



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
701 S. COURTHOUSE ROAD, SUITE 1001
ARLINGTON, VA 22204-2490

█
Docket No. 480-23
Ref: Signature Date

From: Chairman, Board for Correction of Naval Records
To: Secretary of the Navy

Subj: REVIEW OF NAVAL RECORD OF █
█ USMC █

Ref: (a) 10 U.S.C. § 1552
(b) MCO 1900.16, Separation and Retirement Manual (Short Title: MARCORSEPMAN), 15 February 2019
(c) MCO 1610.7A, Performance Evaluation System (Short Title: PES), 1 May 2018
(d) USD (P&R) Memo, "Guidance to Military Discharge Review Boards and Boards for Correction of Military / Naval Records Regarding Equity, Injustice, or Clemency Determinations," 25 July 2018

Encl: (1) DD Form 149 with attachments
(2) SECDEF Memo, subj: Mandatory Coronavirus Disease 2019 Vaccination of Department of Defense Service Members, 24 August 2021
(3) ALNAV 062/21, subj: 2021-2022 Department of Navy Mandatory COVID-19 Vaccination Policy, dtg 302126Z AUG 21
(4) MARADMIN 462/21, subj: Mandatory COVID-19 Vaccination of Marine Corps Active and Reserve Components, dtg 011400Z SEP 21
(5) MARADMIN 533/21, subj: Supplemental Guidance to Mandatory COVID-19 Vaccination of Marine Corps Active and Reserve Components, dtg 061806Z OCT 21
(6) NAVMC 118(11), Administrative Remarks, 12 October 2021
(7) Petitioner's Memo 6105 █, subj: Rebuttal to 6105 Regarding Forced Vaccination, 12 October 2021
(8) MARADMIN 612/21, subj: Supplemental Guidance (2) to Mandatory COVID-19 Vaccination of Marine Corps Active and Reserve Components, dtg 222100Z OCT 21
(9) NAVMC 118(11) Administrative Remarks, 27 October 2021
(10) Petitioner's Memo 6105 █, subj: Rebuttal to 6105 Regarding Forced Vaccination, 29 October 2021
(11) NAVMC 10835A, USMC Fitness Report, FITREP ID#3334344
(12) 2d Maintenance Battalion, 2d Marine Logistics Group Memo 1910 ADSEP, subj: Administrative Discharge Board Report: Findings and Recommendations in the case of [Petitioner], 23 May 2022
(13) SECDEF Memo, subj: Rescission of August 24, 2021 and November 30, 2021 Coronavirus Disease 2019 Vaccination Requirements for Members of the Armed Forces, 10 January 2023
(14) MARADMIN 025/23, subj: Rescission of COVID-19 Vaccination Requirement, dtg 181130Z JAN 23

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- (15) ALNAV 009/23, subj: Rescission of COVID-19 Vaccination Requirement for Members of the Armed Forces, dtg 201839Z JAN 23
- (16) MARADMIN 109/23, subj: Update to Mandatory COVID-19 Vaccination Requirement of Marine Corps Active and Reserve Components, dtg 272000Z FEB 23
- (17) DD Form 214
- (18) OTJAG Military Justice Branch Practice Advisory, No. 8-21, Mandatory COVID-19 Vaccinations, 10 September 2021

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed enclosure (1) with the Board for Correction of Naval Records, hereinafter referred to as the Board, requesting removal from her naval record of an adverse fitness report (FITREP) for the reporting period 27 May 2021 to 28 November 2021.

2. The Board reviewed Petitioner's allegations of error or injustice on 3 November 2023 and, pursuant to its regulations, determined that the corrective action indicated below should be taken on Petitioner's naval record in the interests of justice. Documentary material considered by the Board included the enclosures, relevant portions of Petitioner's naval record, and applicable statutes, regulations, and policies.

3. Having reviewed all of the evidence of record pertaining to Petitioner's allegations of error or injustice, the Board found as follows:

a. Before applying to the Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy (DON).

b. By memorandum dated 24 August 2021, the Secretary of Defense (SECDEF) mandated that all members of the Armed Forces under Department of Defense authority be fully vaccinated against the COVID-19 virus with a vaccine receiving full licensure from the Food and Drug Administration (FDA).¹ Accordingly, he directed the Service Secretaries to immediately begin full vaccination of all Service members of their respective services. See enclosure (2).

c. On 30 August 2021, the Secretary of the Navy (SECNAV) implemented the SECDEF's directive referenced in paragraph 3b above in ALNAV 062/21, ordering all DON active duty Service Members who were not already vaccinated or exempted to be fully vaccinated within 90 days, and all Reserve Component Service Members to be fully vaccinated within 120 days with an FDA-approved COVID-19 vaccination. In issuing this directive, SECNAV made the following statement:

The order to obtain full vaccination is a lawful order, and failure to comply is punishable as a violation of a lawful order under Article 92, Uniform Code of Military Justice [(UCMJ)], and may result in punitive or adverse administrative action or both. The Chief of Naval Operations and Commandant of the Marine Corps have authority to exercise the full range of

¹ A Service member was considered to be fully vaccinated two weeks after completing the second dose of a two-dose COVID-19 vaccine, or two weeks after receiving a single dose of a one-dose vaccine.

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administrative and disciplinary actions to hold non-exempt Service Members appropriately accountable. This may include, but is not limited to, removal of qualification for advancement, promotions, reenlistment, or continuation, consistent with existing regulations, or otherwise considering vaccination status in personnel actions as appropriate.

See enclosure (3).

d. On 1 September 2021, the Marine Corps published MARADMIN 462/21 to implement the COVID-19 vaccination mandates referenced in paragraphs 3b and 3c above. Specifically, MARADMIN 462/21 directed all Marine Corps Active and Reserve Component Service Members to be fully vaccinated against COVID-19, unless medically or administratively exempt. All non-exempt Active Component Marines were to achieve full vaccination no later than 28 November 2021,² while all non-exempt Reserve Component Marines were to achieve full vaccination no later than 28 December 2021.³ MARADMIN 462/21 further specified that this mandate “constitutes a lawful general order and any violations of these provisions is punishable as a violation of Article 92 of [the UCMJ].” It further provided that initial disposition authority for cases arising from refusal of this order is withheld to the general court-martial convening authority level, “except that administrative counseling pursuant to paragraph 6105 of [reference (b)] may be used at the special court-martial convening authority level.” See enclosure (4).

e. On 7 October 2021, the Marine Corps published MARADMIN 533/21 to supplement the guidance of MARADMIN 462/21 referenced in paragraph 3d above. This message specified that “[i]n order to meet Commandant-directed deadlines as stated in [MARADMIN 462/21], all Active Component Service Members must receive their first dose of Pfizer-BioNTech/COMIRNATY vaccine no later than 24 October 2021 and all Reserve Component Service Members must receive their first dose no later than 24 November 2021.” It further specified that all Active Component Marines must receive their second dose no later than 14 November 2021, while all Reserve Component Marines must receive their second dose no later than 14 December 2021. The message also provided guidance for recording vaccine refusals in the Medical Readiness Reporting System, and advised that adverse administrative or judicial proceedings may be initiated in accordance with the authorities delineated in MARADMIN 462/21 when a Marine has refused to take the vaccine, and that “[t]here is no requirement to delay action until the deadlines established in [MARADMIN 462/21].” See enclosure (5).

f. On 12 October 2021, Petitioner was administratively counseled in writing for refusing to comply with the COVID-19 vaccination mandate, and was advised to become fully vaccinated by 28 November 2021. She was further informed that failure to take corrective action may result in judicial or adverse administrative action, including but not limited to administrative separation. See enclosure (6).

g. By memorandum dated 12 October 2021, Petitioner provided a statement in rebuttal to the administrative counseling referenced in paragraph 3f above. She reported that she reported to the Camp Lejeune vaccination site to receive her first dose of the FDA-approved COMIRNATY

² This date was 90 days from issuance of ALNAV 062/21 (see paragraph 3c above).

³ This date was 120 days from issuance of ALNAV 062/21 (see paragraph 3c above).

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vaccine, but was informed that it was not available at Camp Lejeune or within the United States. She also claimed to have submitted a request for redress to her commander on 6 October 2021 to address concerns regarding the order to vaccinate for COVID-19 with an FDA licensed product, but had not yet received a response. Accordingly, Petitioner argued that the Navy does not currently have an FDA-approved COVID-19 vaccine product available to enable her compliance with the vaccine mandate. See enclosure (7).

h. On 23 October 2021, the Marine Corps published MARADMIN 612/21 to further supplement the guidance of MARADMIN 462/21 referenced in paragraph 3d above. This message provided guidance that “Marines refusing the COVID-19 vaccination, absent an approved administrative or medical exemption, religious accommodation, or pending appeal shall be processed for administrative separation.” It further clarified that, in most cases, Marines will be ordered to begin the vaccination process before the deadlines established in MARADMIN 462/21, and that a Marine is considered to have “refused the vaccine” when they do not have an approved administrative or medical exemption, religious accommodation, or pending appeal, and they (1) received and willfully disobeyed a lawful order from a superior commissioned officer to be vaccinated against COVID-19; or (2) they are not or will not be fully vaccinated by the deadline established in MARADMIN 462/21. Finally, this message established restrictions upon the assignments available to, ability to reenlist or execute assignment for, authority to promote, and separation benefits available to Marines who have refused the vaccine, and authorized the temporary reassignment of such unvaccinated Marines based upon operational readiness or mission requirements, and specifically directed commanders to relieve for cause unvaccinated Marines without an approved administrative or medical exemption, religious accommodation, or pending appeal currently serving in command assignments, which was defined to include senior enlisted advisor positions like that held by Petitioner at the time. See enclosure (8).

i. On 27 October 2021, Petitioner was again administratively counseled in writing for refusing to comply with the COVID-19 vaccination mandate. She acknowledged that she was being processed for administrative separation pursuant to reference (b) for the convenience of the government for refusal of medical treatment. See enclosure (9).

j. By memorandum dated 29 October 2021, Petitioner provided a statement in rebuttal to the administrative counseling statement referenced in paragraph 3i above. She indicated her willingness to follow all lawful orders, and requested the opportunity to take the COMIRNATY vaccine or any other COVID-19 vaccine with full FDA licensure, but asserted that no such vaccine was available within the Navy. In this regard, Petitioner cited to 10 U.S.C. § 1107(a)(1) in support of her argument that “only the President of the United States may direct a service member to accept an [Emergency Use Authority] vaccine following a written determination that complying with the requirement for FDA approval is not in the interest of national security.” See enclosure (10).

k. On or about 28 November 2021, Petitioner was relieved for cause from her position as a company first sergeant due to her willful disobedience of a lawful order to become vaccinated for COVID-19, as required by MARADMINs 462/21 and 612/21. See enclosure (11).

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l. On 9 February 2022, Petitioner received an adverse FITREP from her Reporting Senior (RS) for the reporting period 27 May 2021 to 28 November 2021, based upon her relief for cause from her position as company first sergeant.⁴ See enclosure (11).

m. On 13 February 2022, Petitioner provided a statement in response to the adverse FITREP referenced in paragraph 3l above. The content of this statement appears to mirror that which she submitted in rebuttal to her second administrative counseling, referenced in paragraph 3j above. See enclosure (11).

n. On 9 March 2022, Petitioner's Reviewing Officer (RO) found Petitioner's arguments referenced in paragraph 3m to be without merit. Specifically, the RO noted that Petitioner provided no statement from anyone at the vaccination sites to support her claim that approved vaccines were not available, and that Petitioner was authorized to receive her COVID-19 vaccination at any vaccination site of her choosing. The RO concurred with the adverse nature of the FITREP, and found that Petitioner's relief for cause was in accordance with MARADMIN 612/12 and a matter of operational readiness and good order and discipline.⁵ See enclosure (11).

o. On 6 April 2022, the Third Officer Sighter (TOS) reviewed Petitioner's adverse FITREP, along with her statement in response and the comments of the RO, and made the following comments:

[Petitioner] was given ample opportunity to become fully vaccinated per DoD policy and Commandant of the Marine Corps direction. Her justification for not being vaccinated is not accepted due largely to the fact that nearly 30,000 people on this installation were able to fully comply with policy and remain in service. I have not detected any obstacels [sic] to vaccination similar to what she states above. She is considered a COVID vaccination refusal and was appropriately formally counseled in writing, thus necessitating an adverse report. [Petitioner] did not set an acceptable example for her Marines and failed in her leadership duties. I do not recommend her for promotion or retention.

See enclosure (11).

p. On 23 May 2022, an administrative separation board unanimously determined that the preponderance of the evidence did not support any of the acts or omissions alleged in the notification memorandum.⁶ See enclosure (12).

q. On 23 December 2022, the James M. Inhofe National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2023 was enacted. Section 525 of the FY 2023 NDAA directed the SECDEF to rescind the vaccination mandate referenced in paragraph 3b above. See enclosure (13).

⁴ Apart from the references to Petitioner's refusal to comply with the vaccination mandate and the resulting relief for cause, the comments and ratings in this FITREP are generally favorable.

⁵ Petitioner elected not to submit a statement in response to the RO's comments.

⁶ Petitioner's record did not include any documents pertaining to Petitioner's administrative separation process. Petitioner provided a copy of the administrative separation board report with her matters.

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r. By memorandum dated 10 January 2023, the SECDEF rescinded the vaccine mandate referenced in paragraph 3b above in accordance with the FY 2023 NDAA. He also directed the military departments to update the records of individuals currently serving in the Armed Forces who sought an accommodation to the vaccination mandate on religious, administrative, or medical grounds “to remove any adverse actions solely associated with denials of such requests, including letters of reprimand.” No such directive was included for those Service Members who did not seek an accommodation to the vaccination mandate on religious, administrative, or medical grounds. See enclosure (13).

s. On 18 January 2023, the Marine Corps published MARADMIN 025/23, rescinding MARADMINs 462/21, 533/21, 612/21, and other MARADMINs related to the former vaccination mandate, and directing the immediate suspension of any new adverse administrative actions associated with refusal of the COVID-19 vaccine. See enclosure (14).

t. On 20 January 2023, the SECNAV published ALNAV 009/23, cancelling ALNAV 062/21. See enclosure (15).

u. On 28 February 2023, the Marine Corps published MARADMIN 109/23 to provide further guidance regarding the rescission of the former vaccine mandate. Amongst the guidance provided was that the Deputy Commandant for Manpower and Reserve Affairs (DC M&RA) would “direct an audit to search for adverse information in the [official military personnel files (OMPF)] of all currently serving members *who requested religious accommodations to the COVID-19 vaccine mandate (emphasis added)*,” and that such adverse matters would be removed as necessary in accordance with the SECDEF’s guidance referenced in paragraph 3t above. MARADMIN 109/23 also provided that “Marines who submitted requests for a medical or administrative exemption may submit written requests to the DC M&RA, through their chain of command, requesting removal of adverse material from their OMPF,” and that “[s]eparated Marines may petition the [Board] to request removal of adverse matters.” No provisions were discussed, however, for adverse matters pertaining to refusal of the COVID-19 vaccine mandate in the records of currently serving Marines who did not request a religious accommodation or an exemption for medical or administrative reasons. See enclosure (16).

v. On 31 August 2023, Petitioner was transferred to the Fleet Marine Corps Reserve (FMCR) after attaining sufficient service to qualify for requirement. Her service was characterized as honorable, and she was assigned a reentry code of “RE-2A.” See enclosure (17).

z. Petitioner requests the removal of her adverse FITREP based upon the findings of the administrative separation board, which found that the preponderance of the evidence did not support any of the acts or omissions alleged against her.⁷ See enclosure (1).

⁷ None of the other adverse matters pertaining to Petitioner’s refusal to comply with the former COVID-19 vaccination mandate, such as the above referenced administrative counselings or Petitioner’s rebuttals thereto, appear to remain in Petitioner’s naval record. These documents were provided to the Board by Petitioner with her application, but do not appear in her official naval record obtained for review by the Board.

CONCLUSION:

Upon careful review and consideration of all of the evidence of record, the Board determined that equitable relief is warranted in the interests of justice.

The Board found no error in Petitioner's relief for cause from her position as a company first sergeant. The vaccination mandate was a lawful order, so the refusal to comply constituted a violation of Article 92, UCMJ. Petitioner claims that a vaccine that complied with the mandate was not available to her, but the vast majority of the Marine Corps was able to comply. If Petitioner did not desire to receive the vaccines made available to her at Camp Lejeune, she was free to receive another vaccine to comply with the order at a location of her choosing. Additionally, Petitioner's claim that the Pfizer-BioNTech COVID-19 vaccine which was presumably available to her at Camp Lejeune did not comply with the vaccine mandate was disingenuous, as it had the same formulation as the COMIRNATY vaccine that Petitioner claimed to be willing to accept.⁸ The violation of lawful orders in the Marine Corps, especially by senior leaders, is inherently detrimental to good order and discipline, so Petitioner's removal from her position of company first sergeant was entirely appropriate. It was also required by MARADMIN 612/21, which explicitly directed commanders to relieve for cause unvaccinated Marines without an approved administrative or medical exemption, religious accommodation, or pending appeal then serving in senior enlisted advisor positions.

As there was no error in Petitioner's relief for cause from her position as a company first sergeant at the time of its occurrence, there was also no error in her receipt of an adverse change of duty FITREP. Per reference (c), a FITREP is required on the occasion of a change of duty. A change of duty occurs when there is a significant change in primary duties under the same RS. Removal from the position of company first sergeant would necessarily qualify as a significant change in primary duties. In the case of a performance-based relief for cause, the RS is directed by reference (c) to provide the factual basis for the assessment in the justification block of the appropriate attribute and state that the Marine was relieved for cause. It appears that all procedural requirements for the subject FITREP were complied with. In particular, Petitioner was afforded and availed herself of the opportunity to submit a statement in rebuttal to the FITREP, and that statement was considered by both the RO and the TOS. Accordingly, the FITREP in question was appropriate and required under the circumstances.

Petitioner's contention that relief is warranted based upon the findings of the administrative separation board is without merit. Administrative separation board findings are not related to the factual determination for a relief for cause. Petitioner's refusal to comply with the vaccination mandate was not in doubt, and her relief for cause was therefore mandated by MARADMIN 612/21. The administrative separation board's findings in this regard, which the Board did not find to be supported by the evidence, does not negate the overwhelming evidence supporting Petitioner's relief for cause and the resulting FITREP.

Despite finding no error in Petitioner's relief for cause, or in the resulting adverse FITREP, the Board found that equitable relief is warranted in the interests of justice. Reference (d) provides

⁸ See enclosure (18).

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that the Board must consider “changes in policy, whereby a Service member under the same circumstances today would reasonably be expected to receive a more favorable outcome than the applicant received” in determining whether to grant relief on the basis of an injustice.⁹ It also directs the Board to consider uniformity and unfair disparities in punishment as a basis for relief. Given the change in the law, Petitioner would not reasonably expect to be relieved for cause under similar circumstances today. MARADMIN 612/21 was revoked in the wake of the FY 2023 NDAA, and Petitioner’s performance as company first sergeant appears to have been otherwise favorable. Additionally, the Board found a disparity in treatment for Petitioner relative to other Marines who also refused the vaccine mandate but sought an accommodation or exemption. The latter category of Marines would expect adverse information pertaining to a vaccine refusal-based relief for cause to be automatically removed from their record, regardless of the validity of their accommodation or exemption request. The board found that this disparity in treatment was worthy of favorable consideration. Finally, the Board found no evidence of any misconduct in Petitioner’s record other than that related to her refusal to comply with the COVID-19 vaccination mandate. Her advancement to the position of company first sergeant and more than 20 years of otherwise honorable service suggests that she was an asset to the Marine Corps. Accordingly, the Board believed that the interests of justice, and the best interests of the Marine Corps, warranted clearing Petitioner’s record of this adverse information in the event that she is ever recalled to active duty from the FMCR.

RECOMMENDATION:

In view of the above, the Board recommends that the following corrective action be taken on Petitioner’s naval record in the interests of justice:

That Petitioner’s adverse FITREP for the reporting period 27 May 2021 to 28 November 2021 be removed from her naval record, and replaced with an appropriate and neutral continuity memorandum.

That Petitioner’s naval record be scrubbed for any other material or entries referencing her refusal to abide by the former COVID-19 vaccination mandate, and that any such materials or entries be removed. This includes, but is not limited to, all information systems or database entries that may reference or indicate Petitioner’s refusal to abide by the vaccination mandate.

4. It is certified that a quorum was present at the Board’s review and deliberations, and that the foregoing is a true and complete record of the Board’s proceedings in the above titled matter.

⁹ Although reference (d) applies primarily in the context of discharge upgrade cases, it specifically states that its guidance “applies to any other corrections ... which may be warranted on equity or relief from injustice grounds.”

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5. In accordance with Section 6(e)(2)(c) of SECNAVINST 5420.193, the foregoing action of the Board is submitted for your review and action.

12/27/2023

[REDACTED]

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ASSISTANT GENERAL COUNSEL (MANPOWER AND RESERVE AFFAIRS) DECISION:

X Board Recommendation Approved (Grant Relief – I concur with the Board’s conclusion and therefore direct the relief recommended by the Board above.)

_____ Board Recommendation Disapproved (Deny Relief – I do not concur with the Board’s conclusion that equitable relief is warranted in the interests of justice. A conscious decision to violate a lawful order is a violation of the UCMJ, and such violations have consequences in the Marine Corps. It is also contrary to good order and discipline in the Marine Corps, which necessitates appropriate action to maintain unit effectiveness and to deter such breaches. This is especially true in the case of a violation by a senior leader, whose conduct must be above reproach and who set the example for subordinate Marines. While I acknowledge that reference (d) requires the Board to consider changes in policy when determining whether to grant relief on the basis of an injustice, I analyzed this factor differently than did the Board. Specifically, while the Board focused on the act of refusing the COVID-19 vaccination in particular, I considered the actual UCMJ violation at issue. A Marine in Petitioner’s position refusing to be vaccinated for COVID-19 today would expect a more favorable outcome today only because the vaccination mandate is no longer in effect. However, a Marine who violates a lawful order today would expect to receive the same, if not worse, consequences as did Petitioner, depending upon the circumstances of the violation. As such, I did not find the change in the law to be a legitimate basis for equitable relief. I also did not agree with the Board’s disparate treatment analysis, as those Marines who refused the COVID-19 vaccination but requested religious accommodation or exemption on medical or administrative grounds are not similarly situated to those who did not. Per MARADMIN 612/21, “[a] Marine is not considered to have ‘refused the vaccine’ until final adjudication of any administrative or medical exemption, religious accommodation, or pending appeal,” so the latter group whose accommodation or exemption requests were not finalized did not violate a lawful order. There is a distinct difference between seeking an approval of an accommodation or exemption to a lawful order, and an outright refusal of the order. Based upon these considerations, I found no injustice in Petitioner’s relief for cause from her position as a company first sergeant, and the documentation of this relief in a FITREP which is not accessible to the general public.

[REDACTED]