



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: 5208-24
Ref: Signature Date

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

Subj: REVIEW OF NAVAL RECORD OF █
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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
(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) DC (M&RA) 1730 MRA Memo, subj: Request for Immunization Exemption, 15 November 2021
(7) MARADMIN 612/21, subj: Supplemental Guidance (2) to Mandatory COVID-19 Vaccination of Marine Corps Active and Reserve Components, dtg 222100Z OCT 21
(8) NAVMC 118(11) dated 18 January 2022
(9) NAVMC 118(11) dated 25 February 2022
(10) NAVMC 10835A, USMC Fitness Report, FITREP ID #3457614
(11) MARADMIN 464/22, subj: Interim Guidance Regarding Marines Requesting Religious Accommodation from COVID-19 Vaccination Requirements, dtg 132100Z SEP 22
(12) 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
(13) MARADMIN 025/23, subj: Rescission of COVID-19 Vaccination Requirement, dtg 181130Z JAN 23
(14) ALNAV 009/23, subj: Rescission of COVID-19 Vaccination Requirement for Members of the Armed Forces, dtg 201839Z JAN 23
(15) MARADMIN 109/23, subj: Update to Mandatory COVID-19 Vaccination

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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 Board, requesting removal of COVID-19 related material, specifically Administrative Remarks (Page 11) counseling entries dated 18 January 2022 and 25 February 2022. In subsequent correspondence, Petitioner amended his request to include removal of the adverse Fitness Report (FITREP) for the reporting period 1 February 2022 to 30 June 2022.

2. The Board, consisting of [REDACTED], [REDACTED], and [REDACTED], reviewed Petitioner's allegations of error and injustice on 8 August 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. 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).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.

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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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 submitted a request for religious accommodation. See enclosure (6)⁴.

g. 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

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).

⁴ Information derived from enclosure (6), a document submitted by Petitioner but no longer available in his OMPF.

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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 (7).

h. Petitioner's request for religious accommodation was formally denied on 15 November 2021, and he elected not to appeal the denial. See enclosure (6).

i. On 18 January 2022, Petitioner was administratively counseled in writing for refusing to comply with the COVID-19 vaccination mandate, noting that his current refusal, after being denied exemption, constitutes a violation of Article 92 of the Uniform Code of Military Justice. Petitioner declined to submit a rebuttal statement. See enclosure (8).

j. On 25 February 2022, Petitioner was again administratively counseled in writing after his relief for cause due to disobeying a lawful order. Again, Petitioner declined to submit a rebuttal statement. See enclosure (9).

k. On 7 September 2022, Petitioner received an adverse transfer (TR) FITREP for the reporting period 1 February 2022 to 30 June 2022 indicating he was the subject of derogatory material. The Reporting Senior (RS) noted the report was adverse due to Petitioner being relieved for cause and issued a 6105 for failing to receive the COVID-19 vaccination by the required deadline, despite Petitioner's subsequent decision to receive the vaccination due to his "overriding desire to continue service as a Marine." Petitioner elected not to submit a statement in response to the RS or Reviewing Officer (RO) comments. See enclosure (10).

m. On 18 August 2022, a U.S. Federal District Court issued a preliminary injunction prohibiting the Marine Corps from "taking certain actions against Marines." In response, on 14 September 2022, the Marine Corps published MARADMIN 464/22 amending the actions for unvaccinated Marines on active duty or in the Ready Reserve who had requested a religious accommodation, which had been disapproved by the DC (M&RA), then appealed the disapproval to the ACMC in a timely manner. If the ACMC had neither denied the appeal nor taken action on the appeal, commanders were directed, among other things, to pause all administrative actions related to the involuntary separation, regardless of the current status of separation process. See enclosure (11).

n. 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 (12).

o. 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,

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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 (12).

p. 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 (13).

q. On 20 January 2023, the SECNAV published ALNAV 009/23, cancelling ALNAV 062/21. See enclosure (14).

r. 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 (15).

s. Petitioner contends “[a]dverse matters will be removed as necessary” in accordance with MARADMIN 109/23. See enclosure (1).

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 Petitioner’s relief from cause from his special duty assignment. 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 his position was entirely appropriate.

As there was no error in Petitioner’s relief for cause at the time of its occurrence, there was also no error in his receipt of an adverse TR FITREP. Per reference (c), a FITREP is required on the occasion of transferring to a new command and, per the RO’s comments, Petitioner had executed orders to the fleet. Based on the relief for cause and the Page 11 counseling entry issued during the reporting period, the RS properly categorized the FITREP as adverse. It appears that all procedural requirements for the subject FITREP were complied with. In particular, Petitioner

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was afforded, but did not avail himself of, the opportunity to submit a statement in rebuttal to the FITREP. Accordingly, the FITREP in question was appropriate and required under the circumstances.

Despite finding no error in Petitioner's relief for cause, or the resulting adverse FITREP, 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 applicant received" in determining whether to grant relief on the basis of an injustice.⁵ 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. Additionally, the Board found a disparity in treatment for Petitioner relative to other Marines who also refused the vaccine mandate, requested religious accommodation, and appealed the denial of the 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. Finally, 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 by the required deadline. Accordingly, the Board believed the interests of justice warranted clearing Petitioner's record of this adverse information.

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 Petitioner's adverse TR FITREP for the reporting period 1 February 2022 to 30 June 2022 be removed from his 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 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 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 having assured compliance with its provisions, it is hereby announced that the foregoing

⁵ 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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corrective action, taken under the authority of reference (a), has been approved by the Board on behalf of the Secretary of the Navy.

9/4/2024

