-service misconduct may be excused by mental health conditions such as PTSD.

25. In addition, the Kurta Memo advised that misconduct itself may be “evidence of . . . PTSD.”

26. The Kurta Memo listed examples of behaviors associated with PTSD and related conditions, including: “substance abuse; episodes of depression, panic attacks or anxiety without an identifiable cause; [and] unexplained economic or social behavior changes.”

27. The Kurta Memo also clarified that, with respect to its guidance to military review boards considering requests by veterans to modify their discharge status, unless otherwise indicated, its use of the term “discharge” included “the characterization, narrative reason, separation code, and re-enlistment code” pertaining to a service member’s discharge.

28. The Kurta Memo advised the boards that “[m]ental health conditions, including PTSD . . . impact veterans in many intimate ways, are often undiagnosed or diagnosed years afterwards, and are frequently unreported,” and that “[m]ental health conditions, including PTSD

. . . inherently affect one's behaviors and choices causing veterans to think and behave differently than might otherwise be expected.”

29. The Kurta Memo also advised the boards that “[a]n Honorable discharge characterization does not require flawless military service,” and that in cases of PTSD, “some significant misconduct [may] be sufficiently justified or outweighed by the facts and circumstances.”

30. On July 25, 2018, then-Under Secretary of Defense for Personnel and Readiness Robert L. Wilkie issued additional mandatory guidance (the “Wilkie Memo”) to all the boards following outreach efforts to inform veterans of their right to apply for discharge upgrades and records correction. The Wilkie Memo instructs the boards to upgrade discharges when required to ensure “fundamental fairness.”

31. Among the several factors that the Wilkie Memo instructs the boards to consider includes that “similarly situated service members sometimes receive disparate punishments,” and instructs the boards to consider unfair disparities in punishments as a basis for relief.

32. The Wilkie Memo also instructs the boards to consider factors such as positive post-conviction conduct, the length of time since misconduct, acceptance of responsibility and remorse, job history, and whether misconduct may have been youthful indiscretion, among others.

33. Each of the four memos—the Hagel Memo, the Carson Memo, the Kurta Memo, and the Wilkie Memo—emphasize the need for adequate and consistent redress for veterans whose deleterious discharges arose from misconduct caused by PTSD.

34. The four memos constitute mandatory guidance that is binding on the Secretary of the Navy, acting through the BCNR.

Procedural Protections at the BCNR

35. U.S. Code requires the BCNR to provide applicants with “a copy of all correspondence and communications (including summaries of verbal communications) to or from the agency or board, or a member of the staff of the agency or board, with an entity or person outside the agency or board that pertain directly to the applicant's case or have a material effect on the applicant’s case.”

36. Federal regulations require the BCNR to provide, attached to the decisional document containing a denial of relief, “any advisory opinion considered by the Board which is not fully set out in the statement” and to “furnish promptly to the applicant and counsel” the “statement of the grounds for denial, together with all attachments.”

37. DoD policy requires the BCNR to provide the applicant “a copy of all correspondence to or from the agency or board with an entity or person outside the agency or board.”

38. In adversely ruling on applications of former service members for correction of naval records, the BCNR must provide applicants with “the grounds for denial . . . includ[ing] the reasons for the determination that relief should not be granted, including the applicant’s claims of constitutional, statutory and/or regulatory violations that were rejected, together with all the essential facts upon which the denial is based.”

39. The Secretary of the Navy has authority for final decisions of the BCNR, and the responsibility to oversee the operations of the BCNR.

40. The Secretary of the Navy must “ensure that the time standards for disposition of applications . . . are met.”

FACTUAL ALLEGATIONS

41. Mr. Lomax was born in 1964 in Chicago and was raised there, along with his eleven siblings, by his parents. After his father died, he and his siblings were raised by his mother.

42. Mr. Lomax is African American.

43. Prior to joining the Marines, Mr. Lomax had no history of disciplinary infractions or mental health issues, and had never experienced sexual assault or harassment.

Mr. Lomax's Service in the U.S. Marine Corps

44. In 1982, at age 17, Mr. Lomax enlisted in the Marines.

45. Mr. Lomax completed boot camp at Camp Pendleton, California.

46. During boot camp, his drill instructor called him racially pejorative nicknames, such as "Windy City Pimp," because he was a Black man from Chicago. White recruits were not called pejorative names. When Mr. Lomax politely asked his drill instructor to treat him like the other recruits, the drill instructor yelled at him.

47. In November of 1982 he was stationed at the Naval Submarine Base New London located in Groton, Connecticut, and was assigned to the military occupational specialty of guard.

48. In his unit, Mr. Lomax was one of about 10 Black people in a group of 200 Marines.

49. When off-duty, the non-commissioned officers (NCOs) who supervised the enlisted Marines socialized with the white Marines but refused to socialize with Black Marines.

50. Black Marines in Mr. Lomax's unit, including Mr. Lomax, were assigned more menial duties than other Marines.

51. Black Marines in Mr. Lomax's unit, including Mr. Lomax, were disciplined more harshly than other Marines for the same conduct.

52. On one occasion, Mr. Lomax observed a white Marine decline an order to buff the floors, stating he was too tired. The supervisor ordered Mr. Lomax to buff the floors instead. When Mr. Lomax responded that he also was tired, the supervisor told him, “you’re going to get your black ass up and buff the floors.”

53. Following this incident, the supervisor punished Mr. Lomax with a written counseling warning, but the white Marine was not punished.

54. While on guard duty at a base gate, white Marines frequently engaged in brief conversations with passers-by without any reprimand by supervisors.

55. In 1983, while Mr. Lomax was on guard duty at the base gate, he had a brief conversation with his fiancée while she was walking past the gate. For this conduct, he was given Non-Judicial Punishment (NJP).

56. Despite his feelings about the disparate treatment from his chain of command that Mr. Lomax experienced and witnessed, Mr. Lomax was determined to work hard and do his best to obey the rules and develop camaraderie with his fellow Marines.

57. Mr. Lomax’s peers also treated him differentially based on his race. Many of his peers did not socialize with him or the other Black Marines.

58. In one instance, Mr. Lomax attended a party with a group of white Marines, where he fell asleep. Without his consent, the others put hot dogs in his mouth in a sexually explicit manner and then photographed him.

59. Early in his service, Mr. Lomax went out for a drink with another Marine who he viewed as a friend. On the way back to barracks, this Marine forcibly grabbed Mr. Lomax’s crotch and attempted to kiss him. Mr. Lomax got away but did not report the incident, out of shame and a fear of retaliation.

60. Mr. Lomax began experiencing feelings of increasing anger, shame, and humiliation due to the military sexual trauma (MST) and discriminatory treatment he experienced. He increasingly felt socially isolated. In the absence of any treatment or recourse for the MST or discrimination, the psychological impact on Mr. Lomax intensified.

61. On March 4, 1983, a group of Marines Mr. Lomax knew invited him to ride along with them in a plan to rob a local restaurant. Mr. Lomax agreed to join them, a decision that to this day he does not fully comprehend.

62. The group drove as far as the restaurant but took no further action and returned to base.

63. Mr. Lomax felt terrible about his involvement because it was against his values and his upbringing, and he had never behaved in such a fashion before. Concerned that the group would renew their plan, he went to his supervisors and turned in the parties involved.

64. Mr. Lomax pled guilty at Special Court Martial and accepted a sentence of reduction in rank, a fine, and a period of confinement. On information and belief, the ring-leader of the group was discharged following court martial.

65. On completion of his sentence, the Marine Corps retained Mr. Lomax and he regained his rank and maintained good conduct and proficiency scores.

66. Mr. Lomax received a Letter of Appreciation in March 1983.

67. In August of 1983, Mr. Lomax loaned a fellow Marine of Filipino descent, Michael Tabilas, a belt buckle when Mr. Tabilas did not have a belt that met ceremonial dress requirements. Their supervisor became angry that Mr. Lomax had shared the belt buckle and harshly reprimanded both Mr. Lomax and Mr. Tabilas.

68. Within a few hours of being yelled at, Mr. Tabilas died by suicide. He was still wearing Mr. Lomax's belt.

69. Mr. Tabilas' suicide impacted Mr. Lomax for years, and still does.

70. In November 1983, the Marines awarded Mr. Lomax a Meritorious Mast for volunteering to participate in burial ceremonies for the Marines killed in the 1983 Lebanon barracks bombing.

71. In May 1984, Mr. Lomax was transferred to Camp Lejeune and deployed with his battalion to Okinawa.

72. In Okinawa, Mr. Lomax experienced a culture of sexual assault and intimidation. Senior Marines smacked him on the bottom and grabbed and pulled his genitals. Mr. Lomax again felt shame and humiliation but he feared that if he were to report this treatment he would be retaliated against.

73. Racial discrimination and slurs were also common on the base in Okinawa. Mr. Lomax was repeatedly called a "n---" as well as "boy" and "tar baby" by senior Marines. He also heard others being targeted by these slurs.

74. In this context, Mr. Lomax's feelings of fear, shame and humiliation about the ongoing sexual assaults intensified. He also felt angry at the continued unprovoked racism he experienced.

75. Mr. Lomax did not recognize or seek assistance for his mental health needs. DoD has recognized that service members frequently served with unrecognized mental health conditions, and that service members still struggle to access appropriate support and medical care for mental health needs.

76. On July 28, 1984, Mr. Lomax went to the United Service Organization (USO) at night to make a phone call back to the states to his wife, whom he had married shortly before deploying.

77. When Mr. Lomax left the USO in the dark, he was alone. Two white Marines approached him. One intentionally walked into him and threatened, “watch it, N—r.” The other Marine attempted to hit Mr. Lomax, who dodged.

78. Under assault and outnumbered, Mr. Lomax was terrified and fought back.

79. Mr. Lomax struck one of his assailants, PFC Harms, in the nose.

80. As a result of this incident, Mr. Lomax was given an NJP for assault, and the USMC discharged him with an Other Than Honorable discharge with the narrative reason for separation of Pattern of Misconduct.

81. On information and belief, the two white Marines who attacked him received no punishment.

Mr. Lomax’s Life After Discharge and PTSD Diagnosis

82. Following his discharge, Mr. Lomax returned to Connecticut, where he and his wife raised two daughters and he maintained steady employment to support his family.

83. Mr. Lomax struggled with his mental health and ongoing depression and continued to feel shame and frustration over the sexual assault and discrimination he experienced during service.

84. Mr. Lomax began to have nightmares and for a brief time self-medicated with alcohol.

85. Aside from one misdemeanor arrest shortly following discharge, Mr. Lomax had no involvement with the criminal justice system.

86. When Mr. Lomax's wife, Judy, passed away from Lupus, Mr. Lomax raised his daughters alone and supported them through college. He married his second wife, Jessica, in 2012.

87. After decades of dealing with his mental health symptoms alone, Mr. Lomax realized he needed professional help.

88. In 2018, he began psychotherapy treatment at the Norwich Vet Center, a U.S. Department of Veterans Affairs facility.

89. Mr. Lomax's treating clinician diagnosed him with PTSD, Insomnia, and Depression and noted that he "encountered unwarranted acts of trauma that eventually resulted in a discharge undeserving of his character," such as "racial discrimination, body shaming, and sexually laced harassment and hazing that impacted his overall military experience."

Mr. Lomax's Application for Discharge Upgrade

90. On February 21, 2020, represented by counsel, Mr. Lomax filed an application for a discharge upgrade with the BCNR. Mr. Lomax asked the BCNR to upgrade his DD 214 to reflect an "Honorable" Character of Service, and to correct his Narrative Reason for Separation, Reentry Code, and Separation Authority to "Secretarial Authority."

91. Mr. Lomax requested an upgrade on three bases.

92. First, Mr. Lomax requested "liberal consideration" of his application per the Hagel, Carson, and Kurta Memos due to his PTSD, which was caused by the racism and MST he experienced in service.

93. Second, Mr. Lomax requested an upgrade pursuant to applicable law and DoD regulations because the discriminatory treatment and sexual harassment he experienced in service were contrary to USMC policies prohibiting such offenses.

94. Third, Mr. Lomax requested an upgrade due to the totality of the circumstances of his service and his demonstrated good character in the 35 years following service, under the factors set forth in the Wilkie Memo.

95. In support of his contentions, Mr. Lomax supplied his own statement and a letter from his Vet Center clinician containing his PTSD and other mental health diagnoses and attributing these conditions to events occurring in service.

96. He also supplied letters from a military friend who attested to his good character in service, an employer who attested to his character during his post-service employment at Foxwoods, and a fellow veteran who attested to his care and attention to his family and excellent character after discharge.

97. In the cover letter to his application, Mr. Lomax requested that the BCNR furnish “advisory opinions from any sources” and “any other documents to be considered in the discharge review” so that he could have reasonable opportunity to rebut such materials prior to the BCNR’s decision.

98. On March 28, 2021, the BCNR issued its decision denying Mr. Lomax a discharge upgrade. *See* Docket No. 1596-20 (Mar. 28, 2021), attached as Exhibit A.

99. The decisional document states the BCNR considered an “advisory opinion (AO) from a qualified mental health professional dated 8 March 2021.” The document is silent as to the contents of the AO.

100. The decisional document also states that the BCNR considered another AO from a qualified mental health professional dated 22 January 2021. According to the decisional document, this mental health professional found Mr. Lomax credible as to his military sexual trauma and that MST mitigated some of his misconduct in service.

101. The decisional document also states “your involvement in the conspiracy to participate in a robbery is not the typical behavior associated with PTSD.”

102. There is insufficient context in the decisional document to determine if this statement is the conclusion of the AO or an independent conclusion made by the BCNR. To the extent this is the conclusion of the BCNR, it is not qualified to make a medical determination such as the typicality of some PTSD symptoms and atypicality of others. To the extent this is the conclusion of the AO, Mr. Lomax seeks to rebut that conclusion.

103. The “typicality” of an applicant’s PTSD symptoms is not a standard or decision criteria set forth in 10 U.S.C. § 1552, or the Hagel, Carson, or Kurta Memos.

104. Nonetheless, impulsive decision-making, such as Mr. Lomax’s snap decision to get into the car with his friends who voiced an intent to rob a pizza store, against his normal judgment, *is* a known and typical behavior associated with PTSD and, in individuals with no prior criminal misconduct, is an “unexplained. . . social behavior change” as contemplated by the Kurta memo.

105. The BCNR did not provide either the January 22 or March 8 AOs to Mr. Lomax. Consequently, Mr. Lomax had no opportunity to rebut or clarify the information before the BCNR or to supply additional evidence or argument on the “typicality” of his PTSD symptoms; or any other material the AO may have communicated to the BCNR.

106. The BCNR panel did not cite to any facts or circumstances that contradicted or undermined the evidence put forth by Mr. Lomax.

107. The BCNR denied that the liberal consideration standard from the Kurta and Hagel memos indicated relief, stating only that there was “insufficient evidence” to warrant

relief, without stating why Mr. Lomax's evidence was insufficient or what evidence would be sufficient.

108. The BCNR also denied that Mr. Lomax merited relief under the Wilkie factors. The only reason given by the BCNR was that Mr. Lomax's two NJPs and Special Court Martial Conviction "outweighed" all the mitigating factors supplied by Mr. Lomax's service and post-service conduct.

109. Nowhere in its decision did the BCNR address Mr. Lomax's allegations of racial mistreatment or give reasons or analysis to explain why the discrimination Mr. Lomax experienced does not mitigate his misconduct.

110. Nor does the BCNR explain why the March 1983 NJP and 1983 Special Court Martial should factor so decisively in its decision, when the Marine Corps itself promoted, honored, deployed, and retained Mr. Lomax for over a year and a half following these incidents.

111. Nowhere does the BCNR address Mr. Lomax's contention that his final NJP resulting in discharge was the result of an unprovoked racial attack in which Mr. Lomax was the victim.

112. On April 26, 2021, Mr. Lomax wrote, via counsel, to the BCNR requesting that the BCNR supply copies of the two AOs, the credentials of the qualified mental health professionals, any and all communications considered by the BCNR in its decision, and to reopen his case and grant him a reasonable amount of time to submit a response to such documents. *See* Letter Request to Reopen (April 26, 2021), attached as Exhibit B.

113. On May 5, 2021, the BCNR responded to Mr. Lomax's counsel stating that "you do not have a current application on file with this Board," and that to have a previous BCNR decision reconsidered, Mr. Lomax must submit a new application along with new evidence

previously not submitted. The letter neither enclosed, nor made mention of, the advisory opinions Mr. Lomax seeks to review. *See* BCNR Letter to Petitioner (May 5, 2021), attached as Exhibit C.

Injury Suffered by Mr. Lomax as a Result of the BCNR Decision

114. Mr. Lomax has been damaged by the BCNR's refusal to upgrade his Character of Service to "Honorable" and its refusal to amend his narrative reason for separation and separation code.

115. Because the BCNR refused to upgrade Mr. Lomax's character of service, Mr. Lomax was required to undergo a separate process with the Department of Veterans Affairs in order to establish eligibility for benefits. As a result of the BCNR's denial, Mr. Lomax's access to VA benefits for disabled veterans has been delayed for over a year.

116. On March 21, 2022, the VA determined, based on substantially the same evidence and argument Mr. Lomax submitted to the BCNR, that the racial harassment, sexual harassment, and sexual assault he experienced in service mitigated his misconduct, and found that his Other Than Honorable discharge would not bar his eligibility for certain VA benefits.

117. The VA's determination does not render Mr. Lomax eligible for all VA benefits. Certain benefits, such as education benefits, are only available to those veterans with a fully Honorable discharge.

118. Additionally, VA's determination does not entitle Mr. Lomax to state benefits for Honorable veterans, such as burial in the state military cemetery, local property tax exemptions and certain scholarships; nor does it resolve the possibility that Mr. Lomax would be asked by a future employer or educator for his DD 214 as proof of military service.

119. Only an upgrade by the BCNR would entitle Mr. Lomax to a new DD 214 containing non-stigmatizing language.

120. Mr. Lomax's narrative reason for separation is stigmatizing, shameful, and upsetting to Mr. Lomax. Mr. Lomax has been damaged and continues to suffer damage from the stigma of this offensive language.

121. Mr. Lomax seeks an order vacating the BCNR's decision, remanding the matter to the BCNR, and directing the BCNR to upgrade Mr. Lomax's Character of Service to Honorable, his narrative reason for separation to Secretarial Authority, and his separation code to a code reflecting Secretarial Authority.

122. In the alternative, Mr. Lomax requests that this Court direct the BCNR to provide him with all the materials and communication it relied on in making its determination, including all advisory opinions, and to reopen his case for a period not less than 60 days to permit him to submit additional evidence to rebut those opinions, and to render a new decision consistent with all applicable DoD guidance.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

Violation of The Administrative Procedure Act, 5 U.S.C. § 706

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

124. Defendant's denial of Mr. Lomax's application for discharge upgrade is a final agency action.

125. Defendant failed to give "liberal consideration" as contemplated by the Hagel, Carson, and Kurta Memos to Mr. Lomax's diagnosis of PTSD and related mental health conditions.

126. Defendant failed to consider important evidence that demonstrated Mr. Lomax's misconduct in service was a symptom of his PTSD and related mental health conditions, and that his PTSD and related mental health conditions mitigated that misconduct.

127. Defendant failed to consider the additional factors evidenced in Mr. Lomax's application, such as the length of time since his discharge, his remorse, his lack of any other comparable criminal activity, and other factors as outlined in the Wilkie memo.

128. Defendant failed to follow its own rules by not responding to all the issues raised in Mr. Lomax's discharge upgrade applications – namely, his allegations of racial discrimination, punishment disparities in service, and good character following discharge. Defendant also failed to follow its own rules, including 32 C.F.R. § 723.3(e)(4), by refusing to provide the Advisory Opinions on which it relied to Mr. Lomax.

129. Defendant failed to provide a decision demonstrating a rational connection between the evidence presented and its conclusion that Mr. Lomax's misconduct – including misconduct which the Marine Corps deemed not worthy of discharge – is not mitigated by his PTSD due to MST and racial discrimination.

130. Defendant's failure to adequately apply the guidance set forth in the Hagel, Carson, Kurta, and Wilkie memos and its failure to address Mr. Lomax's contentions is arbitrary, capricious, an abuse of discretion, and not in accordance with law, in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

SECOND CLAIM FOR RELIEF
Violation of the Due Process Clause
of the Fifth Amendment to the United States Constitution

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

132. The protections of the Due Process Clause of the Fifth Amendment of the U.S. Constitution require an administrative agency to conduct adjudications in a fair and orderly manner, and also require an administrative agency to follow its own regulations and sub-regulatory guidance in conducting its adjudications.

133. Mr. Lomax's Character of Service and narrative reason for separation each affect liberty and property interests of Mr. Lomax's in that they determine his eligibility for various material benefits, and also represent his sacrifice and service to the United States, contributing to his dignity and self-worth.

134. The narrative reason for separation reporting that Mr. Lomax was discharged for "Misconduct" casts a continuing stigma on Mr. Lomax.

135. Military separation codes are known, they are understood, and they are easily procurable to the part of society that matters: prospective employers. Discharge codes and reasons for separation that include stigmatizing and derogatory information must be accompanied by elementary due process rights for servicemen and servicewomen to challenge such designations.

136. The BCNR's own regulations and mandatory procedures are set forth in the Hagel, Carson, Kurta, and Wilkie Memos, 10 U.S.C. § 1552, 32 C.F.R. § 723.3(e)(4), and other laws and regulations, as set forth above.

137. The BCNR's consideration of mental health advisory opinions without supplying the opinions to the applicant constitutes consideration of secret evidence that is not due process of law.

138. Mr. Lomax was entitled to know the content of the advisory opinions the BCNR relied on when considering his application, and he was entitled to have the opportunity to rebut those opinions prior to the BCNR's decision.

139. The BCNR's refusal to provide the advisory opinions and reopen his application on request violates the applicable statute, regulations, and agency guidance set forth above and runs counter to principles of due process in violations of the Fifth Amendment.

THIRD CLAIM FOR RELIEF
Violation of Equal Protection

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

141. Mr. Lomax, a Black man, is a member of a discrete and insular class, and Defendant's policies applied unequally to individuals such as Plaintiff are subject to strict scrutiny.

142. Mr. Lomax, in his discharge upgrade application, alleged that he was subjected to racially targeted actions during service – including racialized name-calling, hazing, differential treatment and differential punishment, and a racially motivated attack – that detrimentally affected his mental health and mitigated his misconduct.

143. Mr. Lomax alleged that the racially targeted actions he experienced were contrary to Marine Corps policy at that time and that he merited relief on that basis, yet Defendant did not address this contention.

144. Although the Wilkie Memo requires Defendant to consider “uniformity and unfair disparities in punishments as a basis for relief,” Defendant did not consider Mr. Lomax’s contentions that at least three instances of misconduct in his record were disparate punishments in which white Marines were not punished for substantially similar conduct.

145. Although studies indicate that the service branches see racial disparities in military punishment that negatively impact service members of color, the BCNR has issued no guidelines for service members who desire to upgrade their discharges on that basis.

146. On information and belief, the BCNR has granted relief in only one case since 2010 in which the applicant raised racial trauma as the basis for relief.

147. Defendant’s refusal to follow its own policy, as set out in the Wilkie Memo, regarding unfair disparities in punishment, together with its lack of formal guidance for race-based claims despite its knowledge that racial discrimination in military justice is well-documented, its practically non-existent grant rate of race-based claims, and its refusal to even address Mr. Lomax’s race-based contentions, amount to a policy that denies veterans of color, such as Mr. Lomax, access to the discharge upgrade process to the same extent veterans who are not members of a racial minority.

PRAYER FOR RELIEF

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

- (1) Order the Defendant to upgrade Mr. Lomax’s discharge status to Honorable;
- (2) Order the Defendant to change the narrative reason for separation to “Secretarial Authority” and his separation code to a code reflecting Secretarial Authority;
- (3) In the alternative, hold unlawful and set aside the BCNR’s decision, and remand with instructions for Defendant to supply Plaintiff with all medical, mental health,

and legal advisory opinions as well as any other communications the BCNR considered in the course of its decision, and direct BCNR to permit Plaintiff ample time to rebut such communications by submission of additional briefing and evidence;

- (4) Award reasonable attorneys' fees and costs to Plaintiff; and
- (5) Grant any other and further relief that the Court deems just and proper.

Dated: April 5, 2022
New Haven, Connecticut

Respectfully submitted,

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