

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOHN EAKIN	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO. SA-12-CA-1002-FB(HJB)
	§	
AMERICAN BATTLE MONUMENTS	§	
COMMISSION, <i>et al</i>	§	
	§	
Defendants	§	
	§	

PLAINTIFF'S STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

Pursuant to Fed.R.Civ.P. 56, Plaintiff submits this statement of genuine issues of material facts not in dispute

Plaintiff has a property interest in recovering the remains of his family member for burial.

Private Arthur H. Kelder was at all times a resident of the state of Illinois and intended to return there upon the completion of his military service. (Pl. Ex. 25, ECF No. 31)

Common Law of the State of Illinois recognizes a right arising out of the duty of the nearest relatives of the deceased to bury their dead, which authorizes and requires them to take possession and control of the dead body for the purpose of giving it a decent burial. *Courtney v. St. Joseph Hospital*, 149 Ill. App.3d 397 (1986) 500 N.E. 2d 703

Plaintiff is the designated primary next-of-kin recognized by Defendants. (Plf Exh 26)

Defendants have a self-acknowledged obligation to return the remains of deceased U.S. Servicemembers to their families for burial.

Defendants acknowledge the rights of family members to possess the remains of their family members for burial by their established burial practices and the following federal statutes and Department of Defense regulations, *Inter alia*.

- 10 USC § 1481
- 10 USC §§ 1501-1513
- Department of Defense Directive Number 1300.22, May 25, 2011 Subject: Mortuary Affairs Policy
- Department of Defense Directive Number 2310.07E November 10, 2003 Subject: Personnel Accounting -- Losses Due to Hostile Acts

- Department of Defense Instruction Number 1300.18 January 8, 2008 Subject: Department of Defense (DoD) Personnel Casualty Matters, Policies, and Procedures
- (CJCS) Joint Publication 4-06, Mortuary Affairs 12 October 2011, ¶2
- U.S. Army Regulation 638-2
- U.S. Army Pamphlet 638-2

Defendants concede their obligation to "account" for deceased servicemembers, but contend they have no obligation to officially identify the remains. (Mot. Dismiss ECF No. 47 at 7)

Defendants non-discretionary obligation to identify the remains of missing service members is acknowledged by the following Department of Defense regulations, *Inter alia*:

- Department of Defense Directive Number 1300.22, May 25, 2011 Subject: Mortuary Affairs Policy
- Department of Defense Directive Number 2310.07E November 10, 2003 Subject: Personnel Accounting -- Losses Due to Hostile Acts, ¶ 4.1
- (CJCS) Joint Publication 4-06 Mortuary Affairs 12 October 2011, ¶¶ 1-2d, 2
- U.S. Army Regulation 638-2, ¶¶ 2-17, 8-1, 8-2, 8-4, 8-9, 8-10
- U.S. Army Field Manual FM 4-20-65 (FM 10-286), Identification of Deceased Personnel, ¶¶ 1-1, 1-8
- Under Secretary of Defense Walter B. Slocombe memorandum, dated May 13, 1999, subject: Disinterment Policy for the Purpose of Identification. (Supp AR page 3).

This Court has previously addressed Defendant's argument that they have no obligation to identify remains.

“For purposes of leave to amend, plaintiff has sufficiently alleged that *the Deputy Assistant Secretary of Defense has a duty with regard to identifying the remains of unaccounted-for members of the armed forces from World War II* and that, to the extent these duties are owed to private persons, he qualifies as acting primary next of kin.” [emphasis added]

Order ECF No. 34 at 17

Plaintiff has been denied a hearing before an impartial decisionmaker.

On June 21, 2011, Plaintiff petitioned for consideration of new evidence under the provisions of Army Regulation 638-2. Defendants refused to consider this new evidence on (the false) grounds that the Army Regulation had been superseded by PL 111-84 (NDAA 2010). Army Regulation 638-2 currently exists unchanged and PL 111-84 does not address such an issue. (Pl. Ex. 9, 10, 11, 12)

On February 25, 2012, Plaintiff met with the Chief of the U.S. Army Past Conflicts Repatriation Branch, a senior management person representing the Defense POW/MIA Accounting Office, and Defendant Johnie Webb. Each of these persons represented that they were the decision maker for their agency and they had the authority to advance or deny

additional investigation concerning identification of the remains recovered from Cabanatuan Grave 717. Plaintiff was informed that their decisions were final and not appealable. (Eakin Decl, ECF No. 15-2)

Defendants have no policy on disinterment for identification, consideration of new evidence or return of unidentified remains to families.

Fletcher Declaration, ECF No. 64-1, ¶ 6

Department of Defense Inspector General Report No. DODIG- 2015-001, Assessment of the Department of Defense Prisoner of War/Missing in Action Accounting Community, dated Oct 17, 2014, page 25) ¹

Defendants have acted dishonestly in denying Plaintiff's right to due process

Defendants denied Plaintiff's petition for consideration on new evidence on the false assertion that Army Regulation 638-2 had been superseded by Federal Statute. (Pl. Ex. 9, 10, 11, 12)

Defendants filed an incomplete Administrative Record with this Court which withheld the reports and recommendations of at least four of Defendant's own investigators which all supported Plaintiff's contention that the subject remains were those of his family member. (Plf Mo Compel Comp of Admin Record, ECF No. 15, Plf Mo to Complete Admin Record, ECF No. 15, Plf Decl, ECF No. 15-2)

Defendants filed a Supplemental Administrative Record (ECF No. 13) which contained a memorandum signed by Dr. Thomas D. Holland falsely asserting that the "data do not meet the level of scientific certainty required by current DoD disinterment guidance." This statement ignored the written reports of at least four of Defendant's own investigators and is confirmed false by their subsequent exhumations of the Unknowns originally buried in Cabanatuan Grave 717. (ECF No. 15, 23)

Defendants filed status reports with this Court which contained false and/or incomplete information. In an effort to explain their apparent inability to extract DNA from the remains, Defendants falsely informed this Court that the remains had been treated with embalming compounds. (ECF No. 87 ¶ 3, 88 ¶ 3) There are no documented records of the use of embalming compounds on the skeletal remains recovered from Cabanatuan Grave 717. The only documented example of treatment with embalming compounds interfering with extraction of remains involved those recovered during the Korean War and processed through the Kokura, Japan Mortuary. Further, this treatment left a distinctive white powder on the remains which a reputable laboratory would have recognized and employed alternate DNA extraction techniques. (ECF No. 87 ¶ 3, 88 ¶ 3) (H.E.C. Koon, Diagnosing post-mortem treatments which inhibit DNA amplification from US MIAs buried at the Punchbowl, Forensic Sci Intl, (2007))

¹ <http://www.dodig.mil/pubs/documents/DODIG-2015-001.pdf> (last viewed Jan 3, 2015)

Defendants continue to deny due process to Plaintiff by their continued inability to identify the remains of Pvt Arthur H. Kelder

Defendant's status reports indicate that they have chosen to rely primarily on mitochondrial DNA testing, a type of DNA testing useful only as an exclusionary tool and which does not provide a conclusive match to a family reference sample. Defendants' have either chosen not to employ nuclear DNA testing or have limited capability in their in-house laboratory as this type of DNA testing in other laboratories is typically completed in ten days or less and provides a conclusive match to family reference samples. (Status Reports 1 thru 4, ECF No. 85, 87, 88, 93)

Nuclear DNA (nucDNA) testing is as unique as a fingerprint and is shared only by identical twins. Testing is less expensive and may often be completed in as little as five days, as was shown in the identification of PFC Lawrence Gordon, another WWII era Unknown identified by a non-government DNA laboratory in May 2014.

Contrary to this Court's instruction "to use every available resource to complete the disinterment and DNA testing as quickly and as efficiently as possible." The status reports filed by Defendants show that their identification efforts rely primarily upon the use of mitochondrial DNA. (Status Reports 1 thru 4, ECF No. 85, 87, 88, 93). Rather, Defendant's status reports indicate that they have chosen to rely primarily on mitochondrial DNA testing, a type of DNA testing useful only as an exclusionary tool and which does not provide a conclusive match to a family reference sample. Defendants' have either chosen not to employ nuclear DNA testing or have limited capability in their in-house laboratory as this type of DNA testing in other laboratories is typically completed in ten days or less and provides a conclusive match to family reference samples. (Status Reports 1 thru 4, ECF No. 85, 87, 88, 93)