

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

DANIEL ROBERT
SSG, U.S. ARMY

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HOLLIE MULVIHILL
SSGT, USMC

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Plaintiffs,

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v.

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Civil Action No. 1:21-cv-2228-RM-STV

LLOYD AUSTIN
Secretary of Defense,
U.S. DEPARTMENT OF DEFENSE
Washington, D.C. 20301

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and

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XAVIER BECERRA
Secretary of the U.S. Department of
Health and Human Services
U.S. DEPARTMENT OF HEALTH
AND HUMAN SERVICES

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and

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JANET WOODCOCK, Acting
Commissioner of the Food & Drug
Administration
U.S. FOOD AND
DRUG ADMINISTRATION

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UNITED STATES OF AMERICA

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Defendants.

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**PLAINTIFF’S RESPONSE TO DEFENDANT’S MOTION TO DISMISS
AND REQUEST FOR IMMEDIATE RELIEF**

Facing the possibility of having their illegal mandate enjoined by federal courts, the Defendants have resorted to making misrepresentations to this Court (and other federal),

ignoring court rulings, and continuing to persecute members of the Armed Forces, all in order to save themselves from the possibility of having Defendant Austin's mandate enjoined and light shined upon the Defendant FDA's complete abandonment of its regulatory oversight obligations on behalf of the American people.

The Plaintiffs, therefore, submit this Response to the Defendants' Motion to Dismiss and ask this honorable Court for immediate relief in both denying the Defendant's Motion and enjoining the Defendant's actions: the Defendants are willfully manipulating this Court's jurisdiction by discharging named plaintiffs and other members of the plaintiff class, in open and flagrant violation of the law, contradicting their own sworn filings in this case. This Court must act now while there are still members left whose rights haven't yet been destroyed by the *ultra vires* actions of the Defendants.

Jurisdiction and Deceit

1. The Plaintiffs filed their Motion for Preliminary Injunction on Nov. 2, 2021. (ECF Dkt. #30). The Defendants Responded on Nov. 23, 2021, with a Response and Motion to Dismiss plaintiffs' claims. (ECF #36 and #37). The Plaintiffs Replied to the Response on Dec. 7, 2021, (ECF #43). The Reply included declarations from several members of the plaintiff class, some of whom also have requests for exemptions or religious accommodation pending with the Defendant DoD, but at least two of whom do not have any request for exemption pending. One of those plaintiffs, SSgt Cami Long, USMC, resides in Colorado, clearly within the ambit of this Court's jurisdiction. The other, SSG Steven Brown, USA, currently resides in Case Del Din, Italy, with his paratrooper unit. (ECF Dkt. #43-2 and #43-3.)

2. Both of these plaintiffs submitted declarations showing themselves to be eligible members of the plaintiff class; they requested to be added as named plaintiffs to illustrate the

flawed nature of Defendants’ arguments regarding jurisdiction that focused solely on the two named plaintiffs in this case.

3. The Defendants’ Motion to Dismiss, filed with this Court on Nov. 23, 2021, claimed that this Court lacks jurisdiction to adjudicate the named plaintiffs’ claims because they are “not ripe.”

Plaintiffs’ primary grievance appears to be that they will be required to receive an “unlicensed drug of unknown long-term safety profile” and that they will be “subject to or threatened with disciplinary action under the Uniform Code of Military Justice (“UCMJ”), including adverse administrative action that would characterize [their] voluntary service as ‘other than honorable[,]’” if they refuse to comply with the DoD directive. SAC ¶¶ 48, 52, 56, 60, 64. But these claims are not ripe for judicial review because they rest upon “contingent future events that may not occur as anticipated, or indeed may not occur at all.”

(Defendants’ Brf., at p. 10, emphasis added)

4. Further, the Defendants claim:

Staff Sergeant Robert has sought an exemption from the vaccination requirement. Ex. 15 (Decl. of Darek Wilcox)¶ 3. That request is pending, and he will not be required to receive the COVID-19 vaccination during the pendency of that request. Accordingly, neither Plaintiff is facing a “direct and immediate dilemma” as a result of the challenged DoD directive[.]

(Id., p. 11, ¶1)

5. First and foremost, this completely ignores that it is the Defendants’ themselves who control the entire exemption or religious accommodation process. This alone is ample justification for the Court to denying the Defendants’ Motion to Dismiss, as has already been submitted in the Plaintiffs’ Reply. It cannot be that the Defendants’ get to control the federal court’s jurisdiction based upon the Defendant’s timing of the exercise of its discretion.

6. More importantly for this instant Response, on Friday, 10 December, just 3 days

after the Plaintiffs filed their Reply to the Defendants' combined Response and Motion to Dismiss with this court, which included SSgt Long's declaration and request to be added as a plaintiff, SSgt Long was given notice that she was being summarily discharged "for the Best Interest to [sic] the Service." That undated notification is attached as Exhibit 28.

7. SSgt Long has more than 6 years of time in service and therefore would normally be entitled to present her case to an administrative separation board under the applicable service regulation, Marine Corps Order 1900.16 w/ ch. 2, the Marine Corps Separations and Retirement Manual ("MARCORSEPMAN").¹ By its explicit terms, SSgt Long can only be separated without a Board by the authority of the Secretary of the Navy.

The Secretary of the Navy may direct the separation of any Marine before the expiration of that Marine's term of service after determining that such separation is in the best interest of the Marine Corps. For example, the Secretary may use this secretarial plenary authority to separate a Marine whose personal conduct reflects discredit upon the Service, adversely affects the good order and discipline of the unit, or adversely affects the Marine's performance of duty. However, requests for this type of discharge should only be made in unusual cases where such action is essential in the interest of justice, discipline, and proper administration in the naval service.²

8. To be clear, the decision to force SSgt Long out of the Marine Corps without the benefit of an Administrative Separation Board can only come from the office of the Secretary of the Navy. The SecNav reports directly to Defendant Secretary of Defense Austin.

9. While SSgt Long's notification is deficient in several regards, including that she

¹ See MARCORSEPMAN, ¶6303.3.a(8) ("A commanding officer must provide written notice to any Marine being recommended for separation... such notice shall include...A statement of the right to request an administrative separation board if the Marine has six or more years of total active and inactive-service[.]" Available here - <https://www.marines.mil/portals/1/Publications/MCO%201900.16%20CH%202.pdf?ver=2019-02-26-080015-447>

² *Id.*, at ¶6214.4 ("The procedures for requesting an administrative separation board, including for a Marine with six or more years of service, do not apply.")

was not afforded her right to consult with a qualified and certified military counsel, most important is that there is no indication as to *why* she is being separated. The notification uses only the boilerplate legal grounds that it is in the “best interests of the service” without stating the reason – as it is required to do: “The notification *shall state why no other reason for separation under this Chapter is appropriate and why separating the Marine is in the best interest of the Marine Corps.*”³

10. In short, this action by the Defendant Austin’s direct subordinate has all of the telltale signs of being a pretext to prevent SSgt Long from being a plaintiff in this case and thwarting this Court’s jurisdiction. This deficient notice would also frustrate any future attempts for SSgt Long to obtain relief because she can’t even point to a single word that shows she is being kicked out for refusing to take the unlicensed vaccine. At the same time that the Defendants and their counsel are arguing to this Court that plaintiffs’ claims are “not ripe” because there is no possibility of being discharged, the Defendants have taken steps to remove any plaintiffs beyond the named plaintiffs from this suit. And this is not just SSgt Long.

11. Five days after SSgt Long was given her notification to be processed for separation in the “Best Interests of the Service,” on Dec. 15, 2021, the Secretary of the Navy announced via Administrative Message (NavAdmin 283/21) that commanders should begin discharging all service members who have refused this vaccine for “Misconduct” effective immediately.⁴ The relevant sections for the Court’s consideration include that the Defendants’ agents are now doing exactly what counsel just asserted to this Court 3 weeks ago was a

³ *Id.*

⁴ NAVADMIN 283/21, a copy is attached to this Response as Exhibit 29. Available at – https://www.mynavyhr.navy.mil/Portals/55/Messages/NAVADMIN/NAV2021/NAV21283.txt?ver=nNhulnrr-3hkdLrBAZ_aKg%3d%3d – See ¶2.b. “Navy service members not eligible to separate or retire on or before 1 June 2022: Process for administrative separation as soon as practicable based on misconduct.” (emphasis added)

hypothetical and non-specific possibility.

2.b.(1). Less than 6 years of service: Process for separation with an HONORABLE characterization. Service members in this category are not entitled to an Administrative Separation (ADSEP) board or a Board of Inquiry.

2.b.(2). More than 6 years of service: Process for separation with a GENERAL (under honorable conditions) characterization, however, requests to waive Administrative Separation boards or Boards of Inquiry in exchange for HONORABLE characterization of service will generally be favorably endorsed (barring additional misconduct or unique circumstances).

3. Action. Commanders are now directed to conduct separation processing IAW this NAVADMIN and per references (f) through (j)...

However, unless specifically waived by the CCDA based on receiving the vaccine, all other administrative actions associated with vaccine refusal described in references (b) and (c) including but not limited to pay, promotion/advancement, fitness reports/evaluations, etc. continue to apply in all cases of Navy service members refusing the vaccine.

3.c. Officer and enlisted service members separated based on vaccine refusal will not be eligible for involuntary separation pay.

3.d. Officers separated based on vaccine refusal who have not completed a service obligation incurred by attending the U.S. Naval Academy, receipt of a Naval Reserve Officers Training Corps Scholarship, or receipt of other advanced education funds will be required to repay their educational expenses IAW existing agreements.

12. Members with less than 6 years will not receive a Board and will be administratively discharged because they are asserting their statutory rights under 10 U.S.C. §1107a. They will be removed from the plaintiff class as they will no longer be members of the military. Members with more than 6 years will be threatened with a General Under Honorable Conditions discharge, which – in accordance with the references – would entitle loss of their Post-9/11 GI Bill benefits. Having serve your country in time of war, this is the payback for pointing out that the government shouldn't – and can't legally – use an unlicensed vaccine on its

own citizens.⁵ As the cited MarAdmin shows, if a Marine has already transferred their GI Bill benefits to a child who has used them, the service member will *now be indebted to the federal government* for any monies paid, for asserting their statutory rights under 10 U.S.C. §1107a and refusing to be a subject in an unwanted medical experiment.

13. On Dec. 13, 2021, the AP news reported that the DoD had discharged 27 members of the Air Force for refusing to take an unlicensed vaccine,⁶ in flagrant and open contempt of 10 U.S.C. §1107a – and a federal judge’s explicit ruling in that the Defendants cannot use the unlicensed EUA product BNT162b2 “interchangeably” with the licensed Comirnaty product. “The DOD acknowledges that the President has not executed a waiver under this section, so as things now stand, the *DOD cannot mandate vaccines that only have an EUA.*”⁷

14. Whether coincidental or not, since the plaintiffs filed their Reply pointing out the Defendants’ patently illegal mandate, the Defendant DoD appears to have begun a systematic campaign to discharge all of those who remain left to challenge the mandate. These actions are an open flouting of the federal judiciary’s authority. Regardless of what the Court decides, the Defendants in this case have completely misrepresented themselves to the Court and are engaged in a willful fraud on several different Courts, claiming that the courts have no jurisdiction

⁵ See MARADMIN 612/21, 23 Oct 2021, available here – <https://www.marines.mil/News/Messages/Messages-Display/Article/2820695/supplemental-guidance-2-to-mandatory-covid-19-vaccination-of-marine-corps-activ/> “3.h. Marines separated for vaccination refusal will not be eligible for involuntary separation pay and will be subject to recoupment of any unearned special or incentive pays and advance educational assistance. Marines who do not complete their service obligation for Transfer of Education Benefits will *lose their eligibility to retain transferred Post-9/11 GI Bill benefits and may be subject to recoupment if the Veterans Affairs has already processed a payment for transferred benefits.*” (emphasis added).

⁶ See AP News, “Coronavirus: Air Force discharges 27 for refusing to get COVID vaccine,” available here – https://apnews.com/article/coronavirus-pandemic-health-257b231698d17ab3c6aef71867520346?utm_medium=AP&utm_campaign=SocialFlow&utm_source=Twitter

⁷ *Doe v. Austin*, 3:21-cv-1211, Dkt. #47, p.12.

because there really are no harms at all, and then kicking out the only people who have had the temerity to stand up to these illegal actions.⁸

Procedural History and Background

15. The plaintiffs in this filed their First Amended Complaint on Oct. 6, 2021, (ECF Dkt. #29) on behalf of themselves and two classes of military service member plaintiffs. The complaint asks for separate relief for each class based upon the nature of the claims. The first class is all members of the Armed Forces subject to Defendant Austin's mandate to be inoculated *only* with a product that has received full licensure from the FDA. The crux of that claim is that Defendant Austin (on behalf of the DoD) has, either by gross neglect or knowingly, allowed members of the military to be coerced and compelled to receive an "unapproved product," whether EUA or Investigational, in plain violation of either 10 U.S.C §1107a or §1107. For this class of plaintiffs, their claims rest upon the precise licensure status of BioNTech BNT-162b2.

16. The second class is members of the Armed Forces who have *already been infected and recovered from Covid-19* and are therefore presumptively excused from receiving a vaccine for a virus that they have already had under the Defendant Department of Defense's own military medical instructions, AR 40-562. For this class of Plaintiffs, the licensure status of the BioNTech product is immaterial. This claim is purely an APA claim that hinges on the DoD's arbitrary, capricious, and illogical actions with regard to its own regulations. For example, the DoD cannot claim to require testing of people in order to determine whether or not they have been infected for Covid-19 and then simultaneously say 'it doesn't matter' for purposes of being

⁸ <https://www.msn.com/en-us/news/us/more-than-100-marines-kicked-out-of-the-service-for-refusing-covid-vaccine/ar-AART007> - "The Marine Corps has booted 103 of its members for refusing the Covid vaccine, the service announced on Thursday, even as all the military branches report that a vast majority of troops have gotten the shots."

“fully vaccinated” – when it matters for every other respiratory or other virus or other inoculation. Natural immunity can’t simply be ignored and a number of court decisions have already enjoined federal agency action in part because their “...rejection of natural immunity as an alternative is puzzling.” *Louisiana et al v. Becerra, et al.*, 3:21-cv-03970, Memo. Order, Dkt 28, p. 25.

17. For this second class of plaintiffs, the exact licensure status of the vaccine is not an *essential* element of the claim, although the Defendants’ actions regarding the vaccine are certainly relevant facts in the Court’s APA analysis.

18. The Plaintiffs First Amended Complaint pleaded all of the necessary elements to make out a well-defined class claim under FRCP 23(d) for both class – both of these group are easily ascertainable, definite, and valid legal classes. Additionally, there is ample and clear precedent for pleading by military plaintiffs for relief in lieu of being punished and then asking for post-punishment relief. See, e.g., *Doe v. Rumsfeld*, 341 F.Supp.2d 1 (D.D.C. 2004); see also *Witt v. Department of the Air Force*, 527 F.3d 806 (9th Cir. 2008)(sustaining facial challenge to the DoD’s “Don’t Ask, Don’t Tell” policy).

19. The Defendants – and their counsel – are engaged in willful, widespread, systemic fraud on the federal courts of this country in order to deprive service members of their day in court. It is an egregious and public flouting of the Article III courts of this Nation and the Constitution, the same one that the service members have sworn an oath to protect and defend with their very lives.

20. These are not specious allegations – they’re matters of public record. The Defendants aren’t even trying to hide their disregard for the federal courts. As the plaintiffs here have already shown, Judge Winsor was misled during oral argument and told by Defendants

counsel that the licensed Comirnaty product was available and that the Defendants had “hundreds of thousands” of shots available:

Notably, though, the plaintiffs have shown that the DOD is requiring injections from vials not labeled “Comirnaty.” Indeed, defense counsel could not even say whether vaccines labeled “Comirnaty” exist at all. (Although the DOD’s response said it had an adequate Comirnaty supply, it later clarified that it was mandating vaccines from EUA-labeled vials.)

...

The DOD claims it possesses “hundreds of thousands of BLA-compliant vaccine doses that are EUA-labeled, and is using them.” If the DOD is, in fact, administering Comirnaty (albeit EUA-labeled Comirnaty), the plaintiffs’ § 1107a issue disappears.⁹

21. As the plaintiffs have already shown, Comirnaty isn’t available and it can’t be available as a matter of law. These aren’t matters amenable to interpretation: the Defendants own websites, databases, public records, and the manufacturer’s required public filings, all show that there is no Comirnaty.

COMINARTY products are not orderable at this time. NDCs are listed per FDA Structured Product Label (SPL) document for the BLA licensed product. These codes are not included in CDC Vaccine Code Set files at this time.¹⁰

22. The plaintiffs, and all who serve in the Nation’s Armed Forces, are watching these cases, as is the American public. What they are witnessing is the systematic disdain that senior members of this Administration and the attorneys who represent them have for both the people who serve and now the judiciary that might potentially stop this illegal mandate.

Wherefore, Plaintiffs respectfully pray for the following relief:

- a. An immediate Order to all Defendants to stop the discharge of any members of the

⁹ Doe v. Austin, at 13, 15 (internal citations omitted).

¹⁰ See, e.g., <https://www.cdc.gov/vaccines/programs/iis/COVID-19-related-codes.html>

Armed Forces *pendente lite*;

- b. An immediate Order requiring all of the Defendants to provide to this Court a sworn statement regarding the reasons for beginning the mass discharge of members of the plaintiff class, including SSgt Long;
- c. An order prohibiting Defendants from retaliating against or in any other way professionally damaging Plaintiffs, and any other service member objecting to inoculation with the Pfizer-BioNTech EUA product; and
- d. For any other additional relief as this court deems equitable and proper.

Dated this 16th day of December, 2021.

Respectfully submitted,

/s/ Dale Saran

Dale Saran, Esq.
MAJ, USMCR (Ret).
dalesaran@gmail.com
19744 W. 116th Terrace
Olathe, KS 66061
(480)-466-0369

/S/ Todd Callender

Todd S. Callender, Esq.
Colorado Bar #25981
Disabled Rights Advocates PLLC
600 17th St., Suite 2800
Denver, CO 80202
(303) 228 7065, Ext. 7068
todd@dradvocates.com
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on Dec. 16th, 2021, I electronically filed the above-captioned Reply and Exhibits with the Clerk of Court using the CM/ECF system.

/s/ Todd S. Callender

Todd Callender, Esq.
Colorado Bar #25981
600 17th St., Suite 2800
South Denver, CO 80202
Telephone: (720) 704-7929
Email: todd@dradvocates.com
Attorney for the Plaintiffs

/s/ Dale Saran

Dale Saran, Esq.
MA Bar #654781
19744 W 116th Terrace
Olathe, KS 66061
dalesaran@gmail.com
Telephone: 480-466-0369
Attorney for the Plaintiffs



DEPARTMENT OF THE NAVY
NAVAL RESERVE OFFICERS TRAINING CORPS
374 UCB
UNIVERSITY OF COLORADO BOULDER
BOULDER, COLORADO 80309

1910
SJA

From: Staff Sergeant Cambrea L. Long, [REDACTED]/7257, USMC
To: Commanding Officer, Naval Reserve Officer Training Corps, University of Colorado

Subj: ACKNOWLEDGMENT OF RIGHTS TO BE EXERCISED OR WAIVED DURING SEPARATION PROCEEDINGS

Ref: (a) CO's ltr

1. _____ I acknowledge receipt of the reference notifying me of proceedings to discharge me by reason of Best Interest to the Service.
2. _____ I understand that I am being recommended for separation with a honorable characterization of service and that the least favorable characterization which I may receive is general (under honorable conditions). I understand that failure to complete my enlistment contract with an honorable characterization of service may preclude my eligibility for benefits from the Department of Veterans Affairs or other organizations and have an adverse effect on future civilian employment. If I am separated with a characterization of service of general, I understand that I may petition the Veterans Benefits Administration of the Department of Veterans Affairs for certain benefits under the laws administered by the Secretary of Veterans Affairs.
3. In view of the above, I choose to execute the following rights:
 - a. ____ I (have) (have not) included statements in rebuttal to this proposed separation.
 - b. ____ I (have) (have not) consulted with counsel. I realize it is in my best interests to do so before exercising or waiving any of my rights. My counsel's name is: _____.
 - c. ____ I (do) (do not) desire to obtain copies of documents that will be forwarded to the CG, Marine Corps Recruiting Command supporting this proposed separation.
4. _____ I understand that if I am separated before I complete an active duty service requirement incurred because I received advance education assistance, bonuses, or special pays, I may be required to reimburse the U.S. government on a pro rata basis for the unserved portion of the active service requirement.
5. _____ I have read and fully understand the information contained in the Purpose and Scope of the NDRB and BCNR.

6. I understand the basis for which I am being recommended for separation, IAW MCO 1900.16 CH 2 paragraph 6214: Separation in the best interest of the service.

Witness date

Respondent date

CLASSIFICATION: UNCLASSIFIED//

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-----OFFICIAL INFORMATION DISPATCH FOLLOWS-----

RTTUZYUW RHOIAAA0001 3491212-UUUU--RHSSUU.

ZNR UUUUU

R 151203Z DEC 21 MID200001325643U

FM CNO WASHINGTON DC

TO NAVADMIN

INFO CNO WASHINGTON DC

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NAVADMIN 283/21

PASS TO OFFICE CODES:

FM CNO WASHINGTON DC//N1//

INFO CNO WASHINGTON DC//N1//

MSGID/NAVADMIN/CNO WASHINGTON DC/CNO/DEC//

SUBJ/CCDA EXECUTION GUIDANCE TO COMMANDERS//

REF/A/MSG/CNO/311913ZAUG21//

REF/B/MSG/CNO/132050ZOCT21//

REF/C/MSG/CNO/152239ZNOV21//

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REF/E/MSG/SECNAV/302126ZAUG21//

REF/F/DOC/SECNAV/24JUL19//

REF/G/DOC/OPNAV/30OCT19//

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REF/T/DOC/OPNAV/15AUG20//

REF/U/BUMEDINST 6230.15B/7OCT13//

NARR/REF A IS NAVADMIN 190/21, 2021-2022 NAVY MANDATORY COVID-19 VACCINATION AND REPORTING POLICY.

REF B IS NAVADMIN 225/21, COVID-19 CONSOLIDATED DISPOSITION AUTHORITY (CCDA).

REF C IS NAVADMIN 256/21, CCDA GUIDANCE TO COMMANDERS.

REF D IS THE SECRETARY OF THE DEFENSE MEMO MANDATING CORONAVIRUS DISEASE 2019 VACCINATION FOR DEPARTMENT OF DEFENSE SERVICE MEMBERS.

REF E IS ALNAV 062/21, 2021-2022 DEPARTMENT OF THE NAVY MANDATORY

COVID-19 VACCINATION POLICY.

REF F IS SECNAVINST 1920.6D, ADMINISTRATIVE SEPARATION OF OFFICERS.

REF G IS MILPERSMAN 1611-010, OFFICER PERFORMANCE AND SEPARATIONS FOR CAUSE.

REF H IS MILPERSMAN 1910-142, SEPARATION BY REASON OF MISCONDUCT - COMMISSION OF A SERIOUS OFFENSE.

REF I IS MILPERSMAN 1910-233, MANDATORY SEPARATION PROCESSING.

REF J IS MILPERSMAN 1910-010, ENLISTED ADMINISTRATIVE SEPARATION (ADSEP) POLICY AND GENERAL INFORMATION.

REF K IS NAVADMIN 249/21, CCDA DATA REPORTING REQUIREMENTS.

REF L IS 10 U.S. CODE SECTION 8330, ENLISTED MEMBERS: TRANSFER TO FLEET RESERVE AND FLEET MARINE CORPS RESERVE; RETAINER PAY.

REF M IS 10 U.S. CODE SECTION 8326, ENLISTED MEMBERS: 30 YEARS.

REF N IS 10 U.S. CODE SECTION 1370, REGULAR COMMISSIONED OFFICERS.

REF O IS NAVADMIN 268/21, REQUIRED COVID-19 TESTING FOR UNVACCINATED SERVICE MEMBERS.

REF P IS SECRETARY OF DEFENSE MEMO ADDRESSING CORONAVIRUS DISEASE 2019 VACCINATION FOR MEMBERS OF THE NATIONAL GUARD AND THE READY RESERVE.

REF Q IS 10 U.S. CODE SECTION 8323, OFFICERS: 20 YEARS.

REF R IS 10 U.S. CODE SECTION 12731, AGE AND SERVICE REQUIREMENTS.

REF S IS BUPERSINST 1730.11A, STANDARDS AND PROCEDURES GOVERNING THE ACCOMMODATION OF RELIGIOUS PRACTICES.

REF T IS MILPERSMAN 1730-020, IMMUNIZATION EXEMPTIONS FOR RELIGIOUS BELIEFS.

REF U IS BUMEDINST 6230.15B, IMMUNIZATIONS AND CHEMOPROPHYLAXIS FOR THE PREVENTION OF INFECTIOUS DISEASE.

RMKS/1. Purpose. Since we are now past the last date that any Navy service member may receive the vaccine and meet the deadlines specified in reference (a), this NAVADMIN provides execution guidance regarding separation of Navy service members refusing the COVID-19 vaccine as directed in references (a) through (e).

2. Policy. In order to ensure a fully vaccinated force, U.S. Navy policy is, first, that all Navy service members receive the vaccine as directed and, second, that any who refuse the vaccine be processed for separation at the earliest possible opportunity. While the vast majority of Navy service members have already received the vaccine, it remains in the interest of the Navy to encourage remaining Navy service members to become fully vaccinated as soon as possible and, at such time, consider them for retention. Regarding those who refuse the vaccine, the following policy will be implemented to maximize speed and equity in achieving a fully vaccinated force:

2.a. Navy service members eligible or approved to separate or retire on or before 1 June 2022. Upon request, permit separation or retirement (as applicable) as soon as practicable via expedited processes, in lieu of administrative separation processing. Barring extenuating circumstances, this will result in an HONORABLE characterization of service.

2.b. Navy service members not eligible to separate or retire on or before 1 June 2022: Process for administrative separation as soon as practicable based on misconduct.

2.b.(1). Less than 6 years of service: Process for separation with an HONORABLE characterization. Service members in this category are not entitled to an Administrative Separation (ADSEP) board or a Board of Inquiry.

2.b.(2). More than 6 years of service: Process for separation with a GENERAL (under honorable conditions) characterization, however, requests to waive Administrative Separation boards or Boards of Inquiry in exchange for HONORABLE characterization of service will generally be favorably endorsed (barring additional misconduct or unique circumstances).

2.c. The separation guidance in this NAVADMIN applies to active duty, full time support (FTS)/training and administration of the reserve (TAR), and selected reserve (SELRES) Navy service members refusing the vaccine. Paragraph 6, below, provides additional guidance regarding Navy Reserve service members refusing the vaccine. Navy service members in the Individual Ready Reserve (IRR), as well as U.S. Naval Academy (USNA) and Naval Reserve Officers Training Corps (ROTC) midshipmen remain subject to the vaccine mandates in references (a), (d), and (e), but will be processed per their governing instructions.

3. Action. Commanders are now directed to conduct separation processing IAW this NAVADMIN and per references (f) through (j).

3.a. If a Navy service member refusing the vaccine changes their mind and subsequently receives the vaccine, but cannot meet the deadline specified in references (a) and (e), Commanders must expeditiously report that fact to the COVID Consolidated Disposition Authority (CCDA) via *PERS-834(at)navy.mil* for officers and *832vaccineadseps.fct(at)navy.mil* for enlisted, in order to expedite determination regarding pausing or permanently waiving the administrative actions directed by references (b), (c) and this NAVADMIN. Commanders are reminded to update the data required by reference (k) in such cases.

3.b. Separation processing for Navy service members refusing the vaccine will be IAW this NAVADMIN. Where the terms of this NAVADMIN regarding separation processing conflict with references (a) through (c), this NAVADMIN supersedes and replaces that previous guidance. However, unless specifically waived by the CCDA based on receiving the vaccine, all other administrative actions associated with vaccine refusal described in references (b) and (c) including but not limited to pay, promotion/advancement, fitness reports/evaluations, etc. continue to apply in all cases of Navy service members refusing the vaccine.

3.c. Officer and enlisted service members separated based on vaccine refusal will not be eligible for involuntary separation pay.

3.d. Officers separated based on vaccine refusal who have not completed a service obligation incurred by attending the U.S. Naval Academy, receipt of a Naval Reserve Officers Training Corps Scholarship, or receipt of other advanced education funds will be required to repay their educational expenses IAW existing agreements.

3.e. The command endorsement section of separation requests processed in NSIPS per this NAVADMIN must clearly indicate *COVID-19 VACCINE REFUSAL* and Commanders must closely monitor progress and results throughout the process.

3.f. Navy service members with approved or pending COVID-19 vaccination exemption requests shall not be processed for separation per this NAVADMIN. Navy service members whose COVID-19 vaccination exemption request is subsequently denied are required to receive the COVID-19 vaccine as directed by the exemption adjudicating authority or if the exemption adjudicating authority does not specify, commence vaccination within 5 days of being notified of the denial. Navy service members who subsequently refuse the COVID-19 vaccine after expiration of the specified time to commence vaccination will be processed for separation per this NAVADMIN. Commanders are reminded to update the data required by reference (k) in such cases.

3.g. Any officer or enlisted service member refusing the vaccine who has a currently-approved separation or retirement (as of the date of this NAVADMIN) for a date on or before 1 June 2022 will be permitted to execute their separation or retirement without additional administrative separation processing described below.

3.h. For the purposes of this message, use of the word *retirement* in the case of enlisted personnel should be read to include transfer to the fleet reserve, when eligible.

4. Officer Processing: Except as provided in paragraph 3.g, the CCDA, as the show cause authority, has directed mandatory show cause processing for all officers who refuse the vaccine IAW reference (f) on the bases of Misconduct, Moral or Professional Dereliction, and Substandard Performance.

4.a. Commanders shall delay submitting a report of misconduct for officers who are beyond their minimum service requirement (MSR) to determine if they are eligible and desire to request an unqualified retirement or resignation in line with para 2.a. For officers who are not eligible and/or do not desire to request to retire or resign on or before 1 June 2022, Commanders shall initiate processing for separation by submitting a report of misconduct to Commander, Navy Personnel Command (PERS-834) per reference (g) as soon as practicable, but not later than 21 January 2022. The template for this report may be found at *<https://www.mnp.navy.mil/group/navy-covid-19-reporting>*. For officers who are eligible, request and are command sponsored (via NSIPS) to retire or resign on or before 1

June 2022, reports of misconduct are not required. However, if requests for retirement or resignation are disapproved by higher authority, the provisions of this paragraph regarding required reports of misconduct and officer show cause will again apply. In those cases, reports of misconduct must be initiated within 5 days of retirement or resignation disapproval.

4.a.(1). Unqualified resignation or retirement requests in line with this paragraph must be submitted no later than 21 January 2022 with a separation date no later than 1 June 2022.

4.a.(2). Officers who have not met all Time in Grade (TIG) requirements will not be recommended for a TIG waiver and will be recommended to retire at the next lower grade in which the officer served on active duty satisfactorily.

4.a.(3). Officers with prior enlisted service, more than 20 years of active service, and less than 10 years of commissioned service (YCS) are not qualified for a regular officer retirement, but will be permitted to resign their commission and reenlist in the highest enlisted paygrade previously held for the sole purpose of retiring IAW references (l) and (m).

4.a.(4). In cases where an officer is notified after 7 January 2022 that their exemption request was denied and continues to refuse the vaccine, that officer will be provided 14 days from the date of such notification to request resignation or retirement in line with paragraph 4.a. above, if they are eligible and desire to make such a request. Such requests must still ensure resignation or retirement on or before 1 June 2022.

4.b. Eligible. An officer eligible to resign is, generally, one who has completed or will complete their minimum service requirement on or before 1 June 2022. An officer eligible to retire is, generally, one who has completed or will complete at least 20 years of service on or before 1 June 2022. Additional service obligation incurred due to such Navy benefits as education and bonuses may be waived, at the discretion of the CCDA or higher authority, in exchange for agreement to repay any unearned portion of the benefit. Each case will be individually adjudicated for final determination.

4.c. Probationary Officers (as defined in reference (f), but generally less than 6 years of commissioned service).

4.c.(1). Except as provided in paragraphs 3.g. and 4.a., probationary officers who refuse the vaccine will be directed to show cause for retention by notification procedures. The least favorable characterization of service shall be HONORABLE, unless inclusion of another basis for separation warrants a less favorable characterization. The show cause authority will direct processing after receiving reports of misconduct.

4.c.(2). Once notification is complete IAW reference (f) enclosure

11, the matter will be submitted to the Secretary of the Navy for final adjudication.

4.d. Non-Probationary Officers (as defined in reference (f), but generally greater than 6 years of commissioned service).

4.d.(1). Except as provided in paragraphs 3.g. and 4.a., non-probationary officers who refuse the vaccine will be directed to show cause for retention by Board of Inquiry procedures. The least favorable characterization of service directed for consideration will be GENERAL (under honorable conditions), unless inclusion of another basis for separation warrants a less favorable characterization.

4.d.(2). Non-probationary officers who refuse the vaccine who will not be retirement or resignation eligible on or before 1 June 2022, will not have completed their MSR before 1 June 2022, are denied requests for unqualified resignation/retirement, or who do not prefer separation or retirement IAW with paragraph 4.a. above will, in the course of show cause proceedings, be offered the opportunity to submit a qualified resignation or, in some cases, a retirement request, for discharge with an HONORABLE characterization of service in exchange for waiving their right to a Board of Inquiry.

4.d.(2).(a). Qualified resignation or retirement requests under this paragraph must be submitted no later than 14 days after notification to the officer.

4.d.(2).(b). Officers requesting retirement under this paragraph will be recommended to the Secretary of the Navy for retirement in grade so long as time-in-grade requirements are met IAW references (f) and (n).

4.d.(2).(c). Officers requesting retirement under this paragraph, who have not met all TIG requirements will not be recommended for a TIG waiver and will be recommended to retire at the next lower grade in which the officer served on active duty satisfactorily.

4.d.(2).(d). Officers with prior enlisted service, more than 20 years of active service, and less than 10 years of commissioned service (YCS) are not qualified for a regular officer retirement, but will be permitted to resign their commission and reenlist in the highest enlisted paygrade previously held for the sole purpose of retiring IAW references (l) and (m).

4.d.(3). Non-probationary officers who refuse the vaccine who do not avail themselves of the opportunities and options provided above will be subject to show cause through Boards of Inquiry with GENERAL (under honorable conditions) as the least favorable characterization of service.

5. Enlisted Processing. Except as provided in paragraph 3.g., the CCDA has directed that Commanders shall initiate the administrative

separation process for all enlisted service members refusing the vaccine under reference (h), Misconduct-Commission of a Serious Offense, plus any additional basis known at the time of processing. The provisions of reference (g) and MILPERSMAN 1910 (series) apply: treat vaccine refusal cases as though they were listed in reference (i).

5.a. Commanders shall delay initiating administrative separation processing for enlisted service members who have greater than 20 years of service or have an end of active obligated service (EAOS) on or before 1 June 2022 to determine if they are eligible and desire to request separation or retirement in line with para 2.a. For those who are not eligible and/or do not desire to make such a request, initiate administrative separation processing as soon as practicable, but not later than 21 January 2022. For those who are eligible, request and are command sponsored to separate or retire on or before 1 June 2022, administrative separation processing is not required. However, if such requests are disapproved by higher authority, the provisions of this paragraph requiring separation processing will again apply. In those cases, administrative separation processing must be initiated within 5 days of disapproval.

5.a.(1). Separation or retirement requests in line with this paragraph must be submitted no later than 21 January 2022.

5.a.(2). Enlisted service members with an expected EAOS on or before 1 June 2022 may request such separation through use of the Enlisted Personnel Action Request Form NAVPERS 1306/7. Requests may be approved by Commanders as described in existing procedures.

5.a.(3). Enlisted service members retiring who submit a request IAW this paragraph will be retired in grade so long as TIG requirements are met.

5.a.(4). Enlisted service members who have not met all TIG requirements will be ineligible for a TIG waiver and will be retired at the next lower grade. Enlisted service members must include their willingness to retire at a lower pay grade within their request. Commanders must also provide a narrative in the comments that the request is being submitted IAW this NAVADMIN.

5.a.(5). In cases where an enlisted service member is notified after 7 January 2022 that their exemption request was denied and continues to refuse the vaccine, that enlisted service member will be provided 14 days from the date of such notification to request separation or retirement in line with paragraph 5.a. above, if they are eligible and desire to make such a request. Such requests must still ensure separation or retirement on or before 1 June 2022.

5.b. Eligible. An enlisted service member eligible to separate is, generally, one who will reach their EAOS on or before 1 June 2022. An enlisted service member eligible to retire is, generally, one who

has completed or will complete at least 20 years of service on or before 1 June 2022. Additional service obligations incurred due to such Navy benefits as education and bonuses may be waived, at the discretion of the CCDA or higher authority, in exchange for agreement to repay any unearned portion of the benefit. Each case will be individually adjudicated for final determination.

5.c. Enlisted service members with less than 6 years of total service (and/or reserve military service) at the time of notification.

5.c.(1). Except as provided in paragraphs 3.g. and 5.a., enlisted service members with less than 6 years of total service shall be processed for separation using notification procedures. The least favorable characterization of service shall be HONORABLE, unless significant and persistent negative aspects of the members conduct or performance of duty in the current enlistment outweigh positive aspects of the members service record, or if inclusion of another basis for separation warrants a less favorable characterization.

5.c.(2). Once the cognizant Commander completes notification, commands shall endorse and forward to PERS-8 at *832vaccineadseps.fct(at)navy.mil*, which will forward to the applicable separation authority and then direct separation as appropriate.

5.d. Enlisted service members with more than 6 years of total service (and/or reserve military service) at the time of notification.

5.d.(1). Except as provided in paragraphs 3.g. and 5.a., enlisted service members with more than 6 years of total service shall be processed using administrative board procedures. The least favorable characterization of service shall be GENERAL (under honorable conditions), unless inclusion of another basis for separation warrants a less favorable characterization.

5.d.(2). Enlisted service members with more than 6 years of total service who are not eligible for retirement, have an EAOS after 1 June 2022, are denied a request for separation or retirement, or who do not prefer separation IAW with paragraph 5.a. above, may request to conditionally waive an administrative separation board in exchange for separation or retirement (as applicable) with an HONORABLE characterization of service.

5.d.(2).(a). Conditional waiver requests for separation or retirement must be received by the Commander no later than 14 days after notification.

5.d.(2).(b). Unless there are extenuating circumstances, the Commander will favorably endorse the conditional waiver request and forward to PERS 8 at *832vaccineadseps.fct(at)navy.mil*, which will forward to the applicable separation authority and then direct

separation as appropriate. Commanders should generally disapprove a conditional waiver only where additional misconduct (other than vaccine refusal) is present.

5.d.(3). Enlisted service members requesting retirement IAW this paragraph may be recommended for retirement in grade if time in grade requirements are met (as applicable). If TIG requirements are not met, they may be recommended for retirement at the next lower grade.

5.d.(4). Enlisted service members with more than 6 years of total service who do not avail themselves of the opportunities and options above will continue to be processed for administrative separation with GENERAL (under honorable conditions) as the least favorable characterization of service.

5.e. In order to streamline processing of enlisted separation cases, commands are directed to visit <https://www.mynavyhr.navy.mil/Career-Management/Personnel-Conduct-Sep/Enlisted-Separations/> for reference materials, letter of transmittal templates and checklists to be used when submitting enlisted active and FTS/TAR ADSEP cases to *832vaccineadseps.fct(at)navy.mil*.

6. Additional Navy Reserve Guidance:

6.a. Navy service members who refuse the vaccine and separate from the active component (AC) will not be permitted to affiliate with or be assigned in any status within the reserve component (RC).

6.b. Separations for Navy Reserve service members refusing the vaccine will be conducted at the Navy Reserve Center to which the members are assigned. In order to be processed for retirement, separation or resignation, all Navy Reserve service members refusing the vaccine who are on active duty (ACDU), to include active duty for operational support (ADOS) and definite recall, shall be released from active duty (RAD) and returned to a reserve status no later than 21 Jan 2022.

6.c. Navy Reserve service members on ACDU orders, to include active duty for operational support (ADOS) and definite recall, who submitted a vaccine exemption request which is subsequently denied after 7 Jan 2022, and refuse the vaccine following the expiration of the specified time to commence vaccination, shall be released from active duty (RAD) and returned to a reserve status within 14 days of being notified of the denial.

6.d. Commanders must notify the Orders Issuing Authority (OIA), either PERS-92 or PERS-4X, as soon as possible if they have Navy Reserve service members refusing the vaccine on ACDU.

6.e. In accordance with reference (p), in no case will a Navy Reserve service member refusing the vaccine be granted authorized

absence from drill or excused from other reserve duties based on failure to comply with vaccination requirements.

6.f. Active duty members (including FTS/TAR) who do not have 20 qualifying years to retire, but have earned qualifying years in the reserves and have a combination of active duty and reserve years to qualify for a non-regular/reserve retirement under reference (r) should contact PERS-97 Career Transition Office by emailing your most current reserve Statement of Service to *cto.officer(at)navy.mil* for officers and *cto.enlisted(at)navy.mil* for enlisted members prior to 21 January 2022 to inform them of your intentions to be transferred to the reserves solely for the purpose of retirement.

6.g. *Retirement* for RC members includes transfer to the retired reserve and non-regular retirement as eligible.

6.h. Additional administrative guidance regarding Navy Reserve service members refusing the vaccine will be promulgated via a forthcoming ALNAVRESFOR message.

7. As a reminder, all unvaccinated Navy service members are subject to screening testing against COVID-19 IAW reference (o). Commanders shall continue to update the status of unvaccinated service members IAW reference (k).

8. If in doubt as to how to adjudicate issues related to separation of a Navy service member refusing the vaccine, Commanders should seek guidance from their chain of command, their staff judge advocate, and/or the CCDA before acting. Commands without an assigned legal advisor may seek legal advice from a Region Legal Service Office. In all cases, Commanders are accountable to ensure the health and safety of their command while treating every Navy service member with dignity and respect.

9. Points of contact.

My Navy Career Center: 833-330-6622, *askmncc(at)navy.mil*.

PERS-8 Active/FTS enlisted separations:

832vaccineadseps.fct(at)navy.mil

PERS-8 officer separations: *PERS-834(at)navy.mil*

PERS-8 Active/FTS/TAR enlisted retirements:

Enlisted_Active_Duty_Retirements(at)navy.mil

PERS-8 Active/FTS/TAR officer retirements:

pers_835_retirements(at)navy.mil

PERS-8 officer and enlisted promotion delays:

NPC_promotionwithholds.fct(at)navy.mil*

PERS-92 officer and enlisted definite recalls:

PERS-92(at)navy.mil.

PERS-9 Reserve enlisted separations:

913vaccineadseps.fct(at)navy.mil.

PERS-97 officer transitions: *cto.officer(at)navy.mil*

PERS-97 enlisted transitions: *cto.enlisted(at)navy.mil*

OPNAV POC: CAPT Jason Grizzle, *ALTN_N1_NAVY_SCR.FCT(AT)NAVY.MIL*.

10. Released by VADM John B. Nowell, Jr, COVID Consolidated
Disposition Authority.

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