

SETTLEMENT AGREEMENT

This Settlement Agreement is made between Plaintiffs Sergeant First Class (Retired) Kyle A. Smoke and Lieutenant Colonel (Retired) Jennifer A. McIntyre, on behalf of themselves (collectively, “Plaintiffs”), and Daniel Driscoll, in his official capacity as Secretary of the Army (“Defendant”), (collectively referred to as the “Parties”).

RECITALS

WHEREAS, Plaintiffs filed the civil action *Smoke et al. v. Driscoll*, No. 1:24-cv-02919-ACR (D.D.C.) (the “Civil Action”), asserting claims arising from the Army’s classification of certain medical disability retirements related to toxic exposures from open-air burn pits¹ and alleging that the Army improperly failed to designate those disabilities as “combat-related” or as resulting from an “instrumentality of war” under 26 U.S.C. § 104;

WHEREAS, Plaintiff Sergeant First Class (Ret.) Kyle A. Smoke was medically retired for asthma after deployments to Iraq where he was exposed to burn pits, and the U.S. Army Physical Disability Agency (“USAPDA”) revised his formal Physical Evaluation Board findings to remove the V1/V3 combat designation, concluding that exposure to open-air burn pits was not a “direct combat or enemy action” nor was an open-air burn pit an “instrumentality of war”;

WHEREAS, Plaintiff Lieutenant Colonel (Ret.) Jennifer A. McIntyre was medically retired for high-grade metastatic carcinoma (commonly known as breast cancer) incurred after four combat deployments to Iraq and Afghanistan where she was exposed to burn pits, and the

¹ “Open-air burn pit” means an area, not containing an incinerator or other equipment specifically designed for burning of solid waste, designated for the purpose of disposing of solid waste by burning in the outdoor air at a location with more than 100 attached or assigned personnel and that is in place longer than 90 days as defined by Department of Defense Instruction (DoDI) No. 4715.19, Use of Open-Air Burn Pits in Contingency Operations (Feb. 15, 2011).

USAPDA similarly declined to designate her disability as resulting from an “instrumentality of war” under 26 U.S.C. § 104;

WHEREAS, Plaintiffs sought injunctive and declaratory relief on behalf of themselves and a similarly situated class of medically retired Army veterans, requiring the Army to designate burn-pit-related medical retirements as “combat-related” and to modify Army policy accordingly; and

WHEREAS, the Parties, without any admission of liability or wrongdoing, have conducted settlement negotiations and reached an agreement resolving all claims in this Civil Action and any related claims for attorneys’ fees, costs, and expenses, in order to avoid the time, expense, and uncertainty of further litigation.

NOW, THEREFORE, in consideration of the mutual covenants set forth below, and intending to be legally bound, the Parties agree as follows:

TERMS OF SETTLEMENT

1. Record Correction for Plaintiffs

Within sixty (60) days after the Effective Date (as defined below), the USAPDA shall amend the official military disability retirement records of the Plaintiffs to reflect a V1/V3 “combat-related” designation under applicable Department of Defense and Department of the Army regulations implementing 26 U.S.C. § 104, retroactive to each Plaintiffs’ date of medical disability retirement, to the extent any remaining documents require further amendments. Such amended designation shall supersede all prior designations. Defendant makes no representation as to any resulting monetary effect, or tax consequence, if any. Nothing in this Settlement Agreement shall be construed to add to, or take away from, any other rights of Plaintiffs, or similarly situated individuals, to apply for military records corrections under 10 U.S.C. § 1552. However, any such challenge not related to the corrections required by this Paragraph 1, whether or not successful,

shall not give rise to a claim for breach of this Settlement Agreement. This Settlement Agreement is intended to and does resolve the claims of the two Plaintiffs only. No person or entity (including members of the purported class) is intended by the Parties to be, nor shall any such person or entity be deemed to be, a third-party beneficiary of this Settlement Agreement, and no third party shall have any right to enforce this Settlement Agreement. Any reference to the filing of claims on behalf of similarly situated retirees is included solely to reflect the allegations originally pled in the Complaint.

2. Policy Amendment

Prior to the signing of this Settlement Agreement, USAPDA clarified its internal policy to define open-air burn pits located in designated contingency locations during specified time periods as “instrumentalities of war” under 26 U.S.C. § 104(b)(3)(B) for purposes of Army disability determinations. A copy of this policy is attached hereto as Exhibit A.

3. Public Posting and Notification

The USAPDA shall post on its public website the express policy described in paragraph 2 above.

4. Identification and Review of Similarly Situated Individuals

The USAPDA shall make reasonable efforts, using its existing records, to identify Army service members who were medically retired on or after August 10, 2022, for a condition qualifying under the Sergeant First Class Heath Robinson Honoring our Promise to Address Comprehensive Toxics (“PACT”) Act legislation, as codified at 38 U.S.C. § 1120, but who were not assigned a V1/V3 designation. The USAPDA shall review the records of the identified service members under the policy described in paragraph 2 above and, as appropriate, issue on a rolling basis revised determinations consistent with this Settlement Agreement, that policy, and applicable

law. The USAPDA shall make reasonable efforts to complete this review and any revisions within six (6) months of the Effective Date. If the USAPDA cannot complete its review within six (6) months of the Effective Date through reasonable efforts, Defendant will notify Plaintiffs' counsel, and the Parties shall confer in good faith to seek agreement on a revised completion date.

5. No Admission of Liability

This Settlement Agreement shall not be construed as an admission of liability, fault, or wrongdoing by Defendant, the Department of the Army, or the United States, and is entered into solely for the purpose of resolving disputed claims. This Settlement Agreement is for the purpose of settling this case, and for no other. Accordingly, this Settlement Agreement shall not bind the parties beyond this Settlement Agreement, nor shall it be cited or otherwise referred to in any proceedings, whether judicial or administrative in nature, in which the parties or counsel for the parties have or may acquire an interest, except as necessary to effect the terms of this Settlement Agreement.

6. Release of Claims

Upon execution of this Settlement Agreement, Plaintiffs, on behalf of themselves, release and forever discharge the United States, the Department of the Army, and their present and former officers, employees, agents, and assigns from any and all claims, demands, causes of action, and damages of any kind that could have been asserted by Plaintiffs in any forum arising from or relating to the facts and circumstances that are the subject of this Civil Action, including but not limited to claims for attorney fees, interest, costs, or other expenses. Provided however that nothing herein shall be construed to limit Plaintiffs' ability to file claims at the Department of Veterans Affairs or claims for Combat Related Special Compensation. Plaintiffs warrant and represent that no other action or suit with respect to the claims advanced in this suit is pending or

will be filed in or submitted to any other court, administrative agency, or legislative body. Plaintiffs further warrant and represent that they have made no assignment or transfer of all or any part of their rights arising out of or relating to the claims advanced in this suit. Each Party shall bear its own attorneys' fees, costs, and expenses incurred in connection with this Civil Action and this Settlement Agreement.

7. Dismissal of Action

Within ten (10) business days after the actions by Defendant required by paragraphs 1–3 under this Settlement Agreement are completed, the Parties shall file a joint stipulation of dismissal with prejudice pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii).

8. Taxes and Offsets

Plaintiffs acknowledge that they are solely responsible for any tax consequences arising from this Settlement Agreement. Compliance with all applicable federal, state, and local tax requirements shall be the sole responsibility of the Plaintiffs. This Settlement Agreement is executed without reliance upon any representation by Defendants as to tax consequences, and the Plaintiffs are responsible for the payment of all taxes or submission of tax records that may be associated with this Settlement Agreement. Further, nothing in this Settlement Agreement waives or modifies federal, state, or local law pertaining to taxes, offsets, levies, and liens that may apply to this Settlement Agreement or the settlement, and this Settlement Agreement is executed without reliance on any representation by Defendant as to the application of any such law.

9. Entire Agreement

This Settlement Agreement constitutes the entire understanding between the Parties and supersedes all prior written or oral agreements related to the subject matter herein. No amendment or modification shall be valid unless made in writing and signed by both Parties.

10. Authority and Representation

Each undersigned counsel represents that they are fully authorized to execute this Settlement Agreement on behalf of their respective clients and that the Parties have voluntarily and knowingly entered into this Settlement Agreement after consultation with counsel.

11. Counterparts

This Settlement Agreement may be executed in counterparts, including by electronic or facsimile signature, each of which shall be deemed an original and all of which together constitute one and the same Settlement Agreement.

12. Notices

Notices required or permitted under this Settlement Agreement shall be delivered electronically or in writing to the following:

For Defendant:

Brian Tracy
Special Assistant United States Attorney
Johnny H. Walker, III
Assistant United States Attorney
601 D Street, NW
Washington, DC 20530
Tracy: (202) 252-2578
Walker: (202) 252-2511
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johnny.walker@usdoj.gov

For Plaintiffs:

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Arlington, VA 22209
Telephone: (202) 621-5709
Facsimile: (202) 223-9199
rochelle@nvlsp.org
esther@nvlsp.org

13. Effective Date

“Effective Date” is defined as the date that the Settlement Agreement has been signed and delivered by all Parties.

[Signatures follow on next page]

AGREED TO AND ACCEPTED:

FOR DEFENDANT:

JEANINE FERRIS PIRRO
United States Attorney

PETER C. PFAFFENROTH
Chief, Civil Division

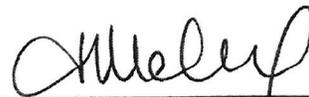
By:  _____ Date 3/6/26
BRIAN C. TRACY
Assistant United States Attorney
601 D Street, NW
Washington, DC 20530
(202) 252-2578

Attorneys for the United States of America

FOR PLAINTIFFS:

KYLE A. SMOKE Date

Plaintiff

 _____ Date 2/17/26
JENNIFER A. MCINTYRE

Plaintiff

DANIEL J. HAY Date

Counsel for Plaintiff

AGREED TO AND ACCEPTED:

FOR DEFENDANT:

JEANINE FERRIS PIRRO
United States Attorney

PETER C. PFAFFENROTH
Chief, Civil Division

By:  _____ Date 3/6/26
BRIAN C. TRACY
Assistant United States Attorney
601 D Street, NW
Washington, DC 20530
(202) 252-2578

Attorneys for the United States of America

FOR PLAINTIFFS:

 _____ Date 2/25/26
KYLE A. SMOKE
Plaintiff

JENNIFER A. MCINTYRE Date
Plaintiff

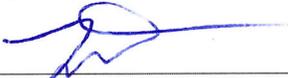
DANIEL J. HAY Date
Counsel for Plaintiff

AGREED TO AND ACCEPTED:

FOR DEFENDANT:

JEANINE FERRIS PIRRO
United States Attorney

PETER C. PFAFFENROTH
Chief, Civil Division

By:  _____ Date 3/6/26
BRIAN C. TRACY
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601 D Street, NW
Washington, DC 20530
(202) 252-2578

Attorneys for the United States of America

FOR PLAINTIFFS:

KYLE A. SMOKE Date
Plaintiff

JENNIFER A. MCINTYRE Date
Plaintiff

 _____ Date 2/18/26
DANIEL J. HAY Date
Counsel for Plaintiff

Exhibit A



DEPARTMENT OF THE ARMY
UNITED STATES ARMY PHYSICAL DISABILITY AGENCY
1836 ARMY BOULEVARD, BUILDING 2000
JOINT BASE SAN ANTONIO - FORT SAM HOUSTON, TX 78234

AHRC-D (635-40)

14 August 2025

MEMORANDUM FOR See Distribution

SUBJECT: Application of Instrumentality of War Coding for Unfitting Condition(s)
Resulting from Burn Pit Exposure in a Designated Combat Zone

1. References

- a. 5 U.S.C. § 3501(a)(3)(A)(ii) – Definitions; application
- b. 26 U.S.C. § 104(b)(3)(B) – Compensation for Injuries or Sickness
- c. 26 U.S.C. § 112 – Certain combat zone compensation of members of the Armed Forces
- d. 37 U.S.C. § 351 – Pay and Allowances of the Uniformed Services. Hazardous duty pay
- e. DoDI 1332.18, Section 10, Para. 10.1a(3) and 10.2b(4) and Glossary Para. G.2 – Disability Evaluation System, 10 November 2022
- f. DoDI 4715.19 – Use of Open-Air Burn Pits in Contingency Operations, 13 November 2018
- g. AR 635-40, Para. 4-35, 5-24, and 5-25 – Disability Evaluation System, Retirement, or Separation, 19 January 2017
- h. Internal Revenue Service, Publication 3, Armed Forces' Tax Guide (2024)

2. Purpose: To provide guidance to the United States Army Physical Disability Agency regarding application of combat coding for injuries caused by the fumes from Open-Air Burn Pits in Contingency Operations, as defined in DoDI 4715.19 (reference f).

3. Open-air burn pits, as defined in reference f, and located in combat zones, are instrumentalities of war for purposes of 26 U.S.C. § 104(b)(3)(B) (reference b).

4. A "combat zone" is an area:

- a. Designated by the President in an executive order;

AHRC-D (635-40)

SUBJECT: Application of Instrumentality of War Coding for Unfitting Condition(s)
Resulting from Burn Pit Exposure in a Designated Combat Zone

b. A qualified hazardous duty area designated by Congress where troops Soldiers earn hostile fire pay or imminent danger pay in accordance with 37 U.S.C. § 351 (reference d);

c. An area outside the combat zone or qualified hazardous duty area when the DoD certifies that such service is in direct support of military operations in a combat zone or qualified hazardous duty area, and where Soldiers receives hostile fire pay or imminent danger pay

5. The point of contact for this memorandum is COL Bonnie Blue B. Clemente at bonnie.b.clemente.mil@army.mil or by phone at 210-221-1613.



ADAM D. SMITH
Brigadier General, USA
Commanding General

DISTRIBUTION:
USAPDA
Office of Soldiers Counsel