IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

NAVY SEAL # 1, *et al.*, Plaintiffs, v. **JOSEPH R. BIDEN, JR.**, in his official capacity as President of the United States, *et al.*, Defendants.	Case No. 8:21-cv-02429-SDM-TGW

DEFENDANTS' OPPOSITION TO PLAINTIFF COLONEL FINANCIAL MANAGEMENT OFFICER'S EMERGENCY MOTION FOR A TEMPORARY RESTRAINING ORDER

Plaintiff Colonel Financial Management Officer filed an emergency motion asking the Court to enjoin an order to be vaccinated.[1] Mot., ECF No. 141. Plaintiff's motion fails to satisfy any of the requirements under law for such emergency relief.

Plaintiff's cursory argument concerning his likelihood of success on the merits is insufficient to show he is entitled to the "extraordinary relief" of a temporary restraining order (TRO). This is especially true given the Supreme Court's recent grant of the Government's request to partially stay a similar preliminary injunction in *Austin v. U.S. Navy SEALs 1-26*, --- S. Ct. ---, No. 21A477, 2022 WL 882559 (U.S. Mar. 25, 2022) (mem.). Nor does Plaintiff make any argument regarding the public interest of entering a TRO. And Plaintiff's motion misrepresents that he would be receiving administrative separation orders on Friday, March 25, 2022. To the contrary, there is no emergency and in any event, any purported harm is reparable. Plaintiff's claimed

[1] As explained in Defendants' partial response to the motion for a TRO, the remaining 21 individuals who joined the motion are non-parties who are not entitled to relief. ECF No. 142 at 5.

injuries relate to the outcome of future officer separation processes, which take, at a minimum, several months to complete and permit Plaintiff to raise arguments against separation. Thus, contrary to Plaintiff's assertions that this matter presents an extraordinary emergency, nothing about the pending motion is proper or remotely justifies the entry of a TRO. For these reasons, set forth further below, Plaintiff's motion should be denied.

BACKGROUND

The procedural background of this matter is largely set forth in prior filings and orders. *See* ECF Nos. 23, 42, 66, 67, 74, 97, 118, 132, 139, 140. Defendants also filed a partial response to Plaintiff's TRO on March 24, 2022. ECF No. 142. Defendants incorporate by reference all arguments and declarations submitted in connection with those motions to this brief.

Plaintiff is a colonel on active duty in the U.S. Marine Corps. Ex. 1 (Decl. of Col. Daren J. Erickson) ¶ 3. He is assigned to U.S. Marine Corps Forces Pacific (MARFORPAC) in Hawaii. *Id.* He holds several financial military occupational specialties and serves as the MARFORPAC Assistant Chief of Staff for the Financial Resources Division. *Id.* Plaintiff works in an office in the MARFORPAC headquarters building where he has his own office, but he interacts daily and directly with his staff in their section spaces. *Id.* ¶ 4. As an Assistant Chief of Staff, Plaintiff leads a team of about twenty financial professionals and attends at least two in-person staff meetings per week, in which the principal staff members sit within six feet of each in a conference room. *Id.* ¶ 5. Although virtual attendance is authorized for most

meetings, virtual attendance almost exclusively occurs from within the MARFORPAC building on a secured network. *Id*. Plaintiff cannot virtually attend any meeting that includes highly classified discussions. *Id*.

As a Marine, Plaintiff must be ready to deploy at all times. *Id.* ¶ 6. To ensure that he is ready to deploy, Plaintiff also must participate in mandatory regular physical and combat training that requires close proximity to other Marines, including Marines who frequently deploy. *Id.* ¶ 7. MARFORPAC staff members, especially due to their location in Hawaii, also travel frequently to other stations in Australia, South Korea, Japan, the Philippines, and the United States, some of which countries have strict COVID vaccination and quarantine requirements that prohibit unvaccinated Marines from entering. *Id*. ¶ 6. Hawaii also has a high rate of tourism, maintains some of the strictest COVID policies in the country, and has limited hospital bed spaces and critical supplies like oxygen necessary in the event of another COVID outbreak. *Id*. ¶ 9.

LEGAL STANDARDS

"The issuance of a temporary restraining order or preliminary injunctive relief is an extraordinary remedy to be granted only under exceptional circumstances." *Cheng Ke Chen v. Holder*, 783 F. Supp. 2d 1183, 1186 (N.D. Ala. 2011) (citing *Sampson v. Murray*, 415 U.S. 61 (1974)); *see also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) ("A preliminary injunction is an extraordinary remedy never awarded as of right."). A TRO "is appropriate where the movant demonstrates that: (a) there is a substantial likelihood of success on the merits; (b) the TRO . . . is necessary to prevent

irreparable injury; (c) the threatened injury outweighs the harm that the TRO or preliminary injunction would cause to the non-movant; and (d) the TRO or preliminary injunction would not be averse to the public interest." *Parker v. State Bd. of Pardons & Paroles*, 275 F.3d 1032, 1034–35 (11th Cir. 2001); *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1225 (11th Cir. 2005) (per curiam). "Because a [TRO or] preliminary injunction is 'an extraordinary and drastic remedy, its grant is the exception rather than the rule, and [the petitioner] must clearly carry the burden of persuasion.'" *Cheng Ke Chen*, 783 F. Supp. 2d at 1186 (quoting *United States v. Lambert*, 695 F.2d 536, 539 (11th Cir. 1983)) (brackets in original).

ARGUMENT

I. Plaintiff Is Unlikely to Succeed on the Merits of His Claims.

A. Plaintiff Lacks Venue in this Court.

As discussed in Defendants' motion to dismiss Plaintiffs' complaint, ECF No. 139 at 17–22, this Court should sever Plaintiff and transfer his claims to the proper venue. Plaintiff is a resident of Hawaii and has no connection with this venue in Florida. Ex. 1 ¶ 3; *see also* Order, *Crosby v. Austin*, No. 8:21-cv-02730 (M.D. Fla. Feb. 22, 2022), ECF No. 44 at 1–2 (severing claims in suit brought by fifteen service members where "[o]nly one of the Plaintiffs ha[d] anything to do with the Middle District of Florida") (this order is in the record at ECF No. 139-8).

B. The Eleventh Plaintiff Failed to Exhaust His Administrative Remedies.

The Eleventh Circuit has made clear "time and again" that exhaustion of

administrative remedies is "require[d]" in military cases. *Winck v. England*, 327 F.3d 1296, 1302 (11th Cir. 2003) (collecting cases), *abrogated on different grounds as recognized in Santiago-Lugo v. Warden*, 785 F.3d 467, 475 n.5 (11th Cir. 2015). The nature of Plaintiff's claim does not excuse failure to exhaust. Even when a plaintiff "allege[s] the deprivation of a constitutional right" or "alleg[es] that the military has acted in violation of applicable statutes," he still must "exhaust[] available intraservice corrective measures" before bringing suit in federal district court. *Mindes v. Seaman*, 453 F.2d 197, 201 (5th Cir. 1971). The exhaustion requirement is especially important in the military context because it serves the important purpose of allowing the military to apply its "specialized expertise" in the first instance. *Lawrence v. McCarthy*, 344 F.3d 467, 470 (5th Cir. 2003). If Plaintiff is dissatisfied with the military's decision, he may seek judicial review only after exhausting military appeals, allowing the military to make its decision and fully articulate its interests. *See Winck*, 327 F.3d at 1302–04.

Plaintiff has not exhausted his military remedies. Even though his religious exemption request has been denied, the Marine Corps has further administrative procedures that offer many opportunities for him to present his arguments and for the Marine Corps to respond. *See* Ex. 2 (Decl. of Chad W. Schrecengost) ¶¶ 3–19 (detailing the lengthy and significant intramilitary procedures related to administrative separation); Furness Decl. ¶¶ 13–23, ECF No. 23-19; *see also United States v. Kisala*, 64 M.J. 50 (C.A.A.F. 2006). Should Plaintiff face discharge for non-compliance with the order, he may present arguments before the discharge authority. *See* Furness Decl. ¶¶ 16–20, ECF No. 23-19; Ex. 1 ¶ 15. For officers like Plaintiff, this process takes several

months and involves a formal administrative hearing over which a panel of general officers preside in order to make findings with respect to the bases for separation, and recommendations with respect to retention or separation and characterization of service. *See* Furness Decl. ¶¶ 17–18, ECF No. 23-19; Ex. 2 ¶¶ 3–6. If Plaintiff is discharged, he can appeal to the Board for Correction of Naval Records. *See* Furness Decl. ¶ 22, ECF No. 23-19. For adverse action less than discharge, the Marine Corps has procedures that can provide relief. *Id.*

As other courts have recently found in similar contexts, review of Plaintiff's claims now "would undermine the purpose of exhaustion and infringe on the military's expertise and interest in handling its own personnel matters." *Church v. Biden*, ---F. Supp. 3d---, No. 21-2815, 2021 WL 5179215, at *11 (D.D.C. Nov. 8, 2021) (citing, *inter alia*, *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953)). In *Short v. Berger*, the court concluded that a Marine Corps officer whose appeal had been denied failed to exhaust administrative remedies because "he still must undergo separation proceedings before any permanent adverse consequences are imposed." Order, *Short v. Berger*, No. 2:22-cv-1151 (C.D. Cal. Mar. 3, 2022), ECF No. 25 at 5 (this order is in the record at ECF No. 132-5). Moreover, the officer would have the opportunity to submit a "written rebuttal" during separation proceedings, and four different individuals would consider his separation, "any one of which could decide to close the process upon review of Plaintiff's written submissions." *Id.* (citing *Diraffael v. Cal. Mil. Dep't*, No. CV 10-07240, 2011 WL 13274364, at *3 (C.D. Cal. Mar. 21, 2011)). The

court in *Short* rejected the plaintiff's argument that the administrative remedies would be futile, finding that there is "no evidence, other than argumentative conjecture, that separation proceedings are always decided against the appealing servicemember." *Id.* at 5–6. The same is true here—Plaintiff has presented no evidence that separation proceedings would be futile so as to excuse the exhaustion requirement.[2] *See generally* Mot.

C. Plaintiffs' RFRA and First Amendment Claims Are Unlikely To Succeed.

The Assistant Commandant of the Marine Corps conducted an independent review of Plaintiff's request for a religious exemption on an individualized basis and has reasonably assessed the Government's compelling interest in vaccinating Plaintiff and the lack of less restrictive alternatives, taking into consideration current military needs, and Plaintiff's unique circumstances. *See* Pl.'s Ex. D at 18–21, ECF No. 141-4; *see also* 42 U.S.C. § 2000bb–1(a).

1. The COVID-19 Vaccination Requirement Furthers the Government's Compelling Interest in Military Readiness.

"[T]he government certainly has a compelling interest in preventing the spread of COVID-19 amongst members of the Marine Corps." *Short* Order at 9 (citing *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020)). In addition, "when evaluating whether military needs justify a particular restriction on religiously

[2] Nor has Plaintiff shown that he will suffer irreparable harm so as to excuse administrative exhaustion. *See infra* Part II.

motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest."[3] *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986); Tr. of Order 36:3–6, *Dunn v. Austin*, No. 22-cv-00288 (E.D. Cal. Feb. 22, 2022), ECF No. 22 ("As courts have said over and over again . . . , the Court must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.") (this order is in the record at ECF No. 132-6).

The Supreme Court's recent grant of the government's application for a partial stay in *U.S. Navy SEALs 1-26*, 2022 WL 882559, confirms the importance of deference to the judgement of military authorities. The plaintiffs in *U.S. Navy SEALs 1-26*, like plaintiffs in this case, are military service members who contend that they are entitled to exemptions from military COVID-19 vaccination requirements under RFRA. The district court in *U.S. Navy SEALs 1-26* granted a preliminary injunction similar to the TRO that plaintiffs request here, prohibiting the military from applying its COVID-19 vaccination policies to the plaintiffs and "from taking any adverse action against Plaintiffs on the basis of Plaintiffs' requests for religious accommodation." *U.S. Navy SEALs 1-26 v. Biden*, --- F. Supp. 3d ---, No. 21-cv-1236, 2022 WL 34443, at *14 (N.D. Tex. Jan. 3, 2022); *see also* Mot. 1 (asking the court "to preserve the status quo ante").

[3] Congress intended for courts to continue to apply principles of military deference in RFRA cases. *See* S. Rep. No. 103-111, at 12, *reprinted in* 1993 U.S.C.C.A.N. 1892, 1901 ("The courts have always recognized the compelling nature of the military's interest in [good order, discipline, and security] in the regulations of our armed services. Likewise, the courts have always extended to military authorities significant deference in effectuating these interests. The committee intends and expects that such deference will continue under this bill.").

The Supreme Court granted the government's request to stay that injunction "insofar as it precludes the Navy from considering respondents' vaccination status in making deployment, assignment, and other operational decisions." *U.S. Navy SEALs 1-26*, 2022 WL 882559, at *1. Justice Kavanaugh observed in a concurring opinion that a stay was warranted because the district court had "in effect inserted itself into the Navy's chain of command, overriding military commanders' professional military judgments," and because "even accepting that RFRA applies in this particular military context, RFRA does not justify judicial intrusion into military affairs in this case." *Id.* (Kavanaugh, J., concurring). The Supreme Court's decision granting a partial stay in *U.S. Navy SEALs 1-26* necessarily rejected the reasoning of the district court in entering preliminary injunctive relief in that case, and confirms that this Court should deny Plaintiff's similar request for a TRO.

Moreover, the appeal authority—the Assistant Commandant of the Marine Corps—conducted an individualized review of Plaintiff's religious exemption request package and determined that Plaintiff's vaccination is in furtherance of the government's compelling interests in "military readiness and in the health and safety of the force." *See* Pl.'s Ex. D at 20, ECF No. 141-4. The Assistant Commandant further found that "[t]he Delta variant of the novel coronavirus is highly transmissible and causes more severe illness, hospitalization, and death than previous variants." *Id.* The Assistant Commandant noted that personnel who remain unvaccinated "do not just put themselves at risk, they also risk the health and medical readiness of other persons within their unit, which in turn decreases the military readiness of the unit and

the Marine Corps as a whole." *Id.*

The Assistant Commandant took Plaintiff's assignment as an Assistant Chief of Staff into account, finding that "as a principal staff officer, [Plaintiff] work[s] primarily indoors and [is] required to be present in [his] work spaces to support the needs of [his] commander." *Id.* Thus, the Assistant Commandant explained that Plaintiff's duties "include[] attending meetings with other high level staff, conducting annual training, and engaging in other activities in close proximity to [Plaintiff's] fellow Marines." *Id.* Indeed, Plaintiff leads a team of about 20 financial professionals and attends at least two in-person staff meetings per week, in which the principal staff members sit within six feet of each other in a conference room. Ex. 1 ¶ 5. The Assistant Commandant also noted that "as a member of the Fleet Marine Force," Plaintiff "must be ready to deploy on a moment's notice." Pl.'s Ex. D at 20, ECF No. 141-4. "Readiness to deploy is an absolute requirement for all individual Marines, and it is an obligation for all officers to ensure that their assigned personnel can deploy and be combat effective." Ex. 1 ¶ 6. Vaccination is necessary to ensure combat readiness for deployment. Ex. 1 ¶¶ 8–9. In response, Plaintiff fails to address any of the Assistant Commandant's findings and instead merely argues that he received a "generalized, boilerplate, form-letter denial[]." Mot. 9–10.

Plaintiff cannot rely on the assertion that the military was able to continue to function without a vaccination requirement. Rather, the record reflects that the military confronted significant and harmful effects from COVID-19 prior to the vaccination requirement. *See e.g.*,Stanley Decl. ¶¶ 3–19, ECF No. 23-16; *see also*

Church, 2021 WL 5179215, at *18 (rejecting a similar argument); *Short* Order at 13 n.17 ("The notion that the military has not been significantly impacted is also belied by the nearly *400,000* infections and 93 deaths it has incurred."). "And merely because the military has found ways to perform its duties despite the risks of COVID-19 does not mean it must endure these risks indefinitely when there are effective means of mitigating them." *Id.* at 13 ("Like many millions of other essential workers, the military has heroically and with great ingenuity found ways to persevere during an unprecedented deadly pandemic. But that does not mean that the military is not entitled to use the most effective means available to end its crisis footing and return to a semblance of normalcy."); *Dunn* Prelim. Inj. Tr. 37:4–7 ("[I]t does come down . . . to what level of risk is appropriate. If the military can eliminate almost all risk through this policy, then there is a compelling governmental interest.").

2. Vaccination is the Least Restrictive Means of Furthering the Government's Compelling Interest in Military Readiness.

As other courts have found, in non-military settings, vaccination is the least restrictive means in fully accomplishing the government's interest in preventing the spread of infectious diseases in the workforce. *See, e.g.*, *Does 1–6 v. Mills*, --- F. Supp. 3d ---, 2021 WL 4783626, at *14 (D. Me. Oct. 13, 2021), *aff'd*, 16 F.4th 20 (1st Cir. 2021), *cert. denied*, 142 S. Ct. 1112 (2022); *see also Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 733 (2014) ("Other coverage requirements, such as immunizations, may be supported by different interests (for example, the need to combat the spread of infectious diseases) and may involve different arguments about the least restrictive

means of providing them."). This reasoning has even greater force in the military setting, where the health of service members is key to military readiness.

After careful consideration of Plaintiff's request for a religious exemption and his appeal, the Assistant Commandant of the Marine Corps concluded that there are no lesser restrictive means than vaccination to further the military's compelling interests in readiness and ensuring the health of service members. Pl.'s Ex. D at 20, ECF No. 141-4. The Assistant Commandant noted that Plaintiff's proffered "alternative treatments, such as Ivermectin, . . . are not as effective as vaccination." *Id.* Nor does "waiting for the availability of vaccines currently in development" achieve the military's "compelling interests in readiness, and health and safety." *Id.*

The Assistant Commandant likewise found that mitigation measures such as "masking, social distancing, hygiene, teleworking, and other similar measures, individually or in combination," are "not as effective as vaccination" and "are often incompatible with the demands of military life, where Marines . . . must live, work, realistically train, and, if necessary, fight in close quarters." *Id.*; *see also Short* Order at 10 (It is "reasonable to conclude—and certainly not the Court's role to micromanage—that some servicemembers, including Plaintiff, need to be able to work in close quarters with others and to deploy to environments where social distancing and surveillance testing are not possible."). Indeed, Plaintiff's work requires daily and direct contact with other individuals, including the 20 financial professionals he leads and the principal staff members with whom he attends two staff meetings each week. Ex. 1 ¶ 5. Plaintiff cannot work entirely remotely because even virtual attendance at meetings

requires Plaintiff's presence within the MARFORPAC building on a secured network, and he cannot virtually attend any meeting that involves discussion of classified documents. *Id*. His training also requires direct contact with other Marines, including those that regularly deploy. *Id.* ¶ 7.[4] Plaintiff provides no argument rebutting the Assistant Commandant's findings.

In sum, the military's vaccine policy is narrowly tailored to serve compelling military interests. And the military is best situated to assess whether a specific unvaccinated individual puts the military mission at risk, or whether feasible, less restrictive alternatives are available. *See Orloff*, 345 U.S. at 94; *Short* Order at 10 (deferring to the military's "judgment that only vaccination will allow Plaintiff to perform his essential duties during the pandemic with an acceptable level of risk to the safety and effectiveness of both himself and his unit"). The Marine Corps has concluded that there are no lesser restrictive means of achieving its interest in military readiness. RFRA does not compel the military to adopt an inferior, less effective measure than vaccines. Therefore, Plaintiff has not shown a likelihood of success on his RFRA claims to warrant the extraordinary relief he seeks.

II. Plaintiff Does Not Face Irreparable Harm.

Plaintiff argues that that he faces irreparable harm from an order to either get vaccinated or face adverse action. *See generally* Mot. Yet Plaintiff's motion

[4] To ensure that he is always ready to deploy, Plaintiff must participate in annual physical fitness (PFT) and combat fitness tests (CFT). Ex. 1 ¶ 7. During the CFT, Marines drag and carry one another on their backs. *Id.* Plaintiff is also required to conduct annual pistol marksmanship training, water survival training in the pool, and gas mask training. *Id.* All these events are done in group settings in relatively close proximity.

misrepresents the imminence of any alleged harm, and, moreover, Plaintiff fails to allege any harm that is irreparable.

Plaintiff incorrectly represented in his motion that he would receive separation orders on March 25, 2022. Yet when the Marine Corps denied Plaintiff's religious exemption appeal in December, Plaintiff sought a medical exemption. *See* Pl,'s Ex. D at 18–22, ECF No. 141-4. MARFORPAC leadership allowed Plaintiff approximately two months to schedule medical appointments to be evaluated for a medical exemption. Ex. 1 ¶ 12. MARFORPAC leadership thereafter provided Plaintiff two additional extensions of time to attend medical appointments, with a final deadline of March 24, 2022. *Id.* ¶¶ 13–14. Plaintiff did not obtain a DoD health care provider recommendation or endorsement for a medical exemption by that date. *Id.* ¶ 14. Thus, Plaintiff was fully in compliance with the DoD policy and the Marine Corps mandatory vaccination order until March 24, 2022. *Id.* ¶ 16.

Plaintiff also fails to establish any harm that is irreparable. He argues that if he does not obey the order to get vaccinated, he will suffer "irreparable damage to [his] military career," including "deprivation of [his] accumulated status and standing in the United States military, as well as prospective advancement and benefits." Mot. 10. But "[m]ilitary administrative and disciplinary actions, including separation, are not . . . irreparable injuries." *Dunn* Prelim. Inj. Tr. 45:25–46:2. "[H]arms such as lost rank, duties, benefits, and pay are not irreparable because 'these harms are redressable as monetary damages and therefore insufficient to obtain injunctive relief.'" *Short* Order at 13 (quoting *Air Force Officer v. Austin*, ---F. Supp. 3d---, 2022 WL 468799, at

*12 (M.D. Ga. Feb. 15, 2022)).

"The harms stemming from separation are also not irreparable for the additional reason that Plaintiff has an opportunity to challenge separation through the administrative process even before seeking relief in court." *Id.* at 13–14. Indeed, although Plaintiff alleges he is on the cusp of being discharged, the process to discharge a Marine Corps officer has multiple levels of review and can take many months. *See* Furness Decl. ¶¶ 13–21, ECF No. 23-19. In other words, even if Plaintiff were correct that initiation of separation proceedings were to begin imminently, he still would not be at imminent risk of separation. And if Plaintiff does proceed to a Board of Inquiry, the Board has a range of options available. *See generally* Secretary of the Navy Instruction (SECNAVINST) 1920.6D at encl. (11) ¶ 13, ECF No. 132-3; Ex. 2 ¶ 8.[5] Moreover, because Plaintiff is retirement-eligible, the Board of Inquiry cannot take away Plaintiff's retirement or the financial, medical, and other benefits associated with retiring; it is limited to recommending whether Plaintiff should be retired and the appropriate retirement grade. Ex. 1 ¶ 15. And if Plaintiff is discharged via retirement, he can seek review from the Board for Correction of Naval Records, which may result in him being reinstated into the Marine Corps. SECNAVINST at encl. (11), ¶ 22, ECF No. 132-3. These remedies make plain that Plaintiff does not face irreparable harm by the initiation of separation proceedings.

[5] It could find that Plaintiff had not committed the misconduct alleged, *see* SECNAVINST 1920.6D at encl. (11) ¶ 13.a, or if it finds misconduct, the Board could nevertheless recommend his retention, which would be binding on the Secretary of the Navy, *see* 10 U.S.C. § 1182(d)(1); SECNAVINST 1920.6D at encl. (11), ¶ 13.a(2)–(3), ECF No. 132-3; *id.* ¶ 17b.

Other disciplinary measures the Marine Corps may take are likewise not irreparable. If Plaintiff does not follow the order to get vaccinated, he will be placed on the Officer Disciplinary Notebook and a report of misconduct will be initiated. *See* Decl. of Maj. Jason M. Weaver, ECF No. 132-2 ¶ 9. Placement on the Officer Disciplinary Notebook, "a database used to track officer misconduct and substandard performance in the Marine Corps," is not itself a disciplinary measure, and such information is not included in an officer's personnel file. *See* Marine Corps Order 5800.16, Vol. 15 ¶ 010401, ECF No. 132-4. While entry on the Officer Disciplinary Notebook holds in abeyance all pending personnel actions (*e.g.*, promotion, separation, or permanent change of station orders) for the officer, such "Personnel/Administrative Hold" carries with it no punitive stigma but, rather, is implemented to maintain the status quo until matters are resolved by the cognizant commander. Marine Corps Order 5800.16, Vol. 15 ¶ 011101, ECF No. 132-4. Necessarily, then, entry on the Officer Disciplinary Notebook does not constitute irreparable harm.

A report of misconduct is generated when the officer's commanding general determines that the officer committed misconduct but *declines* to take disciplinary action against the officer. *See id.* ¶¶ 010502.A, 010603, 010604. After the report is signed, the officer is entitled to extensive additional proceedings which can take

months.[6] Even a final, approved report of misconduct, if ultimately directed by the Deputy Commandant for Manpower and Reserve Affairs to be placed in the officer's personnel file, is not an irreparable harm, as it may be removed, upon petition, by the Board for Correction of Naval Records or by court order. And separation proceedings, if a senior officer decides to initiate them, may not result in separation and, even if an officer is separated, the officer can be reinstated into service. In sum, there is no basis for emergency injunctive relief where Plaintiff's alleged injuries are fully reparable.

Plaintiff also argues that he will suffer irreparable harm by the loss of his constitutional and statutory rights. Mot. 9–11. But, as shown above, Plaintiff addressed the merits in only a cursory fashion and has not established a likelihood of success on the merits on any of his claims. Thus, no presumption of irreparable harm is warranted. *See Short* Order at 14 ("[B]ecause this Court has found that Plaintiff failed to demonstrate a sufficient likelihood of success on the merits of his religious freedom claims, there is no presumption of irreparable harm."); *Dunn* Prelim. Inj. Tr. 45:16–18 ("[I]n a case where plaintiff has failed to demonstrate a sufficient likelihood of success on the merits, then a presumption wouldn't apply.").

III. The Public Interest Weighs Against the Entry of a TRO.

Plaintiff entirely failed to address the public interest factor, which alone

[6] After the report is signed, the officer has an opportunity to provide a rebuttal. Marine Corps Order 5800.16, Vol. 15 ¶ 010603.J. Then the report and the officer's rebuttal is forwarded to a senior officer in the Marine Corps (either the Deputy Commandant for Manpower and Reserve Affairs or a three-star general) via the officer's chain of command to determine whether to process the officer for separation. *Id.* ¶ 010603. If the senior officer decides to process the officer for separation, that officer is entitled to additional proceedings, which can take months. *See infra* Part I.A; Furness Decl. ¶¶ 16–20, ECF No. 23-19.

warrants denial of his motion. *See ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd.*, 557 F.3d 1177, 1198 (11th Cir. 2009) ("Failure to show any of the four factors is fatal[.]"); Local Rule 6.01(b) ("The legal memorandum *must* establish . . . the nature and extent of [the] public interest affected.") (emphasis added).

In any event, the public has an exceptionally strong interest in national defense, *see Winter*, 555 U.S. 7, and "the military—and the public generally—undoubtedly have a strong interest in maintaining the combat readiness and health of the force, especially in these uncertain times," *Short* Order at 14 (citing *Church*, 2021 WL 5179215, at *18; *see also Dunn* Prelim. Inj. Tr. 47:14–16 ("Courts should be and this court in particular is reluctant to enjoin the military when military readiness is at stake."). As described in detail in numerous declarations previously filed by the Government, an injunction that allows Plaintiff to serve in a military setting without being vaccinated against COVID-19 would threaten harm to Plaintiff and the other service members serving alongside him. *See, e.g.*, Ex. 1 ¶ 8; Lescher Decl. ¶¶ 2, 11, 17, ECF No. 66-4; Stanley Decl. ¶ 8, ECF No. 23-16; Second Stanley Decl. ¶¶ 3–20, ECF No. 66-6; Rans Decl. ¶¶ 4–39, ECF No. 66-5; Poel Decl. ¶¶ 6, 10–36, 38, ECF No. 66-7. This is especially true for Plaintiff, as he is in close contact each day with the service members he leads. Ex. 1 ¶ 5. His training also necessitates close contact with other Marines who cannot always practice COVID-19 mitigation measures such as masking and social distancing due to the intense nature of their physical and field training. *See* Ex. 1 ¶ 7; *see also Garland v. N.Y.C. Fire Dep't*, ---F. Supp. 3d---, 2021 WL 5771687, at *9 (E.D.N.Y. Dec. 6, 2021) (noting the city's "significant interest" in preventing the spread of COVID-19

among firefighters who work in "close proximity" with each other "while on duty [and] in their fire stations").

A TRO would also undercut the maintenance of military good order and discipline. Lescher Decl. ¶ 16, ECF No. 66-4; Furness Decl. ¶ 23, ECF No. 23-19; Jurney Decl. ¶ 14, ECF No. 118-7; Ex. 1 ¶ 8; *see also Miller v. United States*, 42 F.3d 297, 303 (5th Cir. 1995) (stating that concern for preserving military discipline is "the most important consideration in any single case" (quoting *Scales v. United States*, 685 F.2d 970, 973 (5th Cir. 1982))). No military can function where service members define the terms of their own military service, including which orders they choose to follow. *See Chappell v. Wallace*, 462 U.S. 296, 300 (1983) ("The inescapable demands of military discipline and obedience to orders cannot be taught on battlefields; the habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection."). The TRO Plaintiff demands here would encourage other members to attempt to bypass the military's processes and ask courts to enter similar injunctive relief, which "in the aggregate present the possibility of substantial disruption and diversion of military resources" and is contrary to the public interest. *Parrish v. Brownlee*, 335 F. Supp. 2d 661, 669 (E.D.N.C. 2004); *see Chappell*, 462 U.S. at 305 (courts are "ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have"). Proceedings in this Court—where Plaintiffs and non-plaintiffs alike have filed numerous emergency motions for TROs before the military even begins its months-long separation proceedings—make clear that this is no idle concern.

IV. Plaintiff's Failure to Follow the Local Rules Warrants Denial of His Motion.

Plaintiff also fails to meet the procedural requirements necessary to obtain the extraordinary relief of a TRO. Local Rule 6.01(a) requires a plaintiff to include "a precise and verified description of the conduct . . . subject to restraint" and "a proposed order." "And Rule 65(d) requires a temporary restraining order to, among other things, 'describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required.'" *Art Headquarters, LLC v. Lemak*, No. 8:19-cv-2899-T-36JSS, 2019 WL 6340245, at *3 (M.D. Fla. Nov. 27, 2019) (quoting Fed. R. Civ. P. 65(d)(1)(C)).

Plaintiff failed to file a proposed order or describe the acts to be restrained. Plaintiff requests only that the Court "preserve the status quo ante." Mot. 1. Such a request is insufficient to issue a TRO under Federal Rule of Civil Procedure 65 and Local Rule 6.01. *See Art Headquarters*, 2019 WL 6340245, at *3. And to the extent Plaintiff's request to "preserve the status quo ante" is tantamount to requiring the Marine Corps to keep Plaintiff in a certain billet or performing certain duty assignments, the Court cannot and should not order such relief. *See, e.g.*, *U.S. Navy SEALs 1*-26, 2022 WL 882559; *Orloff*, 345 U.S. 83; *Speigner v. Alexander*, 248 F.3d 1292, 1298 (11th Cir. 2001); *Harkness v. Sec'y of Navy*, 858 F.3d 437, 443 (6th Cir. 2017).

CONCLUSION

For all of these reasons, Plaintiff's motion for a temporary restraining order should be denied.

Dated: April 6, 2022

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

ALEXANDER K. HAAS
Director, Federal Programs Branch

ANTHONY J. COPPOLINO
Deputy Director

Respectfully submitted,

/s/ Cassandra Snyder

ANDREW E. CARMICHAEL
AMY E. POWELL
Senior Trial Counsel
ZACHARY A. AVALLONE
COURTNEY D. ENLOW
CATHERINE M. YANG
R. CHARLIE MERRITT
CASSANDRA M. SNYDER (DC Bar No. 1671667)
Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, N.W.
Washington, DC 20005
Tel: (202) 451-7729
Fax: (202) 616-8460
Email: cassandra.m.snyder@usdoj.gov

Counsel for Defendants

Table of Exhibits

Exhibit Number	Exhibit Description
1.	Declaration of Colonel Daren J. Erickson (April 6, 2022)
2.	Declaration of Chad W. Schrecengost (April 6, 2022)

Exhibit 1

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

NAVY SEAL #1, *et al.* Plaintiffs, v. **JOSEPH R. BIDEN**, in his official capacity as President of the United States, *et al.* Defendants.	Case No. 8:21-cv-02429-SDM-TGW

DECLARATION OF DAREN J. ERICKSON

[with regard to Colonel Financial Management Officer]

I, Daren J. Erickson, hereby state and declare as follows:

1. I am a Colonel in the United States Marine Corps (USMC), currently assigned as Chief of Staff for U.S. Marine Corps Forces Pacific (MARFORPAC). I make this declaration in my official capacity, based upon my personal knowledge and upon information that has been provided to me in the course of my official duties.

2. I have been assigned to my current position since July 2021. Prior to my current assignment, I served as the Chief of Staff for Marine Corps Recruit Depot San Diego/Western Recruit Region. As part of my current duties, I am directly responsible to the MARFORPAC Commander for directing, coordinating, and supervising staff actions and managing the activities of MARFORPAC headquarters.

3. Colonel (Col) Financial Management Officer (FMO) is on active duty in the USMC, and currently assigned to MARFORPAC located in Hawaii. He holds several financial military occupational specialties (MOS) and serves as the MARFORPAC Assistant

Chief of Staff (A/CS) for the Financial Resources Division (G-8). He holds an advanced degree in systems analysis and is a highly-trained expert in resource management and requirements planning. The mission of the G-8 is to advise and assist the Commander in all matters pertaining to resource management, fiscal compliance, and strategic sourcing. As the A/CS G-8 Col FMO is the MARFORPAC Commander's principal advisor on all program and requirements, resource issues, and business reforms and initiatives.

4. On a day-to-day basis, Col FMO works in an office in the MARFORPAC headquarters building, a repurposed Naval Hospital built in 1941, aboard Camp Smith in Oahu, Hawaii. The office spaces consist of suites of rooms, and each staff section is in a self-contained area, behind an access-controlled door, much like the original hospital was once divided into separate wings and surgical suites. Col FMO has his own office, but interacts directly with his staff in their section spaces.

5. As an A/CS, Col FMO is the senior officer leading a team of about twenty financial professionals, both active duty and civilian. Col FMO attends at least two in-person staff meetings each week where the principal staff members sit within six feet of each other in a conference room. Col FMO is the primary officer responsible for providing budget and resource allocation advice to the Commander. MARFORPAC staff teleworked during the peak of COVID in 2020 and 2021. Recently, cases have dropped in Hawaii and staff began attending meetings in person over the last eight months that I have been Chief of Staff. Virtual attendance is authorized for most meetings. However, virtual attendance, even when authorized, almost exclusively occurs from within the MARFORPAC workplace on a secured network. In addition, some meetings include highly classified discussions which cannot be attended virtually. The MARFORPAC command team and A/CS staffs benefit from daily

interactions and these interactions are essential to making timely, informed decisions. Discussions among staff members before and after meetings are an essential element of staff cohesion; to inform section heads of new and relevant information of common concern; set priorities for cross-staff working groups to analyze issues; and develop options for commander's decision. Based on what is expected of an A/CS, Col FMO would not be fully performing his duties if he teleworked or remote-worked indefinitely. Additionally, Col FMO would likely interact other Marines in MARFORPAC who travel throughout the region.

6. The Marine Corps is fundamentally an expeditionary service. 10 U.S.C. § 8063 requires the Marine Corps to provide Fleet Marine Forces of combined arms for service with the fleet in the seizure or defense of advanced naval bases and the conduct of land operations essential to the prosecution of a naval campaign. MARFORPAC also serves as Fleet Marine Force Pacific (FMF PAC), and all assigned personnel are required to deploy on order in response to a contingency. Marine Corps Force Design and planning guidance from the Commandant of the Marine Corps reinforces the need for naval integration and the expeditionary nature of all Marine Corps forces. Readiness to deploy is an absolute requirement for all individual Marines, and it is an obligation for all officers to ensure that their assigned personnel can deploy and be combat effective. MARFORPAC is the largest field command in the U.S. Marine Corps. With two-thirds of the Marine Corps' operating forces assigned, MARFORPAC operates in the U.S. Indo-Pacific Command (USINDOPACOM) area of responsibility, the largest Geographical Combatant Command in the U.S. Department of Defense. MARFORPAC Marines are stationed over an enormous geographic area ranging from Southern California to South Korea, and MARFORPAC staff members travel frequently to Australia, South Korea, Japan, the Philippines, and California.

MARFORPAC requires COVID vaccination to travel on official orders to all of the aforementioned countries. During conflict, MARFORPAC Marines can expect to deploy from Hawaii, just as Marines in the past have deployed, to the Philippines, Korea, Japan, Vietnam and Afghanistan and numerous other countries. Further, a Marine who has not been fully vaccinated is not considered worldwide deployable, and cannot hold command or serve as an officer-in-charge per Marine Administrative Message (MARADMIN) 612/21, dated 23 October 2021.

7. To ensure that he is always ready to deploy, Col FMO must participate in mandatory regular training that requires close proximity to other Marines. The Marine Corps requires physical fitness (PFT) and combat fitness tests (CFT) which occur once a year. The PFT takes place between January and June and the CFT takes place between July and December. During the CFT, Marines drag and carry one another on their backs. Col FMO is also required to conduct, water survival training in the pool, and gas mask training. All these events are done in group settings in relatively close proximity. Finally, in addition to the physical and skills-based training listed above, all Marines must attend annual Sexual Assault Prevention and Response Training and Prohibited Activities and Conduct Training. This training is conducted in a group setting to facilitate discussion. Marine leaders like Col FMO often provide guidance and advice to their Marines during these group sessions.

8. If Col FMO remains unvaccinated, it will have a direct impact on the combat readiness of this unit, and the Marine Corps has a compelling interest in ensuring that he is vaccinated against COVID-19. If Col FMO becomes severely ill, he will be unable to perform his duties, which will deprive the Commander of a highly trained leader and

adviser. Moreover, if he were infected—even if not seriously ill—he poses a risk of spreading infection to those around him. This is particularly problematic given that he interacts with other service members on a daily basis. If he remains unvaccinated, Col FMO will also be unable to deploy or travel to support planning and operations with critical allies and partners like Japan and Australia. He will also not be eligible to serve as a commanding officer or officer-in-charge, depriving the Marine Corps of experienced leadership.

9. MARFORPAC is located in Hawaii. This creates additional challenges and risks not encountered in a unit located in the continental United States. Attending exercises, conferences, courses, trainings, and other events regularly requires MARFORPAC staff to travel via aircraft to the mainland United States and other countries. Hawaii also has substantial tourism and a regular influx of tourists from across the world. The local hospitals have limited bed spaces and critical supplies like oxygen that would be needed in the event of another COVID outbreak. The Department of the Navy has come under intense scrutiny by local government officials related to the Red Hill Bulk Fuel Storage facility recently, which involved contaminated drinking water near the facility and resulted in the Secretary of Defense ordering the facility's closure on 7 March 2022. MARFORPAC must do everything it can to ease those tensions and ensure that local medical facilities and personnel are not overburdened by preventable illness.

10. On August 24, 2021, the Secretary of Defense (SECDEF) released a memorandum directing the Secretaries of the Military Departments to immediately begin full vaccination of all members of the Armed Forces under Department of Defense (DoD) authority against COVID-19. On August 25, 2021, the Assistant Secretary of the Navy

directed the Services to implement the DoD policy. To do so, on September 1, 2021, the Commandant of the Marine Corps released Marine Administrative Message 462/21, directing that all active duty Marines be fully vaccinated against COVID-19 no later than November 28, 2021.

11. On August 23, 2021, Col FMO submitted a religious accommodation request to the Deputy Commandant for Manpower and Reserve Affairs (DC M&RA). On September 22, 2021, DC M&RA denied Col FMO's religious accommodation request and informed him of his right to appeal that decision to the Commandant of the Corps. According to the Marine Corps Order regarding religious accommodations in the Marine Corps (MCO 1730.9), the appeal was due within ten business days of receiving the denial, or no later than October 6, 2021. On October 1, 2021, Col FMO was promoted to his current rank. On the same day, Col FMO filed a request to extend the deadline for his appeal to October 20, 2021. This extension was granted and the command further extended the deadline to October 21, 2021 to allow for a federal holiday.

12. On October 21, 2021, Col FMO submitted an appeal to the Commandant of the Marine Corps. On December 14, 2021, the Assistant Commandant of the Marine Corps denied Col FMO's appeal. After that denial, the Headquarters Battalion Commanding Officer allowed Col FMO approximately two months to schedule medical appointments to be evaluated for a medical exemption. Col FMO did not receive a COVID-19 vaccination during that time.

13. On February 7, 2022, Col FMO received a written order from Headquarters Battalion Commanding Officer to receive the first shot of the COVID-19 vaccination. On February 11, 2022, Col FMO requested until March 3, 2022, additional time to attend an

appointment to screen for a medical exemption from the COVID-19 vaccination requirement. Commanding Officer afforded him time to do so and delayed enforcement of the order to be vaccinated.

14. On March 3, 2022, Col FMO requested additional time to attend another medical appointment on March 24, 2022. Commanding Officer informed Col FMO that a DoD provider needs to endorse or concur with the civilian provider's medical exemption in accordance with paragraphs 3.j.1. and 3.j.2. of MARADMIN 462/21. Commanding Officer gave Col FMO until March 24, 2022 to do so. Col FMO did not obtain a DoD health care provider recommendation or endorsement for a medical exemption by that date. Col FMO currently has no approved medical exemption or accommodation, and has no pending appeals. Despite that, and the mandatory administrative processing requirement, Commanding Officer has not moved forward on the order pending briefing on this motion.

15. Col FMO is not in immediate jeopardy of being involuntarily retired from the Marine Corps this month or even in the next few months. If ultimately processed for violating an order, Col FMO is entitled to a board of inquiry (BOI). The BOI is a formal administrative hearing before a panel of no fewer than three senior officers who make findings with respect to the bases for involuntary retirement, and recommendations with respect to retention or involuntary retirement, and a retirement grade recommendation in the case of an officer eligible for retirement at the time of the board. SECNAVINST 1920.6D, Encl (7) ¶ 4; Encl (11). Col FMO would also be entitled to representation at the hearing by counsel. *Id.* at Encl (11) ¶ 7.b. The Government carries the burden of proof at the hearing and the standard of proof is a preponderance of the evidence. The Government and the officer are entitled to provide documents and call reasonably available witnesses at the BOI. With limited exceptions, the rules

of evidence applicable to courts-martial do not apply. If a majority of the board members vote that the basis for involuntary retirement is not supported by the evidence, that finding is binding and the officer will be retained. Additionally, if the majority of the board members vote that the basis for involuntary retirement is supported by the evidence but that the officer should be retained, that recommendation is binding and the officer will be retained. 10 U.S.C. § 1182(d)(1). Further, because Col FMO is retirement-eligible, a BOI could only recommend whether Col FMO should be retired and the appropriate retirement grade – the BOI could not take away Col FMO's retirement or the financial, medical, and other benefits associated with retiring. The process using BOI procedures will take several months, from initiation of a notification to show cause to an actual separation from the Marine Corps. To-date, Col FMO has not been provided any documentation or notification that Col FMO will be required to go to a BOI at a later date, and Col FMO is not in jeopardy of involuntary retirement in the next several months. In light of the administrative requirements noted above and the current status of the case, Col FMO's declaration in Plaintiff's Motion for Temporary Restraining Order that he "will receive his administrative separation orders on Friday, March 25, 2022" is inaccurate and does not characterize his current status. ECF No. 141 at 3, 16.

16. MARADMIN 612/21 does not permit commands to initiate separation proceedings on any personnel while under a temporary exemption while they request a religious accommodation or can demonstrate a valid medical condition requiring permanent vaccination exemption on medical grounds. Until 24 March 2022 and the expiration of his extended temporary exemption to seek a permanent medical basis for exemption from COVID-19 vaccination, Col FMO was not in violation of DoD policy or the Marine Corps

mandatory vaccination order. This command provided Col FMO time to request redress and time for him to pursue a permanent exemption as defined by the MARADMIN. Col FMO is now unvaccinated and not in compliance with Marine Corps policy and is not deployable.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 6th day of April 2022.

D. J. ERICKSON

Exhibit 2

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

NAVY SEAL #1, *et al.* Plaintiffs, v. **JOSEPH R. BIDEN**, in his official capacity as President of the United States, *et al.* Defendants.	Case No. 8:21-cv-02429-SDM-TGW

DECLARATION OF MR. CHAD W. SCHRECENGOST

I, Chad W. Schrecengost, hereby state and declare as follows:

1. I am a GS-15 in the United States Marine Corps (USMC), currently assigned as Deputy Director, Manpower Management Division, Manpower & Reserve Affairs, Headquarters U.S. Marine Corps. I make this declaration in my official capacity, based upon my personal knowledge and upon information that has been provided to me in the course of my official duties.

2. I have been assigned to my current position since June 2021. Prior to my current assignment, I served in the U.S. Air Force as a force support and personnel officer in a variety of positions for 23 years before retiring as a colonel in 2019. As part of my current duties, I supervise our Separations and Retirements Branch of Manpower Management Division, which manages all officer and enlisted separations from the U.S. Marine Corps.

Processing for Separation for Officers

3. Administrative separations for officers are processed in accordance with Secretary of the Navy Instruction 1920.6D (hereinafter SECNAVINST 1920.6D) and Chapter 4 of Marine

Corps Order 1900.16, Separation and Retirement Manual (hereinafter MARCORSEPMAN). Enlisted administrative separations are processed pursuant to MARCORSEPMAN, Chapter 6. "Marines refusing the COVID-19 vaccination, absent an approved administrative or medical exemption, religious accommodation, or pending appeal shall be processed for administrative separation [in accordance with] this MARADMIN and supporting references." MARADMIN 612/21 ¶ 3.a. Although processing for separation is required, this does not automatically result in a member actually being separated. Members processed for separation may ultimately be retained in the service.

4. Commanding Generals report adverse incidents involving officers to the Staff Judge Advocate (SJA) to the Commandant of the Marine Corps (CMC) (SJA to CMC), Military Personnel Law Branch (JPL) via the Officer Disciplinary Notebook (ODN). MCO 5800.16 – V15. Lieutenant Generals in command and the Deputy Commandant, Manpower and Reserve Affairs may direct administrative separation processing as alternate show cause authorities (ASCA) when the officer's performance or conduct is such that administrative separation is appropriate. *Id*. Reasons for separation are outlined in SECNAVINST 1920.6D, and include reasons such as Misconduct, Moral or Professional Dereliction, and Substandard Performance. The specific procedures involved with processing an officer for misconduct are outlined in SECNAVINST 1920.6D, Enclosure (6), "Policy Governing Involuntary Separation for Cause or Parenthood", and Enclosure (7), "Guidelines on Separations for Cause."

5. The applicable procedures may vary in certain respects depending on the officer's type of appointment, years of service, and record of performance, among other factors. Probationary officers may be processed without a Board of Inquiry (BOI) when the show cause authority determines that an Honorable, or General (under honorable conditions) characterization

of service is appropriate. SECNAVINST 1920.6D, Encl (2), ¶ 25; Encl (7), ¶ 3.a. Non-probationary officers must be processed using BOI procedures, which entails a formal administrative hearing over which a panel of no fewer than three senior officers preside in order to make findings with respect to the bases for separation, and recommendations with respect to retention or separation, and characterization of service. *Id.*, Encl (7) ¶ 4; Encl (11).

6. In cases where no BOI is required, the processing time *goal* under SECNAVINST 1920.6D is that separation processing should be completed by the convening authority 30 calendar days from the date a command notifies an officer of the commencement of separation processing. SECNAVINST 1920.6D ¶ 9b. In cases where a BOI is required, the processing *goal* is 90 calendar days from the date a command notified an officer of the commencement of separation processing. *Id*. at ¶ 9c. Every effort is made to adhere to these time goals but the failure to process an administrative separation within the prescribed time goals does not constitute a bar to separation or characterization. *Id*. at ¶ 9. These timelines are often not met.

7. Probationary Officers. Probationary officers[1] may be processed without a Board of Inquiry (BOI) when the show cause authority determines that an Honorable, or General (under honorable conditions) characterization of service is appropriate. SECNAVINST 1920.6D, Encl (2), ¶ 25; Encl (7), ¶ 3.a. The officer concerned has the right to see all materials that will be forwarded to the separation authority for consideration, the right to submit matters regarding why they should be retained or given a certain discharge characterization, and to consult with qualified counsel. SECNAVINST 1920.6D, Encl (10), ¶ 2.a.-h. Probationary officers are entitled to a BOI if the notification to show case states that an OTH is the least favorable

[1] Probationary officers are those active duty commissioned officers who have served less than 6 years. For active duty warrant officers, they must have served less than 3 years.

characterization of service, but in vaccine refusal cases this would only likely occur if there is additional misconduct.

8. Non-probationary officers. These officers are entitled to be processed using BOI procedures, which entails a formal administrative hearing before a panel of no fewer than three senior officers who make findings with respect to the bases for separation, and recommendations with respect to retention or separation and character of service, and - for those officers retirement at the time of the board – retirement grade. SECNAVINST 1920.6D, Encl (7) ¶ 4; Encl (11). The officer is entitled to representation at the hearing by counsel. *Id*. at Encl (11) ¶ 7.b. The Government carries the burden of proof at the hearing and the standard of proof is preponderance of the evidence. The Government and the officer are entitled to provide documents and call reasonably available witnesses at the BOI. With limited exceptions, the rules of evidence applicable to courts-martial do not apply. If a majority of the board members vote that the basis for separation are not supported by the evidence, that finding is binding and the officer will be retained. Additionally, if the majority of the board members vote that the basis for separation is supported by the evidence but that the officer should be retained that recommendation is binding and the officer will be retained. 10 U.S.C. § 1182(d)(1).

Processing for Separation for Enlisted Personnel

9. Enlisted Marines may be separated by reason of misconduct for offenses that would warrant a punitive discharge under the Uniform Code of Military Justice (UCMJ), which includes violations of Article 92 of the UCMJ. MARCORSEPMAN ¶ 6210.6. Marines with fewer than six years of service may be processed using notification procedures under MARCORSEPMAN 6303, unless characterization of service[2] of Other Than Honorable is

[2] A characterization of service is assigned to a service member upon separation from the military and generally reflects the quality of an individual's military service. The highest characterization of service is Honorable, followed

warranted. Administrative board procedures under MARCORSEPMAN paragraph 6304 are used in instances where an Other Than Honorable characterization is warranted, or for Marines with greater than six years of service, if they elect an administrative board.

10. Notification procedures afford the Marine with notice of the adverse administrative action and an opportunity to submit written matters for consideration, whereas administrative board procedures require a formal administrative hearing. Written matters include any information that the Marine wishes to be considered—including service record and letters from third parties—and may bear not only on whether discharge is appropriate but also on the characterization of any discharge. The MARCORSEPMAN processing time goal where a board is not required is 15 working days after the Marine received notification of separation. MARCORSEPMAN ¶ 6102. If a board is required, action should be completed within 50 working days after the Marine received notification of separation. *Id*.

11. All active duty and reserve component Marines who separate, retire, demobilize or deactivate after a minimum of 180 continuous days of active duty are eligible and required to participate in a transition readiness seminar (TRS), with limited exemptions. *See* MCO 1700.31, (Dec. 30, 2015). The TRS includes mandatory pre-separation counseling to inform Marines of available transition-related services and benefits, to include a Department of Labor Employment Workshop, and Department of Veterans Affairs (VA) benefits briefings with information on education, healthcare, compensation, life insurance, home loans, and vocational rehabilitation and training benefits.

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by General (Under Honorable Conditions), Other Than Honorable, Bad-Conduct, and Dishonorable. Officers may be awarded a Dismissal, which is akin to a Dishonorable discharge. The first three types of characterization may be awarded using administrative procedures, whereas Bad Conduct and Dishonorable discharges, as well as an officer's Dismissal, are considered "punitive discharges." These types of discharges may only be awarded by a court-martial sentence and imposed after appellate review is complete.

12. MARADMIN 462/21 permits the special court-martial convening authority to issue administrative counseling pursuant to paragraph 6105 of the MARCORSEPMAN, which provides the following for involuntary separations by reason of misconduct:

> "In cases involving unsatisfactory performance, pattern of misconduct, minor disciplinary infractions, or other bases requiring counseling under paragraph 6105, separation processing may not be initiated until the Marine is counseled concerning deficiencies and afforded a reasonable opportunity to overcome those deficiencies."

MARCORSEPMAN ¶ 6105.3. The duration of time that affords the Marine a "reasonable opportunity" is determined by the commanding officer on a case-by-case basis, and the commanding officer must sign the formal counseling document (commonly known as a "Page 11"). *Id*. The MARCORSEPMAN provides standard language to include advising the Marine of potential disciplinary or adverse administrative action, to include administrative separation, and advises the member of his or her right to provide a rebuttal to be filed with the counseling. *Id*.

Administrative Separation Processing Timelines

13. Timelines to complete administrative processing vary depending on whether the Marine is an officer or enlisted, the efficiency of administrative processing within any given command or unit, and what specific procedures apply to the Marine's case. For cases involving a Marine's vaccine refusal and no other misconduct or basis for separation, the Marine Corps has yet to separate a single officer for vaccine refusal, but has separated approximately 1600 enlisted Marines. There are also several officer packages that are being reviewed by the Deputy Commandant, Manpower & Reserve Affairs (DC M&RA) and the Assistant Secretary of the Navy, Manpower and Reserve Affairs (ASN M&RA).

14. Officers. Officer processing timelines depend on a variety of factors, but timelines most significantly differ based on whether notification procedures or BOI procedures

are used. Because COVID-19 separations have not been prioritized over any other separation for officers, normal timelines are adhered to for processing.

15. Notification Procedures for (Probationary Officers No BOI). First, the Commanding General for the officer issues a formal counseling to the officer, after which the officer has five working days to submit a response. Officers may elect to consult with defense counsel when drafting the response, and may also request an extension of time to respond. After the officer responds, the Commanding General drafts a Report of Misconduct, which documents the misconduct. The Commanding General will also then notify the officer of the administrative separation recommendation. At this juncture, the officer is afforded additional procedural protections, to include a right to confer with a judge advocate and 10 calendar days to submit an additional response. The officer may request an extension of time to respond to the Report of Misconduct. The Commanding General then forwards the Report of Misconduct, notification of separation, and officer's responsive material through the ASCA. This three-star commander's staff judge advocate (SJA), typically a colonel, will review the package for procedural compliance before the ASCA endorses it. The ASCA then forwards the package to the SJA to CMC (JPL), which conducts a legal review and drafts a separation memorandum. Several judge advocates from JPL review the package before the Deputy SJA to CMC forwards it to DC, M&RA. Another legal advisor reviews the separation package before DC, M&RA endorses it and forwards the package to ASN, M&RA. ASN M&RA's special assistant for military law conducts one last legal review before ASN M&RA takes final action. After ASN M&RA signs the package, it is typically returned to JPL that day or the following business day. JPL will send the separation letter to the Marine Corps Separations and Retirement Branch and the SJAs for the Commanding General and ASCA. Those SJAs notify the command and officer of the decision

and the officer's separation date is established, typically 30 days from date of the letter. While times vary depending on operational tempo and Commanding General availability, among other factors, one recent case illustrates the timeline. The officer refused the COVID vaccine on 19 October 2021 and, as of 4 April 2022, his case is pending ASN M&RA action. A timeline of at least four to six months is not uncommon in any notice separation case.

16. Procedures for Officers, BOI Elected or Required**.** Of note, we have not completed the processing of any BOI cases for COVID-19 vaccine refusal. However, the process looks similar to the one above, except the Commanding General of the officer must forward his or her show cause recommendation to the three-star ASCA, who then directs the BOI. The Commanding General will then notify the officer of BOI. An officer has a minimum of 30 days to prepare for the BOI and may request an additional 30 days or more to prepare. Requests for additional time are often granted. BOIs are also dependent on member and counsel availability which can further significantly lengthen the timeline. After the BOI concludes, the senior member must prepare a Report of BOI, which documents the proceedings, and must serve a copy of the Report on the subject officer. The officer, typically through counsel, may submit a response to the Report of BOI within a reasonable period of time, usually 5-10 business days. At the Commanding General level, the SJA must provide a legal review and the Commanding General of the officer must address any legal deficiencies raised by the officer. This report is then forwarded to ASN M&RA via the ASCA, SJA to CMC (JPL), and DC M&RA. Legal sufficiency and compliance reviews are conducted at each level and can take a significant amount of time. Cases involving retirement-eligible officers must further be forwarded to the Secretary of the Navy for a retirement grade determination in compliance with 10 U.S.C. § 1370.

From the time that the initial misconduct is reported to final separation, a BOI case takes, on average from six months to two years to complete.

17. Processes for Enlisted Personnel. Administrative separation of enlisted service members often takes several months, although the range of processing timelines varies. There is no requirement to prioritize the processing of enlisted COVID-19 vaccine refuser cases over other ADSEP cases. Therefore, historical data on processing timelines for these or similar cases is relevant to understanding processing timelines.

18. Notification Procedures for Enlisted Personnel, No ADSEP Board (less than six years of service): Following the notice of administrative separation, the service member is given an opportunity to consult with counsel, which can take anywhere from 2 - 5 business days. For probationary service members, the individual may elect to submit matters to the separation authority and is given a reasonable time to do so, typically 5 to 10 working days. The service member may request additional time for good cause to submit matters to the separation authority and these requests are frequently granted. The commander must then route the case to the separation authority through any intermediate commanders. The approved separation is then forwarded to the Marine's command to complete separation processing requirements locally. On average, Marine Corps commands typically take 90 days to process their notification procedures cases or board waiver cases from the time the misconduct is identified until the Marine receives a letter directing separation. Once the command receives the letter to separate, the command and member are given five days to complete any other administrative requirements and separate the Marine.

19. Procedures for Enlisted Personnel, ADSEP Board Elected or Required. I am not aware of any command who has separated a Marine through board procedures for the sole basis

of COVID-19 vaccine refusal, although these cases are not necessarily reported to my Division. However, commands, on average are separating Marines entitled to a board and issuing a separation letter to the Marine in 180 days. Once the command receives the separation letter, the command and member are given five days to complete other administrative requirements prior to separation of the Marine.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 6th day of April 2022.

Chad W. Schrecengost

Digitally signed by Chad W. Schrecengost
Date: 2022.04.06 17:26:22 -04'00'

CHAD W. SCHRECENGOST