

Notice of Class Action Settlement

Re: Air Force Discharge Review Board

Important Information — Read Carefully

This is a Court-approved Legal Notice. This is not an advertisement.

1. Are you a member of the Air Force, Space Force, Air Force Reserve, or Air National Guard who was discharged from October 7, 2001 through the effective date of settlement?
2. Were you discharged with a “General, Under Honorable Conditions” (General) or “Under Other Than Honorable Conditions” (UOTHC) service characterization?
3. Have you been denied or not yet received a discharge upgrade to Honorable?
4. Do you have a diagnosis of post-traumatic stress disorder (PTSD), traumatic brain injury (TBI), or another mental health condition? If not, do you have records showing that you had symptoms of these conditions in military service? Or, did you experience sexual assault or sexual harassment in service?

If you answered **YES to these questions, you may be part of a proposed settlement class.**

What Is This Case About?

A settlement has been reached in a class action lawsuit against the Secretary of the Air Force, Frank Kendall, regarding the Air Force Discharge Review Board (AFDRB). The lawsuit, filed by named plaintiffs Martin Johnson and Jane Doe, alleges that the Air Force failed to provide “liberal consideration” as required by law to AFDRB discharge upgrade applicants with PTSD, TBI, other mental health conditions, or experiences of sexual assault or sexual harassment in service

The pending lawsuit is: *Martin Johnson et al. v. Frank Kendall, Secretary of the Air Force*
No. 3:21-cv-01214-CSH
United States District Court for the District of Connecticut

Important Dates

The parties have submitted a settlement agreement to the Court for its approval. This settlement is not yet final. If the Court approves it, all members of the Settlement Class will be bound by the terms of the settlement. If you are a Settlement Class Member, you can object to the settlement if you feel that it is not fair, reasonable, or adequate. The key dates for objecting are:

November 13, 2023 — Any objections must be filed with the Court by November 13, 2023, and also sent to the lawyers for the proposed settlement class and the Air Force (details below).

December 4, 2023, at 10:00 a.m. — The Court will hold a Fairness Hearing over Zoom (details below).

What Are the Terms of the Settlement?

The settlement terms will begin after the Court approves the settlement, except where the Department of the Air Force (DAF) has already taken action. The key terms of the settlement are as follows:

1. Automatic Reconsideration: The AFDRB will automatically reconsider discharge upgrade applications that did not result in an Honorable for class members who submitted their applications on or after September 13, 2015 through the date the Court approves the Settlement. The Air Force will provide notice of this automatic reconsideration. Class members do not have to do anything to get reconsideration, but will have 60 days from the date of the notice to submit additional evidence to support their application if they choose.
2. Reapplication Rights Notice: Class members who requested a discharge upgrade from the AFDRB between September 13, 2006 and September 13, 2015, but were denied, will be able to request reconsideration of their denial with or without submitting new evidence.
3. Notice of Additional Resources: For all discharge upgrade applications submitted to the AFDRB after the Court approves the Settlement, when the AFDRB acknowledges receipt of the application, the AFDRB will inform applicants of resources available to help answer their questions about the application process or to help them supplement their applications.
4. Medical Professional Review of Evidence: For applicants entitled to “liberal consideration” who apply to the AFDRB after the Settlement is approved, the AFDRB’s medical professional will review the applicant’s records. If the records are insufficient to establish that the applicant had a mental health condition or sexual assault or sexual harassment experience in military service, the medical professional will send a notice to the applicant and advise them on how to supplement their application.
5. Decisional Document Revisions: The AFDRB has revised its decisional document to give applicants more explanation for the AFDRB’s decision on their applications.
6. Training for AFDRB Members: AFDRB members and staff will participate in live training specifically tailored to applicants entitled to “liberal consideration” and will repeat such training every two years. New AFDRB members and staff will attend such training prior to participating in discharge upgrade decisions.
7. Phone Number for Applicants: The AFDRB will provide a phone number for applicants to call with questions about their applications or the AFDRB’s process, as a trial program.
8. Remote Appearances: The AFDRB will continue to provide a Video-Teleconference (“VTC”) Personal Appearance Hearing Program, which will be available to all applicants who request a Personal Appearance hearing.
9. Review of AFDRB Decisions: If the Secretary of the Air Force overturns a favorable AFDRB decision for an applicant entitled to “liberal consideration,” the Secretary’s discussion of issues will address each issue considered by the AFDRB.
10. Attorney’s Fees: The AFDRB agrees to pay \$55,000 in attorneys’ fees and costs to counsel for the Settlement Class.

Attention all former members of the United States Air Force, United States Space Force, Air Force Reserve, or Air National Guard discharged since October 7, 2001 with an Under Honorable Conditions (General), or Under Other Than Honorable Conditions (UOTHC) service characterization, who, if you submitted a previous discharge upgrade application or application for reconsideration, submitted at least one such application on or after September 13, 2006; and who have not received upgrades of their discharge characterizations to Honorable, and have diagnoses of PTSD, TBI, or other mental health conditions, or have records documenting that one or more symptoms of these conditions existed during military service, or who experienced sexual assault or sexual harassment during military service:

You may benefit from a proposed settlement in the Johnson settlement class action.

Pursuant to Federal Rule of Civil Procedure 23(e) you are notified as follows:

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

MARTIN JOHNSON and JANE DOE on
behalf of themselves and all others similarly
situated,

Plaintiffs,

No. 3:21-cv-01214-CSH

v.

September 27, 2023

FRANK KENDALL, Secretary of the Air
Force,

Defendant.

This is a notice of class members' rights in this class action litigation. This notice proceeds in three parts: (1) background information on the Plaintiffs' claims, the Department of the Air Force's defenses, and the class; (2) a summary and description of the proposed terms of the settlement between the class and the Department of the Air Force; and (3) information on the upcoming settlement hearing.

BACKGROUND

On September 13, 2021, Plaintiffs Martin Johnson and Jane Doe commenced this action against the Defendant Secretary of the Air Force to obtain judicial review of the denial by the Air Force Discharge Review Board ("AFDRB") of the discharge upgrade applications of Mr. Johnson, Ms. Doe, and others similarly situated. The Complaint alleged, among other things, that since the start of military operations in Iraq and Afghanistan, the Air Force, the Air Force Reserve, and the Air National Guard discharged thousands of men and women with less than Honorable characterizations of service due to misconduct attributable to post-traumatic stress disorder ("PTSD"), traumatic brain injury ("TBI"), or other mental health conditions, or misconduct attributable to military sexual trauma ("MST") or intimate partner violence ("IPV"). The Complaint alleged that the AFDRB systematically denied veterans with these disabilities and experiences liberal consideration of their discharge upgrade applications in violation of the Administrative Procedure Act (APA), Department of Defense guidance, the Due Process Clause of the Fifth Amendment, and Section 504 of the Rehabilitation Act. Defendant has denied and continues to deny each of the claims and contentions alleged by Plaintiffs.

A. The Settlement Class

The settlement class in this civil action ("The Settlement Class") is defined as follows:

"Members and former members of the Air Force, Space Force, Air Force Reserve, and Air National Guard who served in the military during the Iraq and Afghanistan eras, defined as those with discharge dates from October 7, 2001 through the Effective Date of Settlement, and who:

- (1) were discharged from the Air Force, Space Force, Air Force Reserve, or Air National Guard with the following service characterizations: Under Honorable Conditions (General), or Under Other Than Honorable Conditions (UOTHC); but not the following service characterizations: Bad Conduct Discharges (BCDs), Dishonorable discharges, Uncharacterized discharges, or Dismissals;

- (2) who, if they submitted a previous discharge upgrade application or application for reconsideration, submitted at least one such application on or after September 13, 2006;
- (3) have not received upgrades of their service characterizations to Honorable; and
- (4) have diagnoses of post-traumatic stress disorder (“PTSD”), Traumatic Brain Injury (“TBI”), or other mental health conditions, or have experiences of sexual assault or sexual harassment, or records documenting that one or more symptoms of PTSD, TBI, other mental health conditions, or experiences of sexual assault or sexual harassment existed/occurred during military service, under the Kurta Memo standard of liberal consideration.”

The “Effective Date of Settlement” is defined as the date the Court orders final approval of the proposed settlement.

B. Class Counsel

The Court named Plaintiffs as settlement class representatives in this civil action and the Jerome N. Frank Legal Services Clinic of Yale Law School and Jenner & Block LLP as Settlement Class Counsel (“Settlement Class Counsel”). Throughout 2022, Plaintiffs and Defendant engaged in discovery and settlement negotiations supervised by the Court. After negotiations and exchanges of multiple proposals, Plaintiffs and Defendant reached an agreement in principle (“Joint Settlement Agreement”) on September 6, 2022 to settle the claims in the Complaint. The Joint Settlement Agreement, if approved by the Court, will settle the claims in the Complaint in the manner and upon the terms summarized and described below.

SUMMARY OF SETTLEMENT TERMS

The full text of the proposed Joint Settlement Agreement can be viewed at www.JohnsonAirForceSettlement.com.

The Joint Settlement Agreement uses the term “Liberal Consideration Cases,” which means veterans discharged from the Department of the Air Force, United States Space Force, Air Force Reserve, or Air National Guard with less-than-Honorable statuses; including Under Honorable Conditions (General) and Under-Other-than-Honorable Conditions (UOTHC) discharges, but excluding Uncharacterized, Bad Conduct, Dishonorable discharges, or Dismissals; who have diagnoses of Post-Traumatic Stress Disorder (PTSD), Traumatic Brain Injury (TBI), or other mental health conditions, or have experiences of sexual assault or sexual harassment during military service, or records documenting one or more symptoms of PTSD, TBI, or other mental

health conditions, or experiences of sexual assault or sexual harassment existed/occurred during military service, under the Kurta Memo standard of liberal consideration.

1. Automatic Reconsideration for Certain 2015-2023 Applicants

The AFDRB will automatically reconsider its decisions that meet the following three criteria: (a) Liberal Consideration Cases, (b) where the application was submitted on or after September 13, 2015 to the date the Settlement is approved, and (c) where the applicant did not receive a full upgrade to Honorable. The Defendant will identify these applicants by conducting a search of its electronically-stored AFDRB case files.

The Air Force will send notice of this automatic reconsideration process to all eligible applicants, to both their last known mailing and e-mail addresses on file with the AFDRB. The notice will provide that the AFDRB will reconsider that individual's case without a need for further response from the Applicant. It will also state that if the Applicant wishes to supplement their application with additional evidence, they should do so within 60 days of the notice, and that submitting medical evidence in support of the application benefits the Applicant. The notice will provide examples of the types of additional evidence that may be relevant, and include information regarding available resources to assist Applicants in supplementing their applications, including legal and medical services. This notice will be posted to [Air Force to provide] and www.JohnsonAirForceSettlement.com, and sent to eligible veterans within 120 days of the date the Settlement is approved. The AFDRB's website will state that, if an individual believes they are part of the automatic reconsideration or reapplication groups, but did not receive a notice, they should contact the AFDRB. The AFDRB will also update the Frequently Asked Questions ("FAQ") section of its website in accordance with the terms of this settlement.

2. Reapplication Rights for Certain 2006-2015 Applicants

Previous applicants to the AFDRB who are not eligible for automatic reconsideration according to the paragraph above, but whose cases were either denied or only granted partial relief by the AFDRB between September 13, 2006 and September 12, 2015, will be eligible to reapply to the AFDRB under the Joint Settlement Agreement with or without submitting new evidence. Settlement Class Counsel will send notice to these applicants informing them of their right to reapply if they qualify as a member of the settlement class. The Applicant may reapply to the AFDRB — or if the Applicant was discharged more than 15 years from the date they reapply, to the Air Force Board for Correction of Military Records — for reconsideration of their case.

3. Notice of Additional Resources for New and Pending AFDRB Applicants

For all discharge upgrade applications submitted to the AFDRB after the Court approves the Settlement, when the Board writes the Applicant to acknowledge receipt of a submitted DD Form 293, the Board will provide an additional notice to inform Applicants of resources available to applicants. These resources will include: websites for Applicants to look up lawyers and Veterans Service Organizations who may help Applicants gather evidence and submit discharge upgrade applications; information about Applicants' potential eligibility for mental healthcare treatment; and information about how to make reasonable accommodations requests at the AFDRB.

Defendant will provide the same notice to all AFDRB applicants whose applications were submitted to the AFDRB before the Court approves the Settlement, but have not yet been decided.

4. Medical Professional Review and Notice Inviting Additional Evidence

For applicants who apply to the AFDRB after the Court approves the Settlement and claim to have PTSD, TBI, or other mental health conditions, or to have experiences of sexual assault or sexual harassment, the AFDRB's medical professional will review the applicant's DD Form 293, the Applicant's official military and medical files — including VA mental health treatment records — and materials the Applicant submits. If the medical professional determines that there may be insufficient records to establish that the mental health condition or experience existed in military service, the medical professional will send a notice to the applicant inviting additional evidence.

This will be a trial program lasting one year, and will only apply to new applications and applications not yet assessed by the AFDRB's medical professional at the time of the program's implementation. This program will be implemented within 45 days of the Court's approval of the Settlement.

5. Revised Decisional Documents & Procedures

For Liberal Consideration Cases, the AFDRB has incorporated the text of the four "Kurta Factors" and the following language and procedure, or a reasonable equivalent, into AFDRB decisional documents, subject to modification due to relevant changes to statutes, regulations, or Department of Defense guidance binding on the AFDRB:

In the event the AFDRB denies an Applicant's request for relief, in this decision the Board will, in accordance with applicable law and regulation: (a) respond to the Applicant's contentions; (b) explain why the Board decided against the Applicant regarding any denied bases for relief; and (c) describe the evidence on which the

AFDRB relied in making its determination. In doing so, the Board will articulate a rational connection between facts found and conclusions drawn. If the Applicant claims to have, or the evidence suggests the Applicant may have, post-traumatic stress disorder (PTSD), traumatic brain injury (TBI), another mental health condition, or an experience of sexual assault or harassment in military service, this decision will include a narrative explanation of why the AFDRB decided against the Applicant as to each of the four factors set out at paragraph two of the 2017 Kurta Memo, as applicable. This explanation should restate and answer the applicable Kurta factors, and give a narrative reason why the Board finds insufficient mitigation to support a discharge upgrade. The Board will also distinguish [explain how the facts or outcome are different] any prior Board decisions cited by the Applicant, in accordance with applicable law and regulation.

The AFDRB will include the medical board member's written opinion with the decisional document, if required. The written opinion will include a narrative explanation as to the following, if applicable: (A) whether the available record reasonably supports that a mental health condition existed at the time of applicant's military service; (B) whether these conditions were present at the time of the misconduct; (C) whether these conditions were mitigating for the misconduct; and (D) whether the applicant received mental health and/or medical evaluations prior to their administrative separation.

When the Applicant requests it, the AFDRB will disclose the type of mental health professional providing the opinion, their licenses and certifications, and the identity of the mental health professional if their military pay grade is at or above the O-6 level or its civilian equivalent.

6. Training for AFDRB Members and Staff

AFDRB members and staff will participate in live training specifically tailored to Liberal Consideration Cases prior to participating in discharge upgrade decisions, and will participate in such training every two years or whenever there is a significant change to Liberal Consideration policies, whichever is sooner. This training obligation can be met through AFDRB member and staff attending trainings conducted by the Army Discharge Review Board; or may be otherwise provided by the AFDRB.

7. AFDRB Phone Number to be Provided to Applicants

The AFDRB will provide a phone number for applicants with questions to leave voicemail messages. Applicants who call should receive a response to their voicemail via phone, unless the applicant clearly indicates a preference for a written response in the voicemail. This will be a trial program of one (1) year in duration.

8. Universal Option for Video-Teleconference Personal Appearance Hearing

The AFDRB will continue to provide a Video-Teleconference (“VTC”) Personal Appearance Hearing Program, which will be available to all Applicants who request a Personal Appearance hearing. Defendant will inform Applicants of their ability to opt in to a VTC AFDRB hearing in the letter acknowledging receipt of their DD-293 application. Applicants can participate in VTC hearings from their personal residences or other locations of their choice.

9. Review of AFDRB Decisions by the Secretarial Review Authority

Defendant acknowledges that the “Kurta” and “Wilkie” memoranda describing liberal consideration apply to the exercise of Secretarial Review Authority detailed under 32 C.F.R. § 865.113. Where acting to overturn a favorable AFDRB decision for a Liberal Consideration Case, the Secretary’s discussion of issues under § 865.113(e) will address each issue considered by the AFDRB, including a discussion of each Kurta Factor as considered and implemented by the AFDRB.

10. Attorneys’ Fees and Costs

If the settlement is approved by the Court, Defendant agrees to pay \$55,000 in attorneys’ fees and costs to Settlement Class Counsel. A portion of these fees will be used by Settlement Class Counsel to pay for the production and mailing of notices to some members of the settlement class informing them of their right to reapply to the AFDRB.

THE SETTLEMENT HEARING

Before the settlement can become final, it must be approved by the Court. Any affected person may comment for or against the proposed settlement.

A. Hearing Details

In order to give settlement class members an opportunity to express their comments in support or objection to the settlement, a hearing will be held before the Hon. Charles S. Haight, Jr., via the videoconferencing software Zoom on December 4, 2023 at 10:00 a.m. Eastern Time. Settlement class members or their attorneys can attend the hearing using the following information:

Join by Phone

Dial: +1 646 828 7666
Meeting ID: 161 129 7914
Passcode: 164628

B. How to Comment and/or Object to the Settlement

If you wish to comment for or against the settlement, you must serve by hand, mail, or e-mail your written objection and support papers, including any legal support for your objection and your status as a settlement class member, upon Settlement Class Counsel or Counsel for the Defendant:

Settlement Class Counsel

Michael J. Wishnie
Jerome N. Frank Legal Services Organization
Yale Law School
P.O. Box 209090
New Haven, CT 06520-9090
johnson.settlement@ylsclinics.org

and **Defendant's Counsel**

Natalie N. Elicker
U.S. Attorney's Office for the District of Connecticut
157 Church St, 25th Floor
New Haven, CT 06510
Natalie.Elicker@usdoj.gov

You must **also** file these documents with the Clerk of the Court:

United States District Court for the District of Connecticut
141 Church Street
New Haven, CT 06510

All written objections must be received by November 13, 2023.

Objections or comments will not be considered by the Court unless you have given notice in the manner described. If you intend to object to the Settlement and desire to present evidence at the fairness hearing, you must include in your written objections the identity of any witnesses you may call to testify and the exhibits you intend to introduce into evidence at the fairness hearing. If you fail to object in the manner described you will be deemed to have waived such objection and will forever be foreclosed from making any objection to any aspect of the Settlement, unless otherwise ordered by the Court. You may present your comments yourself or

you may have an attorney present them for you. You are invited to attend the hearing whether or not you have given notice that you want to comment on the settlement.

This settlement, if approved by the Court, will be a full and final adjudication of the issues raised on behalf of the settlement class in the Complaint and of any and all claims resulting from the facts, circumstances and subject matter that gave rise to the Complaint and that were known to Settlement Class Counsel on the date the settlement is approved.

Dated: New Haven, CT
 September 27,
 2023