No. 23-1238C
(Judge Bonilla)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

CHRISTOPHER HARKINS, et al.,
Plaintiffs,

v.

THE UNITED STATES,
Defendant.

DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR LACK OF SUBJECT-MATTER JURISDICTION AND FOR FAILURE TO STATE A CLAIM

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DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR LACK OF SUBJECT-MATTER JURISDICTION AND FOR FAILURE TO STATE A CLAIM

Pursuant to Rules 12(b)(1) and 12(b)(6) of the Rules of the United States Court of Federal Claims (RCFC), defendant, the United States, respectfully requests that the Court dismiss plaintiffs' Complaint, ECF No. 1 (Compl.), for lack of jurisdiction and failure to state a claim. In support of this motion, we rely upon the complaint, the following brief, and the appendix attached to this brief.

INTRODUCTION

Plaintiffs are a group of seven former and current reservists and active-duty service members who have served in the United States Coast Guard. They raise challenges to the now-rescinded Department of Defense (DoD) COVID-19 vaccine requirement and the Coast Guard's vaccine requirement and seek backpay and other monetary relief for alleged adverse actions taken for their failure to comply with either vaccine requirement. After the Secretary of Defense rescinded its requirement in January 2023 pursuant to Congress's instruction in the Fiscal Year 2023 National Defense Authorization Act (NDAA), the Coast Guard likewise rescinded its own requirement, and plaintiffs filed a class-action complaint before this Court. Plaintiffs seek hundreds of thousands of dollars in backpay and fees under statutory authorities that both fall outside this Court's limited grant of jurisdiction and provide them no relief. Some also seek to

be compensated for unperformed duty, even though precedent makes clear that reservists are not entitled to such relief. Further, plaintiffs ask the Court to direct the military boards of correction to grant relief that plaintiffs have failed to seek from the boards themselves. Because all of plaintiffs' claims are either outside this Court's jurisdiction or fail based upon the facts pled, we respectfully request that the Court dismiss plaintiffs' complaint.

QUESTIONS PRESENTED

1. Whether plaintiffs' claim for violation of the NDAA is within the Court's jurisdiction when the NDAA does not apply to the Coast Guard and is not a money-mandating statute.

2. Whether plaintiffs have stated a claim for violation of the NDAA when the NDAA does not require retroactive rescission of the vaccination requirement and all of their discharges occurred before the NDAA was enacted.

3. Whether plaintiffs have standing to assert, or otherwise state a claim for, wrongful discharge under 10 U.S.C. § 1107a (a statute setting forth certain conditions for emergency use products) when they did not allege facts showing that their discharges were related to the alleged violation of that statute.

4. Whether plaintiffs state a claim for wrongful discharge under the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb, when they did not allege facts showing that they sought relief from the vaccination requirement based on their religious beliefs.

5. Whether two of the plaintiffs state a claim for entitlement to pay under the Military Pay Act, 37 U.S.C. §§ 204 and 206, when they do not allege that they performed any service for which they were not compensated.

6. Whether plaintiffs state a claim for illegal exaction when they do not allege that

any money was taken from them in violation of the Constitution, a statute, or a regulation.

7. Whether plaintiffs' claim under 10 U.S.C. § 1552 (a statute related to the correction of military records) is within the Court's jurisdiction when section 1552 is not a money-mandating statute.

STATEMENT OF THE CASE

I. The Rescinded COVID-19 Vaccination Requirement

On August 24, 2021, the Secretary of Defense directed the Secretaries of the Military Departments to ensure that all members of the Armed Forces were fully vaccinated against COVID-19. Compl. ¶ 25; ECF No. 1-2.[1] Although the Coast Guard falls under the purview of the Department of Homeland Security, rather than DoD, the Coast Guard took similar action and required that all members of the Coast Guard receive the COVID-19 vaccine, unless they were granted an exemption or accommodation. *See* Compl. ¶ 29; ECF No. 1-3 at 2. Consistent with existing law and policies, the Coast Guard permitted members to seek medical, religious, and/or administrative exemptions from the vaccination requirement based on their individual circumstances. *See* Appx1. Further, the Coast Guard's vaccination policy, like DoD's, only required members to receive fully licensed vaccines, stating that members "are required to receive the Pfizer-BioNTech COVID-19 vaccine," which "was granted license by the Food and Drug Administration (FDA) on 23 Aug. 2021." ECF No. 1-3 at 2. Likewise, the policy did not require service members to receive a COVID-19 vaccine from Coast Guard medical personnel, but rather allowed them to use any medical service provider. *See id.* Indeed, the policy stated

[1] In addition to the facts pled in the complaint, "courts may consider matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned." 5B Wright & Miller, Fed. Prac. & Proc. Civ. § 1357 (3d ed.); *Dimare Fresh, Inc. v. United States*, 808 F.3d 1301, 1306 (Fed. Cir. 2015).

that "Service members who have already received all required doses of an FDA licensed vaccine, a vaccine administered under the FDA's Emergency Use Authorization (EUA), or a vaccine on the World Health Organization Emergency Use Listing are considered fully vaccinated." *Id.* Further, the policy stated that any members "who voluntarily receive" an emergency use vaccine would be considered fully vaccinated. *Id.*

On December 23, 2022, the President signed into law the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023. Pub. L. No. 117-263, § 525, 136 Stat. 2395, 2571–72 (2022). Section 525 of the NDAA directed the Secretary of Defense to rescind DoD's August 2021 COVID-19 vaccination requirement. *See id*. at § 525. In compliance with Congress's directive, on January 10, 2023, the Secretary of Defense rescinded that requirement. Compl. ¶ 4; ECF No. 1-4.

The Secretary's rescission memorandum states that current DoD service members who requested an exemption from the vaccination requirement may not be "separated solely on the basis of their refusal to receive the COVID-19 vaccination" and directs the military services to "update the records of such individuals to remove any adverse actions solely associated with denials of such requests" for exemption. ECF No. 1-4 at 1. Further, the rescission memo directed that former DoD service members who were administratively discharged on the sole basis that they failed to obey an order to receive a COVID-19 vaccine "may petition their Military Department's Discharge Review Boards and Boards for Correction of Military or Naval Records to individually request a correction to their personnel records, including records regarding the characterization of their discharge." *Id*. at 2.

Although DoD's mandate, and thus section 525 of the NDAA requiring its recission, did not apply to the Coast Guard, the Coast Guard quickly rescinded its own vaccination requirement

"[i]n alignment with the DoD." Compl. ¶ 5, ECF No. 1-5 at 2. The Coast Guard likewise issued further guidance implementing the removal of adverse actions associated with its vaccination requirement. Appx4. In addition to this guidance, the Coast Guard directed current members to the Personnel Records Review Board (PRRB) and former members to the Board for Correction of Military Records (BCMR) to address claims related to personnel records resulting from its vaccination requirement. Appx5.

II. Plaintiffs File Their Complaint In This Court[2]

On August 4, 2023, plaintiffs, seven former or current active-duty and reserve members of the Coast Guard, filed their class action complaint in this case. The five active-duty plaintiffs plead that they were involuntarily discharged from active duty between July and December 2022 because they were unvaccinated in violation of DoD's and the Coast Guard's COVID-19 vaccine requirements. Compl. ¶¶ 17, 19, 20, 21, 23. The two reserve component plaintiffs plead that they were denied pay they otherwise would have been entitled to because they were unvaccinated in violation of the military COVID-19 vaccine requirement. Compl. ¶¶ 18, 22. Neither of those plaintiffs alleges that he performed duty for which he was not compensated. *Id.* Further, no plaintiff alleges that they submitted religious accommodation requests (RAR) to be exempted from the vaccination requirement.

Plaintiffs claim their discharges and lack of opportunities to perform duties violated the NDAA (*see id.* ¶¶ 182-206)), 10 U.S.C. § 1107a (*see id.* ¶¶ 207-35), and RFRA (*see id.* ¶¶ 236-50), thereby entitling them to monetary relief under the Tucker Act and the Military Pay Act, 37

[2] As referenced in plaintiffs' complaint, there have been dozens of other cases filed in various district courts challenging the now-rescinded DoD vaccination requirement. We are only aware of two other cases in this Court raising such challenges, *Botello v. United States*, No. 23-174, and *Bassen v. United States*, No. 23-211.

U.S.C. §§ 204 and 206.[3] Plaintiffs also allege that the Government illegally exacted money from them, apparently based on the Government's failure to pay them while they were not vaccinated. *Id.* ¶¶ 251-57. Only one plaintiff—Mr. Powers—alleges that the Coast Guard "has sought" to recoup money from him in the form of his reenlistment bonus. *Id.* ¶ 23. Finally, plaintiffs also seek relief under 10 U.S.C. § 1552, asking the Court to order the correction boards "to correct their military records and remove any adverse paperwork resulting from their vaccinated status or failure to comply with the rescinded and/or unlawful DoD Mandate." *Id.* ¶ 260.

STANDARD OF REVIEW

I. Subject-Matter Jurisdiction

Jurisdiction is a threshold matter, and "[w]ithout jurisdiction the court cannot proceed at all in any cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (cleaned up). Under the Constitution, Congress is authorized to define the jurisdiction of the lower federal courts and, once it has done so, limits on that jurisdiction may not be disregarded. *Keene Corp. v. United States*, 508 U.S. 200, 207 (1993).

The jurisdiction of the Court of Federal Claims, like other Federal courts, is set by Congress, *see Aldinger v. Howard*, 427 U.S. 1, 15 (1976) ("federal courts, as opposed to state trial courts of general jurisdiction, are courts of limited jurisdiction marked out by Congress"), and is limited to claims where the United States has expressly waived its sovereign immunity from suit. *United States v. Testan*, 424 U.S. 392, 399 (1976); *Booth v. United States*, 990 F.2d

[3] The Military Pay Act provides members of the uniformed services with entitlement to pay, specifically when the member: "(1) was on active duty, 37 U.S.C. § 204(a)(1) (1988); (2) was a reservist who actually performed full-time duties, *id.* § 204(a)(2); (3) was a reservist on inactive status who actually performed duties, 37 U.S.C. § 206(a)(1)-(2); or (4) was a reservist on inactive status who would have performed duties but for disability, disease, or illness, 37 U.S.C. § 206(a)(3)." *Huber v. United States*, 29 Fed. Cl. 260, 263 (1993).

617, 619 (Fed. Cir. 1993). The waiver of sovereign immunity, and hence the consent to be sued, must be expressed unequivocally and cannot be implied. *Testan*, 424 U.S. at 399. In this Court, consent to suit is generally based upon the Tucker Act, 28 U.S.C. § 1491. *Id.* at 397. Pursuant to this statute, the United States waives sovereign immunity only for "claim[s] against the United States" that are "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1).

"Not every claim invoking the Constitution [or] a federal statute . . . is cognizable under the Tucker Act. The claim must be one for money damages against the United States." *United States v. Mitchell*, 463 U.S. 206, 216 (1983). To determine whether a claim is for money damages, the Court must inquire whether the substantive law on which it is based "can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained," *id.* at 218, and is "reasonably amenable to the reading that it mandates a right of recovery in damage," *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 473 (2003). Unless the plaintiff has made a nonfrivolous assertion that he is entitled to recover under a money-mandating source, the Court lacks jurisdiction.

Plaintiffs bear the burden of establishing by a preponderance of the evidence that the Court possesses subject-matter jurisdiction over their claims. *Reynolds v. Army and Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988); RCFC 12(b)(1); *Visconi v. United States*, 98 Fed. Cl. 589, 590 (2011). "In rendering a decision on a motion to dismiss for lack of subject matter jurisdiction pursuant to RCFC 12(b)(1), this court must presume all undisputed factual allegations to be true and must construe all reasonable inferences in favor of the plaintiff." *Doe v. United States*, 106 Fed. Cl. 118, 122 (2012). "If a motion to dismiss for lack of subject-matter

jurisdiction challenges the truth of the jurisdictional facts alleged, the Court may consider relevant evidence outside the complaint when resolving the dispute." *Allen v. United States*, No. 09-33304, 2023 WL 3737120, at *5 (Fed. Cl. May 31, 2023) (citing *Reynolds*, 846 F.2d at 474).

II. Failure to State a Claim Upon Which Relief Can Be Granted

A motion to dismiss pursuant to RCFC 12(b)(6) should be granted if the facts asserted in the complaint do not entitle the plaintiff to a legal remedy. *Lindsay v. United States*, 295 F.3d 1252, 1257 (Fed. Cir. 2002). The complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." RCFC 8(a)(2). The factual allegations need to "raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In ruling on a motion to dismiss, the Court is "obligated to assume all factual allegations to be true and to draw all reasonable inferences in plaintiff's favor." *Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995). However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" and the court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (cleaned up). "A motion to dismiss under [former] Rule 12(b)(4) for failure to state a claim upon which relief can be granted is appropriate when the facts asserted by the claimant do not under the law entitle him to a remedy." *Perez v. United States*, 156 F.3d 1366, 1370 (Fed. Cir. 1998) (citing *New Valley Corp. v. United States*, 119 F.3d 1576, 1579 (Fed. Cir. 1997)).

ARGUMENT

Plaintiffs raise five claims in this Court, all of which should be dismissed for lack of jurisdiction or failure to state a claim. First, plaintiffs allege that they are entitled to backpay under the NDAA. However, the NDAA is not a money-mandating statute and thus plaintiffs'

request is beyond the Court's jurisdiction. Even if the NDAA were money-mandating, plaintiffs' claim would still fail because the NDAA, by its terms, is not applicable to the Coast Guard and in any event does not provide retroactive relief.

Second, plaintiffs allege a violation of the Military Pay Act, 37 U.S.C. §§ 204 and 206, as a result of their alleged wrongful discharges or wrongful separations from the Coast Guard Reserve in violation of the NDAA, 10 U.S.C. § 1107a, and RFRA, 42 U.S.C. § 2000bb. Once again, the NDAA provides no basis for relief. Further, plaintiffs lack standing to bring a claim under 10 U.S.C. § 1107a and cannot state a claim under RFRA because no plaintiffs allege that they sought a religious accommodation.

Moreover, two of the seven plaintiffs—Ms. Gagnon and Mr. Morrissey—do not allege that they performed any duty for which they were not compensated, and thus fail to state a claim for monetary entitlement under the Military Pay Act. Accordingly, their claims under Counts II and III should be dismissed for this independent reason.

Third, plaintiffs allege that the Government illegally exacted money from them through "recoupment of separations pay, special pays, (re)enlistment bonus payments, post-9/11 GI Bill benefits, costs of training and tuition at military schools or academies and public and private universities, and travel and permanent change of station allowances." Compl. ¶ 255. However, only one plaintiff—Mr. Powers—alleges that the Government "sought" recoupment. He does not allege that any recoupment actually occurred and provides no basis as to why such recoupment, if it did occur, was illegal. Further, as demonstrated in Counts I through III, even if other plaintiffs did allege any recoupment, plaintiffs can show no violation of law to support the claim.

Fourth, plaintiffs allege a violation of 10 U.S.C. § 1552. Because 10 U.S.C. § 1552 is not

money-mandating, and plaintiffs assert no claims upon which the military record correction boards could grant relief in any event, that claim should be dismissed.

I. Plaintiffs' Claims Under Count I Fail Because The FY 2023 NDAA Is Not Money-Mandating, And The Plaintiffs Can Show No Violation Of The Statute

Plaintiffs' claims predicated on the FY 2023 NDAA fail for lack of jurisdiction because that statute is not money-mandating. And even if this Court were to conclude that the FY 2023 NDAA is money-mandating, plaintiffs have not alleged a violation of the statute and thus the count should therefore be dismissed for failure to state a claim.

A. The NDAA Is Not Money-Mandating

Plaintiffs claim for backpay under the NDAA relies on the provision of the NDAA that states that "[n]ot later than 30 days after the date of the enactment of this Act, the Secretary of Defense shall rescind the mandate that members of the Armed Forces be vaccinated against COVID-19 pursuant to the memorandum dated August 24, 2021, regarding 'Mandatory Coronavirus Disease 2019 Vaccination of Department of Defense Service Members.'" NDAA § 525. The Court must look to the plain language of the statute to determine if it can fairly be interpreted as mandating compensation. *New York & Presbyterian Hosp. v. United States*, 881 F.3d 877, 882 (Fed. Cir. 2018).

The language of section 525 is not money-mandating for two reasons. First, given that DoD's vaccination policy did not apply to members of the Coast Guard, *see* Compl. ¶ 75 ("The Coast Guard is not subject to . . . the express terms of DoD Secretary Austin's August 24, 2021 Mandate Memo."), section 525 of the NDAA likewise did not apply to the Coast Guard. *Id.* ("The Coast Guard is not subject to Congress' rescission directive in Section 525"). As such, even if section 525 were otherwise money-mandating, plaintiffs have not made a "nonfrivolous allegation that [they are] within the class of plaintiffs entitled to recover under" the statute. *Jan's*

Helicopter Service, Inc. v. FAA, 525 F.3d 1299, 1309 (Fed. Cir. 2008).

Second, nothing in the language of section 525 can be interpreted as mandating compensation for service members that were affected by DOD's vaccination requirement and the NDAA's repeal of that requirement, retrospectively or prospectively. Indeed, the language of the NDAA does not contemplate, much less mandate, any compensatory rights for such service members.

Plaintiffs' claim that the NDAA is money-mandating appears to be based on their view that it retroactively voided the vaccination requirement. Compl. ¶¶ 185–90. Even if that were correct, which it is not (*see infra* section I.B), the NDAA would still not be money-mandating. Plaintiffs argue that "Congress chose" the term "rescind" "to restore Plaintiffs . . . to the position in which they would have been in." *Id.* ¶ 188. But this language by itself does not mandate monetary compensation or any other particular relief.

Moreover, where, as here, there are "strong indications that Congress did not intend to mandate money damages," the Court should not find that a statute is money mandating absent an express damages provision. *White Mountain Apache Tribe*, 537 U.S. at 478. On December 8, 2022, the House voted to pass the NDAA, which included the provision stating that "the Secretary of Defense shall rescind the mandate that members of the Armed Forces be vaccinated against COVID-19." NDAA, § 525; *see* https://www.congress.gov/bill/117th-congress/house-resolution/1512/text. On December 15, 2022, even though the NDAA already included the word "rescind," Senator Ron Johnson unsuccessfully proposed an amendment to require the military to reinstate and provide backpay to members who were discharged "solely on the refusal of such member to receive a vaccine for COVID-19," in order "to compensate [members who received adverse action] for any pay and benefits lost as a result of such punishment." S. Amdt. 6526 to

H.R. 7776, https://www.congress.gov/amendment/117th-congress/senate-amendment/6526/text. Senator Johnson explained that NDAA section 525—with the word "rescind"—did not go "far enough," and an amendment was needed that "allows the servicemember to be reinstated with backpay if kicked out of the military solely for refusing the vaccine" and to "redress[] any other types of adverse actions the DOD took against a servicemember for refusing the COVID-19 vaccine." Sen. Rec. Col. 168, Issue 195, page S7233. https://www.congress.gov/117/crec/2022/12/15/168/195/CREC-2022-12-15-pt1-PgS7226.pdf. Such an amendment would have been unnecessary if the word "rescind" already required the military to provide the monetary relief the plaintiffs seek. Senator Reed, who spoke in opposition to the proposed amendment, likewise did not understand the word "rescind" to require the remedies Plaintiffs seek. Sen. Rec. Col. 168, Issue 195, page S7233–34 (noting that additional legislation would be needed to "restore [the] benefits" of unvaccinated service members). The Senate ultimately rejected the amendment by a vote of 40 to 54. https://www.congress.gov/amendment/117th-congress/senate-amendment/6526/actions.

Further, a month after the President signed the NDAA, 19 senators introduced the Allowing Military Exemptions, Recognizing Individual Concerns About New Shows (AMERICANS) Act of 2023. Jan. 24, 2023, Sen. Cruz Press Release https://perma.cc/49PR-SQ9Y. Senator Cruz stated that the proposed AMERICANS Act "builds off of the [NDAA]" and "includes measures not incorporated into the NDAA, including a requirement that the Secretary of Defense offer reinstatement to service members who were fired over the military's COVID-19 vaccine mandate." *Id*. Representative Dan Bishop, who offered a companion bill in the House, explained that "last year's NDAA . . . didn't provide any meaningful remedies for servicemembers who were kicked out due to the mandate." *Id.* These statements reflect a

collective understanding that the NDAA did not provide the remedies sought by plaintiffs in this case.

Based on this history, the Court has strong indications that Congress did not intend the NDAA to provide monetary compensation to service members for either past or future losses. Thus, because the statute does not contain an express damages provision, and certainly not one that protects the plaintiffs in this case, the Court should find that it is not money-mandating and dismiss Count II for lack of jurisdiction. *See White Mountain*, 537 U.S. at 478.

B. The NDAA Does Not Provide Retroactive Relief

Even if the NDAA applied to the Coast Guard and was money mandating – and the Court therefore possessed jurisdiction over plaintiffs' claim – plaintiffs cannot state a claim for relief under the NDAA because it does did not direct the Secretary of Defense to rescind DoD's vaccine requirement retroactively.

Plaintiffs argue that the services violated the NDAA by failing to provide backpay following Congress's instruction to rescind the vaccination requirement. Compl. ¶ 204. Plaintiffs plead they were all denied pay prior to the passage of the NDAA on December 23, 2022. *See id.* ¶¶ 17–23. In other words, plaintiffs argue that all the harm they suffered is a consequence of the vaccination requirement in place between August 24, 2021 and the passage of the NDAA. Accordingly, in order to state a claim for violation of the NDAA, plaintiffs must establish that the NDAA rendered DoD's vaccine mandate void from the moment it was adopted.

Plaintiffs' entire theory of retroactivity hinges on their interpretation of Congress's intent behind its direction to the Secretary of Defense to "rescind" the Department's vaccine requirement. Citing the Sixth Edition of Black's Law Dictionary, plaintiffs contend that rescind "means 'an annulling; avoiding, or making void; abrogation; rescission . . .'" and "Congress

chose this term to direct the Defendant Agencies and the courts to apply the rescission with full retroactive effect to restore Plaintiffs and other similarly situated Coast Guard members to the position in which they would have been in the absence of the unlawful Mandate." *Id.* ¶¶ 187–88. Plaintiffs are wrong.

This Court should not determine that Congress intended this statute to have retroactive effect unless Congress made such an intent express. Plaintiffs must overcome the strong "presumption against retroactivity," which "the Supreme Court has made clear '[] is not favored in the law.'" *BP America Production Co. v. United States*, 148 Fed. Cl. 185, 195 (2020) (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)). The Court of Appeals for the Federal Circuit has held that it "will construe a statute to avoid retroactivity unless there is clear evidence that Congress intended otherwise." *Hicks v. Merit Sys. Prot. Bd.*, 819 F.3d 1318, 1321 (Fed. Cir. 2016). "The principle that legislation usually applies only prospectively 'is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic.'" *Opati v. Republic of Sudan*, 140 S. Ct. 1601, 1607 (2020) (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994)). Under "the principle against retroactive legislation, . . . courts read laws as prospective in application unless Congress has unambiguously instructed retroactivity." *Vartelas v. Holder*, 566 U.S. 257, 266 (2012) (citing *Landgraf*, 511 U.S. at 263); *Landgraf*, 511 U.S. at 272–73 (stating that courts presume a statute is not retroactive unless Congress provides "clear intent" otherwise). Congress has codified the presumption that laws only apply in the future and do not apply retroactively "to release or extinguish any" previously imposed consequence "unless the repealing Act shall so expressly provide." 1 U.S.C. § 109.

In short, there is abundant authority that this Court should only apply a statute

retroactively where the congressional intent to do so is clear. Here, absent express congressional intent, this Court should not presume that the NDAA authorizes retroactive relief to those affected by the mandate while it was in effect.

Plaintiffs cannot meet this heavy burden merely by pointing to the NDAA's use of the term "rescind." The current version of Black's Law Dictionary defines "rescind" when used in the phrase to "rescind the legislation" as to "make void; to repeal or annul." RESCIND, Black's Law Dictionary (11th ed. 2019). Merriam-Webster defines "rescind" as "to take away," to "remove," to "take back," to "cancel," or "to make void." RESCIND, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/rescind. As these definitions reflect, the most natural understanding of this term as used in the NDAA is that Congress intended the Secretary to repeal or void the vaccine mandate prospectively. Nothing in Congress' use of the term "rescind," without more, supports a conclusion that the repeal of the mandate was intended to apply retroactively.

Plaintiffs attempt to support their retroactivity argument by pointing to how the related term "rescission" is sometimes used in contract law. Compl. ¶ 59 ("in the context of *rescission* of a contract").[4] But even in contract law, the "term 'rescission' is often used by lawyers, courts, and businessmen in many different senses." RESCISSION, Black's Law Dictionary (11th ed. 2019). In some cases, "rescission" means "an agreement by contracting parties to discharge all remaining duties of performance and terminate the contract." *Id.* In other situations, however, "rescission" means "unilaterally unmaking of a contract for legally sufficient reasons, such as the

[4] Plaintiffs' citation to Black's Law Dictionary (6th ed. 1990) is incomplete. Compl. ¶ 59. The Sixth Edition does not independently define the word "rescind." Plaintiffs instead cite to the definition for "Rescission of contract" but never identified the full legal phrase they were defining or reveal that they were citing to that contract-law-specific definition. RESCISSION OF CONTRACT, BLACK'S LAW DICTIONARY (6th ed. 1990).

other party's material breach, or a judgment rescinding the contract." *Id.* And "rescission" can also refer to "a remedy or defense for a nondefaulting party and is accompanied by restitution of any partial performance, thus restoring the parties to their precontractual positions." *Id.* Plaintiffs appear to rely on this last definition of "rescission"—a remedy for a non-defaulting party to seek restitution for partial performance. Compl. ¶ 59. However, plaintiffs are not non-breaching parties who have elected restitution for a material breach of a mutually agreed upon contractual arrangement. In any event, Congress used the term "rescind" in the NDAA – not the distinct and more technical term "rescission" – and the plain and usual meaning of rescind when applied to legislation or a rule is that the legal provision no longer has prospective force.

The legislative history of the NDAA supports this plain reading of the statute. As explained above, the Senate's consideration—and subsequent rejection—of Amendment 6526 to the NDAA and subsequent consideration of the AMERICANS Act strongly indicate that Congress did not intend to make the NDAA a vehicle for retroactive money damages or any other retroactive relief against the United States.

In sum, plaintiffs have failed to overcome the strong presumption that laws be read as prospective in application, particularly given the NDAA's applicable legislative history. Thus, plaintiffs have failed to establish that the NDAA required retroactive rescission of DoD's vaccination requirement, and Count II should also be dismissed for failure to state a claim.

II. Plaintiffs' Claims Under Count II Fail Because Plaintiffs Lack Standing And Otherwise Fail To State A Claim

Under Count II, plaintiffs allege that they were wrongfully denied pay under the Military Pay Act because the vaccination requirement violated the NDAA and 10 U.S.C. § 1107a. Compl. ¶¶ 210-12.

As an initial matter, plaintiffs' claim that they were wrongfully denied military pay based

on a violation of the NDAA fails for the reasons noted above. The NDAA did not apply to the Coast Guard or require any retroactive action and thus did not entitle plaintiffs to any backpay.

Further, plaintiffs lack standing to pursue their claims based on 10 U.S.C. § 1107a and also fail to state a claim for a violation of this provision.[5] Section 1107a, which sets forth certain conditions for emergency use products, provides that the President may waive a service member's right to refuse a product authorized for emergency use "if the President determines, in writing, that complying with such requirement is not in the interests of national security." 10 U.S.C. § 1107a.

Plaintiffs argue that DoD and the Coast Guard "mandated unlicensed [Emergency Use Authorization (EUA)] COVID-19 vaccines," and that section 1107a prohibits the military from mandating any service member to take an unlicensed EUA vaccine absent an express Presidential authorization. Compl. ¶¶ 213, 218. Their theory is that "DoD did not have any FDA-licensed COVID-19 vaccines" when the vaccination requirement was instituted, and thus the only way that they could receive a vaccination is by receiving an unlicensed EUA vaccine. *Id.* ¶¶ 124-25.

Under the facts pled, plaintiffs lack standing to pursue this claim. In order to invoke this Court's jurisdiction, a plaintiff must establish standing under Article III of the Constitution. *Media Techs. Licensing, LLC v. Upper Deck Co.*, 334 F.3d 1366, 1370 (Fed. Cir. 2003). To demonstrate standing, a plaintiff must satisfy three elements. *Paradise Creations, Inc. v. UV Sales, Inc.*, 315 F.3d 1304, 1308 (Fed. Cir. 2003). First, "the plaintiff must allege that it has suffered an 'injury in fact—an invasion of a legally protected interest." *Id.* Second, "there must

[5] As discussed below, two plaintiffs also fail to state a claim under the Military Pay Act because they do not allege that they performed duty for which they were not paid. *See infra* Section IV.

be a causal connection between the injury and the conduct complained of." *Id.* Third, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.*

Here, based on the facts pled, plaintiffs cannot establish a causal connection between their alleged injuries and the conduct complained of. Even accepting as true plaintiffs' allegation that DoD and the Coast Guard only had unlicensed EUA vaccines available, nothing in the mandate required that plaintiffs receive those unlicensed vaccines. To the contrary, DoD's vaccination requirement stated that service members were required to receive only "COVID-19 vaccines that receive full licensure . . . in accordance with FDA-approved labeling and guidance," ECF No. 1-2 at 1, and permitted service members to obtain a fully licensed vaccine from a commercially available source. Likewise, the Coast Guard's vaccination requirement stated that member "are required to receive the Pfizer-BioNTech COVID-19 vaccine," which "was granted license . . . on 23 Aug 2021." ECF No. 1-3 at 2. The requirement expressly allowed service members to meet the requirement through non-Coast Guard or DoD sources. *Id.* Critically, plaintiffs do not allege that they were prevented by the Government from receiving a fully licensed vaccine from such a commercial source. As a result, plaintiffs cannot show that their denial of pay was causally connected to the conduct complained of – that DoD only possessed unlicensed vaccines. Instead, plaintiffs' own actions demonstrate that they elected not to receive a COVID-19 vaccine despite the option to receive it from a fully licensed source, and thus their alleged failure to receive backpay was not caused by any asserted violation of 10 U.S.C. § 1107a.

Moreover, plaintiffs' own allegations defeat their claims. Plaintiffs allege that licensed vaccine became available in June 2022. Compl. ¶ 138. The earliest any plaintiff alleges to have

suffered any adverse action was August 2022. *Id.* ¶ 18. Plaintiffs offer no explanation as to why, in June 2022 when they allege fully licensed vaccines became available, they did not receive the vaccines. Accordingly, plaintiffs suffered no adverse action as a result of any alleged violation of 10 U.S.C. § 1107a, but instead as a result of their own decision to remain unvaccinated.

For similar reasons, plaintiffs also fail to state a claim that the vaccination requirement violated 10 U.S.C. § 1107a. As noted, neither DoD's nor the Coast Guard's now-rescinded vaccination policy required a vaccine authorized only for emergency use. Accordingly, those policies did not implicate, let alone violate, section 1107a. The policy was clear: service members were required to receive only "the Pfizer-BioNTech COVID-19 vaccine" that "was granted license by the Food and Drug Administration." ECF No. 1-2 at 2; *see also* ECF No. 1-2 at 2 ("Mandatory vaccination against COVID-19 will only use COVID-19 vaccines that receive full licensure . . . in accordance with FDA-approved labeling and guidance."). Plaintiffs do not and cannot dispute that the requirement was limited to COVID-19 vaccines that received full licensure.

Plaintiffs try to muddy the waters by alleging what type of vaccine doses DoD and the Coast Guard had and when. But those allegations fail to establish that plaintiffs were required to use unlicensed vaccines. Given that the vaccination requirement did not limit plaintiffs or any service members to taking only vaccines in DoD's possession, service members were permitted to obtain commercially available and fully licensed vaccine doses of their choice (which many service members did) to satisfy the requirement. Accordingly, even if DoD only had unlicensed vaccines available, as plaintiffs allege, neither DoD's nor the Coast Guard's policy violated 10 U.S.C. § 1107a because the policies did not require unlicensed vaccines to be taken. Thus,

plaintiffs have not stated a claim for relief under 10 U.S.C. § 1107a.

III. Plaintiffs' Claims Under Count III Fail Because Plaintiffs Fail To State A Claim

Under Count III, plaintiffs again allege that they were wrongfully denied military pay under the Military Pay Act, this time based on a violation of RFRA, 42 U.S.C. § 2000bb. Compl. ¶¶ 236-50. Like their claims under Count II, plaintiffs fail to state a claim for a violation of RFRA.[6]

Plaintiffs allege that the services violated RFRA by "systematically denying" religious accommodation requests (RARs). *Id.* ¶ 243. However, no plaintiff alleges that they submitted an RAR or had an RAR denied. *Id.* ¶¶ 17-23. Accordingly, plaintiffs fail to state a claim for a violation of RFRA.[7]

Coast Guard Commandant Instruction (COMDTINST) 1000.15, "Military Religious Accommodations," allows members to submit an RAR to request that they be exempted from certain policies, practices, or duties on religious grounds. COMDTINST 1000.15; *see also* Compl. ¶ 243. In order to state a claim for a RFRA violation, plaintiffs must allege that the challenged policy substantially burdened their sincerely held religious belief. 42 U.S.C. § 2000bb-1; *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 694–95 (2014). Plaintiffs, who

[6] To the extent that plaintiffs ask this Court to read their claims in Count IV as stand-alone RFRA claims unrelated to the Military Pay Act, such claims would also fall outside this Court's jurisdiction because RFRA "does not provide a damages remedy or waive the government's sovereign immunity with respect to a claim for damages." *Klingenschmitt v. United States*, 119 Fed. Cl. 163, 184-85 (2014).

[7] Even setting aside that no plaintiff alleges to have submitted an RAR, they make only conclusory allegations that the vaccination requirement violated RFRA, which is insufficient to state a claim. *See Twombly,* 550 U. S. at 555 (a pleading must do more than just offer "a formulaic recitation of the elements of a cause of action"). Indeed, they do not allege any facts suggesting they harbored any sincerely held religious belief that was unduly burdened by the vaccine requirement as required under the RFRA standard.

do not allege they submitted RARs, fail to allege facts showing the vaccination requirement burdened any sincerely held religious belief when they did not attempt to obtain an accommodation and pleaded no basis on which it would have burdened them to seek an accommodation. Indeed, because the basis of their claims is that the services wrongfully denied their RARs, the facts asserted do not entitle them to any relief. *Perez*, 156 F.3d at 1370.

Moreover, plaintiffs, who voluntarily chose not to avail themselves of the RAR process, fail to state a claim because they requested or assented to the consequences from which they now seek relief. It is well-settled that voluntary separation actions are not the basis for viable claims for relief in this Court. *See Metz v. United States*, 466 F.3d 991, 1000 (Fed. Cir. 2006); *Tippett v. United States*, 185 F.3d 1250, 1255 (Fed. Cir. 1999) (applying the rule to a servicemember's request for discharge); *Thomas v. United States*, 42 Fed. Cl. 449, 452 (1998) ("[C]laims for post-retirement relief following a voluntary retirement must be denied for failure to state a claim upon which any court can grant relief."). When assessing the voluntariness of a servicemember's discharge, this Court applies an objective standard based on all the facts and circumstances; the individual's subjective perception is not controlling. As this Court has held,

> [e]xternal events and conditions, rather than subjective impressions or perceptions, must guide the court's focused inquiry. Involuntariness, therefore, is not determined by the fact that an individual subjectively perceived no choice in deciding to retire earlier when, in fact, he truly had an option. Rather, what is determinative as to voluntariness is whether such individual did in fact have a choice, notwithstanding the undesirability of the alternatives available.

Longhofer v. United States, 29 Fed. Cl. 595, 601 (1993). Applying this standard in the context of a claim of duress or coercion, a plaintiff "must demonstrate that: (1) he involuntarily accepted the terms of the government; (2) circumstances permitted no other alternative; and (3) said circumstances were the result of the government's coercive acts." *Carmichael v. United States*,

298 F.3d 1367, 1372 (Fed. Cir. 2002). None of the requirements for overcoming a presumption of voluntariness is met in this pleading. Plaintiffs plead no facts suggesting they were coerced into not filing accommodation requests or that they did not understand the effect on their full-time orders and ability to drill if they remained unvaccinated without filing an accommodation request.

When plaintiffs declined to seek an accommodation, they did so with the clear understanding that they were effectively asking their respective services to take administrative actions against them despite the availability of alternative relief. They therefore *voluntarily* accepted the consequences of remaining unvaccinated, which extended to travel restrictions, removal from full-time orders, and exclusion from attending their unit's drills and earning pay and points, among others. They do not allege that they took any steps to avoid the consequences of which they now complain, even though there were alternatives available for those who harbored religious objections to the vaccine mandate. At bottom, plaintiffs cannot complain of a RFRA violation in this Court after failing to allege that they availed themselves of the opportunities to assert such a violation before their respective services.

For these reasons, plaintiffs' claims in Count III should be dismissed for failure to state a claim.

IV. Two Plaintiffs Are Not Entitled To Any Relief Under The Military Pay Act Regardless Of Any Alleged Violations Of 10 U.S.C. § 1107a Or RFRA And Fail To State A Claim Under Counts II And III

In their complaint, plaintiffs allege that they are entitled to "back pay and other ancillary relief" after they were allegedly wrongfully denied pay for failing to comply with DoD's and the Coast Guard's COVID-19 vaccination requirements. Compl. ¶ 1. As explained above, plaintiffs claim in Count I that they are entitled to compensation under

the NDAA fails due to the lack of jurisdiction because the NDAA is not money mandating and due to plaintiffs' failure to state a claim. Under Counts II and III, plaintiffs allege that they were improperly denied pay under the Military Pay Act based on violations of the NDAA, 10 U.S.C. § 1107a, and RFRA. As shown above, those claims fail because, although the Military Pay Act is money mandating, plaintiffs have failed to show that any of the latter statutes were violated. *See supra* Section I.B, Section II, Section III.

In addition to the reasons stated above, Counts II and III should be dismissed for two plaintiffs—Ms. Gagnon and Mr. Morrissey—because they also fail to state a claim that they are entitled to relief under the Military Pay Act. The Federal Circuit construes the Military Pay Act to mandate the payment of money in only four circumstances: where a plaintiff "(1) was on active duty, 37 U.S.C. § 204(a)(1) (1988); (2) was a reservist who actually performed full-time duties, *id.* § 204(a)(2); (3) was a reservist on inactive status who actually performed duties, 37 U.S.C. § 206(a)(1)-(2); or (4) was a reservist on inactive status who would have performed duties but for disability, disease, or illness, 37 U.S.C. § 206(a)(3)." *Huber*, 29 Fed. Cl. at 263. Ms. Gagnon's and Mr. Morrissey's claims under Counts II and III fail even if they could otherwise plead a violation of the NDAA, 10 U.S.C. § 1107a, or RFRA, because they do not allege they performed duties for which they were not compensated.

Ms. Gagnon and Mr. Morrissey served in the Coast Guard Reserve. Compl. ¶¶ 18, 22. Neither plaintiff alleges that they were not paid for any duty they actually performed. *See id.* Instead, Ms. Gagnon alleges that she served the term of her contract and requested that her contract be extended. *Id.* ¶ 18. Mr. Morrissey alleges that he

served on active-duty orders until July 7, 2021, when the term of those orders was completed. *Id.* ¶ 22. Neither plaintiff alleges that they were on active status and denied pay or performed duties for which they were not paid. To be sure, they allege that they would have performed duties but for their vaccination status. *Id.* ¶¶ 18, 22. But a reservist cannot state a claim for backpay for unperformed duties "even where the lack of performance was involuntary and improperly imposed." *Reilly v. United States*, 93 Fed. Cl. 643, 649 (2010); *Radziewicz v. United States*, No. 22-90, 2023 WL 4717581, at *4 (Fed. Cl. Jul. 25, 2023) ("[R]eservists on inactive status cannot receive backpay for any duties that they did not actually perform."); *Palmer v. United States*, 168 F.3d 1310, 1314 (Fed. Cir. 1999) ("[A] member who is serving in part-time reserve duty in a pay billet, or was wrongfully removed from one, has no lawful pay claim against the United States for unattended drills or for unperformed training duty."); *Riser v. United States*, 97 Fed. Cl. 679, 683 (2011) (applying the rules of § 206(a) "even when a reservist alleges that the military has acted unlawfully and thereby wrongfully prevented his performance of such duties"); *Reeves v. United States*, 49 Fed. Cl. 560, 561 (2001) (reservist failed to state a claim under § 206(a) for retroactive backpay where he alleged that but-for the Army's wrongful failure to consider him for promotion, he was improperly denied pay at a higher grade).

Accordingly, even if Ms. Gagnon and Mr. Morrissey could allege violations of the NDAA, 10 U.S.C. § 1107a, or RFRA, those claims would still have to be dismissed because they have no entitlement to pay under the Military Pay Act.

V. Plaintiffs' Claims Under Count IV Fail Because Plaintiffs Do Not Allege Any Money Was Illegally Exacted From Them

Under Count IV, plaintiffs claim that the Government "punished" plaintiffs "through the

illegal exaction and recoupment of separations pay, special pays, (re)enlistment bonus payments, post-9/11 GI Bill benefits, costs of training and tuition at military schools or academies and public and private universities, [and] travel and permanent change of station allowances." Compl. ¶ 255. Plaintiffs' illegal exaction claim should be dismissed for lack of jurisdiction and failure to state a claim because they fail to allege that six of seven plaintiffs actually experienced such exaction or recoupment, and that any suffered an illegal exactment.

"[A]n illegal exaction occurs . . . when the 'plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part of that sum' that was 'improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation.'" *Virgin Islands Port Authority v. United States*, 922 F.3d 1328, 1333 (Fed. Cir. 2019) (quoting *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1007 (Ct. Cl. 1967)). "[T]o establish Tucker Act jurisdiction for an illegal exaction claim, a party that has paid money over to the government and seeks its return must make a non-frivolous allegation that the government, in obtaining the money, has violated the Constitution, a statute, or a regulation." *Boeing Company v. United States,* 968 F.3d 1371, 1383 (Fed. Cir. 2020). Where no violation of law is identified, there is no illegal exaction claim. *E.g., Virgin Islands,* 922 F.3d at 1333-1334 (holding that agency acted within its legal authority).

Here, the only allegation that the Government took money from any plaintiff comes from Mr. Powers, who alleges that the Coast Guard "has sought recoupment of [his] $13,000 reenlistment bonus." Compl. ¶ 23.

This single allegation does not state a claim for illegal exaction for two reasons. First, given that Mr. Powers asserts that the Coast Guard "has sought recoupment," it is not clear that

he has actually paid any money to the Government.[8] Second, in any event, Mr. Powers does not identify any violation of law that would render any such recoupment illegal. When a service member receives a bonus that is subject to certain eligibility requirements, the member "shall repay to the United States an amount equal to the unearned portion of the bonus or similar benefit if the member fails to satisfy the eligibility requirements." 37 U.S.C.§ 303a(e). Mr. Powers makes no allegations concerning his eligibility for his bonus and thus fails to state a claim that the alleged recoupment of that bonus is illegal.

The complaint includes no other allegations that the Government took money from any plaintiffs that they seek to have returned. *See* Compl. ¶¶ 17–23. The complaint lists a variety of pecuniary benefits that plaintiffs speculate *could be* recouped by the Government and might form the basis of an illegal exaction claim, but no plaintiff alleges that any such exaction occurred. *See* Compl. ¶ 255. Without a payment to the Government that the remaining plaintiffs seek to have returned, this Court also lacks jurisdiction over their illegal exaction claims. *Boeing,* 968 F.3d at 1383 (holding that to establish jurisdiction, a plaintiff must make a non-frivolous claim that the Government obtained money from the plaintiff in violation of the Constitution, a statute, or a regulation).

Further, even if the complaint could be construed to contain allegations that money was taken from each of the plaintiffs, their pleading still fails to state a claim. They argue any such exaction was illegal based on the NDAA's instruction for the vaccine requirement to be

[8] To the extent Mr. Powers might argue he is entitled to injunctive relief to prevent the Government from actually collecting the "sought" recoupment, such a claim for nonmonetary relief would be beyond the Court's jurisdiction. *Reilly*, 93 Fed. Cl. at 650. In the military pay context, the Court may only award non-monetary relief that "is tied and subordinate to a money judgment." *Id.* (citations omitted). Because Mr. Powers is not entitled to a money judgment on his illegal exaction claim, any request for nonmonetary relief on that claim must be rejected.

rescinded. As we have explained, however, plaintiffs have failed to allege a violation of the NDAA. *See supra* Section I.B. Accordingly, plaintiffs fail to state a claim that any money was illegally exacted, and their claims under Count IV should be dismissed.

VI. Plaintiffs' Claims Under Count V Fail Because 10 U.S.C. § 1552 Is Not Money-Mandating And Plaintiffs Have Not Otherwise Pled A Claim Entitling Them To Relief From The Correction Boards

Under Count V, plaintiffs invoke 10 U.S.C. § 1552 for correction of their military records and removal of any adverse actions from their records. Compl. ¶¶ 258-61. However, this statute does not provide the Court with jurisdiction because it is not money-mandating. *Martinez v. United States*, 333 F.3d 1295, 1315 (Fed. Cir. 2003) ("section 1552 is not the 'money-mandating' statute that gives rise to the cause of action that provides the basis for a Tucker Act suit in the Court of Federal Claims"); *see also Visconi v. United States*, 98 Fed. Cl. 589 (2011), *aff'd*, 455 F. App'x 986 (Fed. Cir. 2012). Neither does it provide them with any cause of action for which plaintiffs could recover damages under the Tucker Act. Accordingly, to the extent plaintiffs attempt to assert stand-alone claims under section 1552, those claims should be dismissed as beyond this Court's jurisdiction.

Moreover, plaintiffs "seek an order from the Court directing the appropriate BCMR to correct their military records and remove any adverse paperwork resulting from their unvaccinated status or failure to comply" with the vaccination requirement. Compl. ¶ 260. "Although the court has jurisdiction to order the correction of military records, it may only do so as 'incident of and collateral to [an] award of a money judgment.'" *Visconi*, 98 Fed. Cl. at 595 (quoting *Voge v. United States*, 844 F.2d 776, 781 (Fed. Cir. 1988)). Plaintiffs ask the Court to direct the correction of military records beyond a correction incident to a money judgment, which is beyond the Court's jurisdiction. Essentially, plaintiffs' fifth claim asks the Court to do

what plaintiffs are free to do on their own: direct their requests for records correction to their respective service boards.

Finally, to the extent that plaintiffs are merely asking the Court to direct the correction boards to correct their records to reflect their entitlement to backpay based on the other claims in their complaint, we have shown why each of those claims fail. Thus, this claim, too, should be dismissed.

CONCLUSION

For these reasons, we respectfully request that the Court dismiss this case for lack of subject-matter jurisdiction and for failure to state a claim upon which relief may be granted.

Respectfully submitted,

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Dated: October 30, 2023

Attorneys for Defendant

APPENDIX

TABLE OF CONTENTS

R 072247Z SEP 21
FM COMDT COGARD WASHINGTON DC
TO ALCOAST
BT
UNCLAS
ALCOAST 315/21
SSIC 6230
SUBJ: COVID-19: MANDATING COVID-19 VACCINATION FOR
MILITARY MEMBERS: UPDATE 1
A. COMDT COGARD WASHINGTON DC 262212Z AUG 21/ALCOAST 305/21
B. Coast Guard Medical Manual, COMDTINST M6000.1 (series)
C. Military Religious Accommodation, COMDTINST 1000.15 (series)
D. Immunization and Chemoprophylaxis for the Prevention of
Infectious Diseases, COMDTINST M6230.4 (series)
1. The Coast Guard has been and continues to focus on mission
and personnel readiness amid the ongoing COVID-19 pandemic.
COVID-19 has negatively impacted both for over 18 months. Data and
modeling also indicate that available vaccines are effective
against severe illness and mortality caused by COVID-19. A fully
vaccinated military force saves lives, protects those we serve
alongside and our loved ones, and ensures our readiness. Commanders,
Commanding Officers, and Officers in Charge shall lead by example,
and act with a sense of urgency to meet this intent as soon as
operations allow, starting immediately.
2. Commanders, Commanding Officers, and Officers in Charge shall
direct unvaccinated active duty and ready reserve members to
initiate the COVID-19 vaccination regimen immediately, and in doing
so shall ensure members are scheduled and made available to receive
the vaccine. Active duty and ready reserve members without approved
exemptions shall get fully vaccinated against COVID-19. Counseling
of unvaccinated members on this requirement, the timeline for
vaccination, and the process to request medical exemption or
religious accommodation shall be documented through Administrative
Remarks Form, CG-3307. Commanders, Commanding Officers and Officers
in Charge shall only use the template provided. The standard
administrative remarks template for this counseling is available at
the COVID Community of Practice Portal Page:
(Copy and Paste URL Below into Browser)

https://cg.portal.uscg.mil/units/cgcpe2/Pages/HomeCOP.aspx?View=%7
B4724ff56-43ee-4941-beaf-5af3500e88f4%7D

3. Given the need to safeguard the workforce, and maintain
readiness, the Coast Guard will determine additional measures
necessary to mitigate health risks to members of the Service and
our communities posed by those who are not yet vaccinated. These
measures may include additional restrictions on official travel,
liberty, and leave, as well as cancellation of "A" and "C" school
orders. Further guidance regarding these measures will be provided
separately.

4. All members shall be provided any vaccine that has received Food and Drug Administration (FDA) licensure. Currently, the Pfizer-BioNTech COVID-19 vaccine meets this requirement. Members may also choose to receive any COVID-19 vaccine that is fully approved by the FDA, administered under the FDA's Emergency Use Authorization (EUA), or a vaccine on the World Health Organization Emergency Use Listing. Additional quantities of vaccine are being delivered to Coast Guard clinics to accelerate vaccination of the entire workforce and are available for any active duty or ready reserve member. This message does not change the existing authority for Coast Guard clinics to vaccinate Coast Guard civilian employees, contractors, or Coast Guard dependent family members who voluntarily seek vaccination.
5. All military personnel may voluntarily get vaccinated outside of a Coast Guard clinic in accordance with REF (A), but must meet the timeline prescribed by their Commanders, Commanding Officers, and Officers in Charge. Personnel who have TRICARE may receive their vaccination from their Primary Care Provider or from a civilian pharmacy that accepts TRICARE. There is no charge for the vaccine at pharmacies in the Tricare network. A list of CG clinics supporting all units in the CG is available at:
(Copy and Paste URL Below into Browser)

https://www.reserve.uscg.mil/Portals/2/Documents/PDF/HSWL_HRC_list_SELRES%232.pdf?ver=2018-08-17-135417-933

The COVID vaccine is federally funded and may also be available free of charge through state and local health departments.
6. Members shall request and retain the hard copy immunization record from the vaccination clinic site. Those members who get vaccinated outside of a Coast Guard clinic shall provide the following information to their cognizant Coast Guard clinic:
(1) date the vaccine was administered, (2) the vaccine name or code, (3) the manufacturer and lot number, (4) the dose administered, and (5) clinic site. Providing false vaccination information is a violation of Article 107, UCMJ and may also result in administrative and/or disciplinary action.
7. This message constitutes a lawful general order. Failure to comply with any of its provisions is a failure to obey a lawful order punishable under Article 92 of the Uniform Code of Military Justice (UCMJ). It may result in punitive and/or administrative action, including initiation of discharge proceedings.
8. Additional guidance is forthcoming. Updates will provide direction to commands regarding mandatory vaccination documentation and procedures, and additional detail regarding administrative measures for unvaccinated personnel to safeguard the workforce and maintain readiness.
9. POC: S.E. Russell, CVIC Incident Commander, 202-372-2404, COVID19@uscg.mil.
10. RADM K. E. Lunday, Acting Deputy Commandant for Mission Support

(DCMS), sends.
11. Internet release is not authorized.

R 221918Z MAR 23 MID200080828217U
FM COMCOGARD PSC WASHINGTON DC
TO ALCGPSC
BT
UNCLAS
ALCGPSC 044/23
SUBJ: COVID-19 UPDATE: CONDUCT MARKS FOR 2023 ACTIVE DUTY SERVICEWIDE EXAMINATION (SWE) AND MASTER CHIEF ADVANCEMENT PANEL (MCAP)
A. Enlistments, Evaluations, and Advancements, COMDTINST M1000.2 (Series)
1. To continue removing adverse actions from affected members' personnel records, Personnel Service Center (PSC) is working with Commands to correct any Conduct mark awarded to Active Duty members' most recent Enlisted Employee Review (EER) that were based solely on the member's noncompliance with the COVID-19 vaccine mandate. The purpose of this change is to make those members eligible to compete in the 2023 Active Duty SWE and MCAP, assuming they are otherwise eligible.
2. Commands are advised to submit EER change requests to CG PSC EPM by 01 April 2023, requesting that Unsatisfactory (UNSAT) Conduct marks awarded based solely on the member's noncompliance with the COVID-19 vaccine mandate, be upgraded to Satisfactory.
3. Commands may use standard procedures for EER change requests listed in ref (a), or may submit a digitally signed email to HQS-DG-CGPSC-EPM-3-Evaluations@uscg.mil and copy Mr. J. Wess McElroy at James.W.McElroy@uscg.mil (at PPC) with the following information:
(a) The member's name, rate, and employee ID;
(b) The period ending date;
(c) A statement that the conduct mark is being changed IAW this message;
(d) The original conduct mark (Unsatisfactory);
(e) The revised conduct mark (Satisfactory); and
(f) A statement the member has been advised of the change
4. Guidance on changing marks in additional EERs or additional EER categories that were related to member's noncompliance with the COVID-19 vaccine mandate will be issued SEPCOR.
5. Points of Contact:
A. EPM-3: CWO Jessica Olmeda at Jessica.A.Olmeda@uscg.mil, 202-795-6561.
B. EPM-3: YNCS Matthew Sharp at Matthew.S.Sharp@uscg.mil, 202-795-6623.
6.Released by: RDML D. C. Barata Commander, Personnel Service Center.
7.Internet release not authorized.
BT

121319Z APR 23 MID200080889797U
ALCGPSC 058/23
SUBJ: COVID 19 UPDATE: MILITARY HUMAN RESOURCES RECORDS, EVALUATIONS, ADVANCEMENTS, AND PROMOTIONS
A. ALCGPSC 024/23
B. Correcting Military Records, COMDTINST 1070.1 (series)
C. ALCGPSC 044/23
D. ALCGENL 013/23
E. ALCGRSV 003/23
F. Officer Accessions, Evaluations, and Promotions, COMDTINST 1000.3 (series)

1. Purpose: This message provides additional guidance to continue the process of removing adverse actions from affected members' personnel records for members currently serving on Active Duty or in the Reserve Component, when administrative actions were based solely on noncompliance with the COVID-19 vaccine mandate.

2. CG-3307 Administrative Remarks Entries. CG PSC-BOPS (Business Operations Division) has completed their centralized review and removal of COVID-19 related CG-3307s announced in reference A. Members should conduct a comprehensive review of their Military Human Resources Record (CGMHRR) in iPERMS.
A. If members identify CG-3307s that qualify for removal, they should contact their Personnel and Administrative (P&A) office and request that P&A submit a problem case in iPERMS. These problem cases then flow to the PSC-CGMHRR Section for review and action.
B. If members identify other matters of record related to COVID-19 requiring correction, they should follow the guidance in paragraphs 3-6.

3. Correcting Military Records. In accordance with reference B, the Board for Correction of Military Records (BCMR) of the Coast Guard provides the appropriate process to review and correct personnel records of current and former members of the Coast Guard and Coast Guard Reserve. Additionally, the Personnel Records Review Board (PRRB) is available to current Active Duty and Reserve members to seek correction of a record entry made within the past year. Specific PRRB and BCMR application guidance can be found at https://www.uscg.mil/Resources/Legal/bcmr.

4. Enlisted Evaluation Report (EER).
A. Reference C contains guidance on making Active Duty members eligible to compete in the 2023 Active Duty SWE and MCAP. Commands that awarded a mark of Unsatisfactory (UNSAT) on the member's most recent EER based solely on the member's noncompliance with the COVID-19 vaccine mandate were advised to upgrade the member's conduct mark to Satisfactory via an EER change request email.
B. Current or prior Approving Officials of Active Duty or Reserve members that were awarded a mark of Unsatisfactory Conduct, Not Recommended/Not Ready, or any adverse numerical values or comments that were based solely on a member's non-compliance with the COVID-19 vaccination mandate shall submit a Change Request memorandum to CG PSC EPM-3

(Evaluations) at HQS-SMB-CGPSC-EPM-3-Evaluations@uscg.mil to retroactively correct the member's record. The Change Request template can be found at PSC-EPM - Templates (sharepoint-mil.us)

5. Enlisted Advancements.
A. In accordance with references D and E, an Active Duty or Reserve member's non-compliance with the COVID-19 vaccination requirement alone does not require the withholding of advancement. All prior withholdings due solely to COVID-19 vaccination status have been removed and advancements effected.
B. Any approved changes to the numerical values, advancement recommendation, or conduct marks on an EER based on paragraph 4.B of this message will not result in an adjustment to a member's placement on previously expired or current advancement lists and the Marks Factor will not be recalculated for the May 2023 SWE.
C. The PRRB and BCMR are available to members to address any concerns regarding their placement on an advancement list or involuntary removal from an expired advancement list.

6. Officer Evaluations and Promotions.
A. Record Review. All Regular and Reserve officers impacted by the COVID-19 vaccine mandate are strongly encouraged to conduct a full record review to identify any matters of record related to COVID-19.
B. Consultation. Active Duty Officers are encouraged to consult with OPM-3 or OPM-4 for advice based on their specific situation. Reserve Officers are encouraged to consult with RPM-1.
C. Officer Evaluation Report (OERs). The PRRB and BCMR are available to correct OERs.
D. Promotions. Officers on the Active Duty Promotion List (ADPL) who were considered but not selected for promotion in PY23 and had CG-3307 Administrative Remarks Entries removed from their records as outlined in paragraph 2 may request consideration by a Special Selection Board (SSB) in accordance with reference F. Officers are strongly encouraged to complete the record review and OPM consultation in paragraphs 6A and 6B before initiating an SSB request. Submit requests in memo format through the chain of command to CG PSC-OPM at HQS-SMB-CGPSC-OPM-1@uscg.mil. The memo should include the date and type of CG-3307(s) removed as well as any information regarding PRRB or BCMR requests that have been submitted.

7. Commands with questions or concerns regarding this guidance should be directed to the POCs below:
A. Enlisted Evaluations: EPM-3 Shared mailbox: HQS-SMB-CGPSC-EPM-3-Evaluations@uscg.mil
B. Enlisted Advancements: EPM-1 ADV Shared mailbox: HQS-SMB-CGPSC-EPM-1-Advancements@uscg.mil
C. Officer Evaluations: OPM-3 Shared mailbox: HQS-SMB-PSC-OPM@uscg.mil
D. Officer Promotions: OPM-1 Shared mailbox: HQS-SMB-CGPSC-OPM-1@uscg.mil
E. Reserve Component: RPM-1 Shared mailbox: HQS-SMB-CGPSC-RPM-1-STATUS@uscg.mil

8. RDML David Barata, Commander, Personnel Service Center, sends.
9. Internet release not authorized.