



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

█
Docket No. 8444-23
Ref: Signature Date

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

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█ USMCR

Ref: (a) 10 U.S.C. § 1552
(b) MCO 1900.16, Separation and Retirement Manual (Short Title: MARCORSEPMAN), 15 February 2019
(c) Rule for Courts-Martial 306
(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 enclosures (Administrative Separation Board Report)
(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 the 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) MARADMIN 612/21, subj: Supplemental Guidance (2) to Mandatory COVID-19 Vaccination of Marine Corps Active and Reserve Components, dtg 222100Z OCT 21
(7) NAVMC 118(11), Administrative Remarks, 30 November 2021
(8) 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
(9) MARADMIN 025/23, subj: Rescission of COVID-19 Vaccination Requirement, dtg 181130Z JAN 23
(10) ALNAV 009/23, subj: Rescission of COVID-19 Vaccination Requirement for Members of the Armed Forces, dtg 201839Z JAN 23
(11) MARADMIN 109/23, subj: Update to Mandatory COVID-19 Vaccination Requirement of Marine Corps Active and Reserve Components, dtg 272000Z FEB 23

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

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Board, requesting removal of the adverse information entered into his record due to his refusal to comply with the former COVID-19 vaccination mandate.¹

2. The Board reviewed Petitioner's allegations of error or injustice on 1 February 2024 and, pursuant to its governing policies and procedures, determined 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 this 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).² 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 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

¹ Petitioner specifically requests removal of a NAVMC 118(11) (Administrative Remarks), recording negative counseling for his refusal to comply with the mandate on 30 November 2011.

² 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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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 2021,³ while all non-exempt Reserve Component Marines were to achieve full vaccination no later than 28 December 2021.⁴ 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 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. See enclosure (6).

g. On 30 November 2021, Petitioner was administratively counseled in writing by his special court-martial convening authority (SPCMCA) for failing to comply with a direct order to receive the first dose of the COVID-19 vaccination in violation of Article 92, UCMJ.⁵ By his signature,

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

⁴ This date was 120 days from issuance of ALNAV 062/21 (see paragraph 3c above).

⁵ Petitioner allegedly violated this order on 22 November 2021.

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he acknowledged he was being processed for adverse administrative action due to “Misconduct – commission of a serious offense.” Petitioner indicated his intent to submit a statement in rebuttal, but there is no evidence of such a statement in his record. See enclosure (7).

h. 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 (8).

i. 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 vaccine 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 vaccine mandate on religious, administrative, or medical grounds. See enclosure (8).

j. On 18 January 2023, the Marine Corps published MARADMIN 025/23, rescinding MARADMINs 462/21, 533/21, 612/12, 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 (9).

k. On 20 January 2023, the SECNAV published ALNAV 009/23, cancelling ALNAV 062/21. See enclosure (10).

l. 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 3k 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 (11).

m. On 14 September 2023, an administrative separation board found that the preponderance of the evidence did not “support any of the acts or omissions alleged” against Petitioner, and recommended Petitioner’s retention in the Marine Corps Reserve.⁶ See enclosure (1).

⁶ Petitioner’s official naval record includes no documents pertaining to his administrative separation proceedings. The Board is aware of this administrative separation board proceeding only because Petitioner included its findings

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n. Petitioner asserts that the presence of the adverse information in his record is arbitrary and capricious, citing caselaw suggesting that “a mere conclusion or single piece of evidence is insufficient when countervailing evidence is ignored or the conflict remains unresolved.” In this regard, he asserts that the administrative separation board findings established that there was no factual basis for the alleged misconduct referenced in the NAVMC 118(11). Petitioner further contends that it is an injustice to maintain this adverse information in his record given the results of his administrative separation board, and analogizes his case to three previous Board decisions in which adverse information was removed from a naval record after exoneration or unsubstantiation by a command investigation.⁷ See enclosure (1).

CONCLUSION:

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

The Board found no error or injustice in the issuance and/or filing of the adverse material at issue in this case. The COVID-19 vaccination mandate was a lawful order, so the refusal to comply constituted a violation of Article 92, UCMJ. Per reference (c), administrative counseling is an appropriate disposition for such misconduct. The counseling statement was issued by a SPCMCA as required by MARADMIN 462/21. Petitioner’s contention that the administrative separation board findings disproved the misconduct alleged in the counseling statement is without merit, as that is not the function of such a board. Administrative separation boards are convened for the purpose of making a recommendation regarding whether an individual should be discharged from the naval service for a variety of reasons, to include misconduct. While this function requires such boards to make findings regarding the evidence supporting the bases for the proposed separation, that finding does not override the determination of the SPCMCA who had already disposed of the alleged misconduct through issuance of the counseling statement. The administrative separation process is separate and distinct from the process by which allegations of misconduct are investigated and disposed of. Petitioner’s due process regarding the latter was in his opportunity to submit a statement and/or matters in rebuttal to the counseling statement which could have convinced the SPCMCA to rescind the counseling statement before filing or otherwise would have accompanied the adverse material in his record to provide countervailing evidence. It appears from the record that Petitioner was afforded the opportunity to submit such matters. The previous decisions cited by Petitioner are distinguishable from his case in that they involved removal of adverse information from records because the adverse information was disproven. The administrative separation board findings in this case do not serve that purpose.

Despite finding no error in the issuance and filing of the adverse material at issue, the Board found that equitable relief is warranted in the interests of justice. Reference (d) provides 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

amongst the matters submitted with his application at enclosure (1). Accordingly, the Board does not know what specific allegations the administrative separation board found to be unsupported by the preponderance of the evidence. Petitioner asserts that it was related to his refusal of the former vaccination mandate.

⁷ The cases cited by Petitioner were Docket No. 5159-17; 0636-17; and 1382-17.

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applicant received” in determining whether to grant relief on the basis of an injustice.⁸ It also directs the Board to consider uniformity and unfair disparities in punishment as a basis for relief. Given the change in the law, a Marine would not receive the same type of adverse information in his record for refusing to take the COVID-19 vaccine today that Petitioner received in 2021. 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 can expect any adverse information resulting from their refusal of the COVID-19 vaccine to be 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. Accordingly, the Board believed that the interests of justice, and the best interests of the Marine Corps, warranted granting Petitioner a “clean slate” so that his career progression is not hindered by the adverse information in his record.

RECOMMENDATION:

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

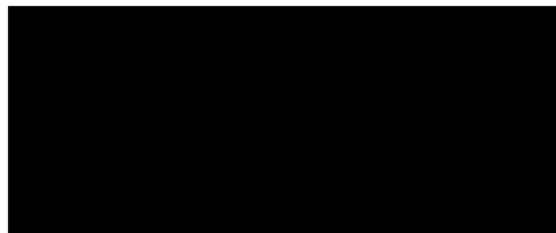
That the NAVMC 118(11) (Administrative Remarks), dated 30 November 2021, documenting Petitioner’s disobedience of an order to receive the COVID-19 vaccination, be removed from Petitioner’s naval record.

That Petitioner’s naval record be scrubbed for any other material or entries referencing his 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.

5. The foregoing action of the Board is submitted for your review and action.

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⁸ 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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ASSISTANT GENERAL COUNSEL (MANPOWER AND RESERVE AFFAIRS) DECISION:

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

_____ Board Recommendation Disapproved (Deny Relief – I do not concur with the Board’s conclusion. A conscious decision to violate a lawful order is a violation of the UCMJ, and such violations have consequences in the Marine Corps. Such decisions are also contrary to good and discipline in the Marine Corps, which necessitates appropriate action to maintain unit effectiveness and to deter future such breaches. The counseling statement documenting Petitioner’s disobedience was a reasonable, appropriate, and proportionate disposition for this type of misconduct. 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, but I analyzed this factor differently than did the Board. Specifically, while the Board focused on the act of refusing the vaccination order in particular, I considered the actual UCMJ violation at issue. A Marine refusing an order to be vaccinated for COVID-19 would expect a more favorable outcome today only because the vaccine 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. As such, I did not find the change in the law to be a legitimate basis for relief. I also did not agree with the Board’s disparate treatment analysis, as those Marines who refused the COVID-19 vaccination but requested accommodation or exemption on religious, 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 approval of an accommodation or exemption to a lawful order, and an outright refusal of such an order. Based upon these considerations, I simply found no injustice in the proper and reasonable disposition and documentation of a violation of Article 92, UCMJ. Accordingly, I direct that no corrective action be taken on Petitioner’s naval record.

