



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

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Docket No. 4105-24
Ref: Signature Date

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

Subj: REVIEW OF NAVAL RECORD OF █, USNR,
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Ref: (a) 10 U.S.C. § 1552
(b) 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
(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) NAVADMIN 190/21, subj: 2021-2022 Navy Mandatory COVID-19 Vaccination and Reporting Policy, dtg 311913Z AUG 21
(5) NAVADMIN 225/21, subj: COVID-19 Consolidated Disposition Authority (CCDA), dtg 132050Z OCT 21
(6) NAVADMIN 256/21, subj: CCDA Guidance to Commanders, dtg 152239Z NOV 21
(7) NAVADMIN 283/21, subj: CCDA Execution Guidance to Commanders, dtg 151203Z DEC 21
(8) Evaluation Report & Counseling Record (E1-E6) for reporting period 16 April 2021 to 28 December 2021
(9) 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
(10) NAVADMIN 005/23, subj: Removal of COVID-19 Vaccination Mandate, dtg 112139Z JAN 23
(11) ALNAV 009/23, subj: Rescission of COVID-19 Vaccination Requirement for Members of the Armed Forces, dtg 201839Z JAN 23
(12) NAVADMIN 065/23, subj: Follow On COVID-19 Vaccine Rescission Actions, dtg 061627Z MAR 23
(13) NPC (PERS 32) 1610 PERS-32 Memo, subj: [Petitioner], 17 April 2024
(14) Petitioner's COVID-19 Vaccination Record Card

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 (Board), requesting removal of the Evaluation Report & Counseling Record (EVAL) for the reporting period 16 April 2021 to 28 December 2021 from his Official Military Personnel File.

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2. The Board, consisting of [REDACTED], [REDACTED], and [REDACTED], reviewed Petitioner's allegations of error and injustice on 9 May 2024 and, pursuant to its regulations, determined the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, relevant portions of Petitioner's naval records, and applicable statutes, regulations, and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, found that, before applying to this Board, he exhausted all administrative remedies available under existing law and regulations within the Department of the Navy. The Board made the following findings:

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).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, 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 31 August 2021, the Navy published NAVADMIN 190/21 to implement the COVID-19 vaccination mandates referenced in paragraphs 3b and 3c above. Specifically, NAVADMIN 190/21 directed all Active Duty Navy service members, service members in the Selected Reserve, and Individual Ready Reserve service members to be fully vaccinated against COVID-19, unless medically or administratively exempt. All non-exempt Active Duty Navy service

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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members were to achieve full vaccination no later than 28 November 2021,² while all non-exempt Ready Reserve Navy service members were to achieve full vaccination no later than 28 December 2021.³ NAVADMIN 190/21 further specified that this mandate “constitutes a lawful order” and “[r]efusal to be fully vaccinated against COVID-19, absent an approved exemption, will constitute a failure to obey a lawful order and is punishable under the Uniform Code of Military Justice and/or may result in administrative action.” It further provided that ultimate disposition will be determined by the designated COVID Consolidated Disposition Authority (CCDA) who will serve as the “central authority for adjudication.” See enclosure (4).

e. On 13 October 2021, the Navy published NAVADMIN 225/21 to supplement the guidance of NAVADMIN 190/21 referenced in paragraph 3d above. The message announced the Chief of Naval Personnel (CNP) assignment as CCDA and further delineated the CCDA as the officer show cause authority and enlisted separation authority while the Vice Chief of Naval Operations retained the authority for nonjudicial punishment (NJP) and courts-martial. The message further delineated the CCDA as the authority for administrative processes regarding removal of warfare qualifications, additional qualification designations (AQD), Navy Enlisted Classifications (NEC), or sub-specialties except in cases where removal authority is otherwise authorized by law of Executive Order. This message provided guidance that “Navy service members refusing the COVID-19 vaccination, absent a pending or approved exemption, shall be processed for administrative separation.” The message defined a Navy service member refusing the vaccine as “one who has: (1) received a lawful order to be full vaccinated against COVID-19; (2) is not or will not be fully vaccinated on the date required by the order; and (3) does not have a pending or approved exemption.” The message further clarified that “[a]dministrative actions per this NAVADMIN may begin as soon as a Navy service member meets the definition of refusing this vaccine.” Additionally, this message directs senior leaders who do not comply with the lawful order to be relieved from their leadership position and the initiation of detachment for cause (DFC) procedures. Finally, this message established guidance for officer and enlisted administrative separations, officer promotion delay and enlisted advancement withholds, counseling, and documentation in fitness reports and enlisted evaluations. See enclosure (5).

f. On 15 November 2021, the Navy published NAVADMIN 256/21 to provide specific guidance to Commanders regarding Navy service members who fail to obey a lawful order by refusing the COVID-19 vaccine. The message dictated that the least favorable characterization of service for Navy service members refusing the vaccine, without extenuating circumstances, would be General (Under Honorable Conditions) which could, at the discretion of the Department of Veterans Affairs (VA), result in the loss of eligibility for some VA benefits. Additionally, the message specified detailed guidance for officer and enlisted administrative separations, officer promotion delay and enlisted advancement withholds, counseling, education, documentation in fitness reports and enlisted evaluations, bonuses, special pays, and incentive pays. For E-1 to E-5 evaluations, the message directed the issuance of an adverse special evaluation containing no greater than a 2.0 on block 36 (Military Bearing/Character) and block 39 (Leadership). Further, block 45 (Promotion Recommendation) required “Not Recommended” and block 43 was required to contain the opening statement “Member failed to maintain

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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deployability or individual readiness standards by refusing the order to receive the COVID-19 vaccine.” Finally, the message made Navy service members who refused the vaccine ineligible to continue Navy education opportunities and, for those who failed to complete an incurred service obligation, required reimbursement of the cost of the education received, prorated for the obligated time served. See enclosure (6).

g. On 15 December 2021, the Navy issued NAVADMIN 283/21 directing Commanders to conduct separation processing of Navy service members refusing the COVID-19 vaccine. The message differentiated between those members eligible or approved to separate or retire on or before 1 June 2022 and those not eligible before 1 June 2022. For those eligible, the message permitted separation or retirement “as soon as practicable via expedited processes, in lieu of administrative separation processing” and for those ineligible, the message stated “process for administrative separation as soon as practicable based on misconduct.” For officers, the CCDA, as the show cause authority, directed mandatory show cause processing for all officers who refused the vaccine on the bases of Misconduct, Moral or Professional Dereliction, and Substandard Performance. Further, the message provided detailed guidance regarding retirement-eligible officers, officers who had not met time in grade requirements, officers with prior enlisted service, officers eligible to resign, and non-probationary/probationary officers. For enlisted members, the CCDA directed Commanders to initiate administrative separation processing by reason of misconduct due to commission of a serious offense, plus any additional basis known at the time of processing. Finally, the message provided specific Navy Reserve guidance including policies disallowing Navy service members separated from the Active Component to affiliate with or be assigned in any status within the Reserve Component and processing of Navy Reserve service members for vaccine refusal. See enclosure (7).

h. On 28 December 2021, Petitioner was issued a Special EVAL for the reporting period 16 April 2021 to 28 December 2021 noting his failure “to maintain deployability or individual readiness standards by refusing the order to receive the COVID-19 vaccine as required.” He received a “Significant Problems” promotion recommendation in block 45 and was “not recommended” for retention in block 47. Petitioner signed his EVAL on 9 January 2022, indicating he did not intend to submit a statement. See enclosure (8).

i. 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 (9).

j. 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 accommodate to the vaccine mandate on religious, administrative, or medical grounds. See enclosure (9).

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k. On 11 January 2023, the Navy published NAVADMIN 005/23 canceling NAVADMIN 190/21 and directing all commands to immediately discontinue administrative separation processing of Navy service members solely for refusing the COVID-19 vaccine, including those with approved separation letters. See enclosure (10).

l. On 20 January 2023, the SECNAV published ALNAV 009/23, cancelling ALNAV 062/21. See enclosure (11).

m. On 6 March 2023, the Navy published NAVADMIN 065/23 to provide further guidance regarding the rescission of the former vaccine mandate. The message stated that the records of currently serving Navy service members who requested religious accommodation from COVID-19 vaccination “are being centrally reviewed to identify and remove any adverse information related to vaccine refusal, should it exist” but directed “other current and former Navy service members” to petition the Board regarding COVID-19 vaccination related matters. No provisions were discussed, however, for adverse matters pertaining to refusal of the COVID-19 vaccine mandate in the records of currently serving members who did not request a religious accommodation or an exemption for medical or administrative reasons. See enclosure (12).

n. Petitioner asserts that relief is warranted because he received the vaccine on 19 September 2022 and 17 October 2022. See enclosure (1).

o. By memorandum of 17 April 2024, Navy Personnel Command (PERS 32) provided an advisory opinion (AO) noting there is no indication in Petitioner’s record that he requested religious accommodation during the time period of the report in question. Based on their review, PERS-32 recommended the report remain in the record, “unless the petitioner provides documents with justification for removal.” See enclosure (13).

p. In his rebuttal response, Petitioner provided a picture of his COVID-19 Vaccination Record Card. See enclosure (14).

CONCLUSION:

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

The Board found no error in the issuance of the EVAL. The COVID-19 vaccination mandate was a lawful order, so the refusal to comply constituted a violation of Article 92, Uniform Code of Military Justice (UCMJ). Further, NAVADMINs 225/21 and 256/21 directed the adverse nature of Petitioner’s Special EVAL. There does not appear to be any controversy regarding whether Petitioner actually violated the order, as he does not claim to have complied during the reporting period covered by the EVAL and elected not to make any statement to the contrary when offered the opportunity to do so. Further, Petitioner indicated that he did not request accommodation on religious grounds.

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Petitioner's contention the requested changes to his record should be made because he subsequently achieved full vaccination is without merit. During the reporting period covered by the contested EVAL, the EVAL appropriately reflected Petitioner's vaccination status as of 28 December 2021.

Despite finding no error in the issuance of the EVAL at issue, the Board found that equitable relief is warranted in the interests of justice, in light of Petitioner's subsequent attainment of full vaccination and change in policy. Reference (b) 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 applicant received" in determining whether to grant relief on the basis of an injustice.⁴ 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 Navy service member 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 navy service members who also refused the vaccine mandate but sought an accommodation or exemption. The latter category of individuals 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. Finally, and most importantly, the Board found no evidence of any misconduct in Petitioner's record other than that related to his refusal to comply with the COVID-19 vaccination mandate. Accordingly, the Board believed that the interests of justice warranted granting Petitioner a "clean slate" by removing the EVAL.

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 Special EVAL for the reporting period 16 April 2021 to 28 December 2021 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.

That no further changes be made to Petitioner's naval record.

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 entitled matter.

5. Pursuant to the delegation of authority set out in Section 6(e) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulation, Section 723.6(e)) and

⁴ Although reference (b) 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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having assured compliance with its provisions, it is hereby announced that the foregoing corrective action, taken under the authority of reference (a), has been approved by the Board on behalf of the Secretary of the Navy.

8/7/2024

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