

**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 USMC CAPTAIN'S  
EMERGENCY MOTION FOR A TEMPORARY RESTRAINING ORDER**

Plaintiff United States Marine Captain has filed an emergency motion asking the Court to enjoin an order to be vaccinated. Mot., ECF No. 121. Plaintiff's motion fails to satisfy any of the requirements under law for such emergency relief. Plaintiff makes only a cursory argument concerning his likelihood of success on the merits, which is plainly insufficient to show he is entitled to the "extraordinary relief" of a temporary restraining order. Nor does Plaintiff make any argument whatsoever regarding the public interest of entering a temporary restraining order. And, significantly, there is no emergency and any purported harm is reparable. Plaintiff's claimed 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 temporary restraining order.

For these reasons, set forth further below, Plaintiff's motion should be denied.

## BACKGROUND

### I. Procedural History

The procedural background of this matter is largely set forth in prior filings and orders. *See* ECF Nos. 66, 67, 74, 118. Of note here, Defendants filed an opposition to Plaintiffs' motion for a temporary restraining order and preliminary injunction on November 3, 2021, ECF No. 23; opposed class certification on December 3, 2021, ECF No. 42; opposed a temporary restraining order on February 2, 2022, ECF No. 66; and opposed Plaintiffs' renewed motion for a preliminary injunction on February 4, 2022, ECF No. 74. Defendants also moved for an emergency stay of the Court's preliminary injunction order as to two Plaintiffs on February 28, 2022. ECF No. 118. Defendants incorporate by reference all arguments and declarations submitted in connection with those motions to this brief.

On February 28, 2022, at 3:43 p.m., Plaintiff's counsel notified Defendants' counsel that they would be seeking emergency relief later in the week as to some plaintiffs in the above captioned case. Plaintiff's counsel did not inform Defendants' counsel of the specific plaintiffs who would be seeking relief or the type of relief they would be seeking. On March 2, 2022, Plaintiffs filed an emergency motion for a temporary restraining order for Plaintiff U.S. Marine Corps Captain pending the Court's decision on their pending motion for a preliminary injunction. Mot. Plaintiff requested that the Court enter a temporary restraining order the following afternoon to prevent him from being disciplined for not following the order to get vaccinated. *Id.* at 2. On March 3, 2022, Defendants notified the Court that the Marine Corps had

agreed to extend the vaccination order for three weeks, to March 24, 2022, thus removing any purported need for emergency briefing. ECF No. 123.

## II. Plaintiff's Background

Plaintiff is a Captain on active duty in the U.S. Marine Corps. Ex. 1 (Decl. of Major Jason Weaver) ¶ 4. He is assigned as an Assistant Series Commander in a Recruit Training Battalion at Parris Island, South Carolina. *Id.* As an Assistant Series Commander, Plaintiff supervises drill instructors and hundreds of recruits during the thirteen-week training course all recruits undertake to become U.S. Marines. *Id.* ¶¶ 3–4. He is in direct daily contact with three platoons of recruits—approximately 200 individuals—as they undergo rigorous physical training and other military-related training, such as hand-to-hand combat skills, marksmanship, swimming survival skills, and land navigation, in addition to classroom lessons in leadership and the Marine Corps' core values. *Id.* Over the course of a year, Plaintiff supervises four training cycles, which means he is in direct contact with approximately 800 recruits. *Id.* ¶ 4.

## 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. NRDC, Inc.*, 555 U.S. 7, 24 (2008) (“A preliminary injunction is an extraordinary remedy never awarded as of right.”). “A TRO or preliminary injunction is appropriate where the movant demonstrates that: (a) there is a substantial likelihood that he ultimately will prevail on the merits; (b) the

TRO or preliminary injunction 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). “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 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)).

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* Furness Decl. ¶¶ 13–23, ECF No. 23-19. Service members subject to discipline can challenge the lawfulness of the vaccination requirement in those proceedings. *See 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. For officers like Plaintiff, this process takes several months, and he would receive a formal administrative hearing over which a panel of senior service members 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.* ¶¶ 17–18. If Plaintiff is discharged, he can appeal to the Discharge Review Board and Board for Correction of Naval Records. *Id.* ¶ 22. For adverse action less than discharge, the Marine Corps has procedures that can provide relief. *Id.*

The nature of his 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.

As other courts have recently found in similar contexts, review of service members’ claims without first allowing the military’s internal processes to conclude

“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---, 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.<sup>1</sup> 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*, 2011 WL 13274364, at \*3 (C.D. Cal. Mar. 21, 2011)). The court 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.<sup>2</sup> *See generally* Mot.

**B. Plaintiffs’ RFRA and First Amendment Claims Are Unlikely To Succeed.**

The Assistant Commandant of the Marine Corps conducted an “independent

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<sup>1</sup> The *Short* Order denying the plaintiff’s motion for preliminary relief is attached.

<sup>2</sup> Nor has Plaintiff shown that he will suffer irreparable harm to excuse administrative exhaustion. *See infra* Part II.

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. 3 at 4, ECF No. 121-1; *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.” Order at 9, *Short*, No. 2:22-cv-1151 (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 motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.”<sup>3</sup> *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986); Tr. of Order 36:4–6, *Dunn v. Austin*, No. 22-cv-0028 (E.D. Cal. Feb. 22, 2022), ECF No. 22<sup>4</sup> (“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.”).

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<sup>3</sup> Congress intended for courts to continue to apply principles of military deference in RFRA cases. *See* S. REP. 103-111, 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.”).

<sup>4</sup> The *Dunn* transcript reflecting the Court’s order denying the plaintiff’s motion for a preliminary relief is attached.

Upon review of Plaintiff's religious exemption request package, the appeal authority, the Assistant Commandant of the Marine Corps, 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." Pl.'s Ex. 3 at 2, ECF No. 121-1. The Assistant Commandant further found that "[s]ervice members who are fully vaccinated have a significantly smaller risk of hospitalization, severe disease, and death" and that "[t]he Marine Corps has seen increasingly convincing data that service members who remain unvaccinated are more likely to experience a wide range of new, returning, or ongoing health problems known as 'long COVID' after being infected with COVID-19 as opposed to those who are fully vaccinated." *Id.* at 2–3. The Assistant Commandant noted that personnel who have fallen ill from COVID-19 have "undermine[d] a unit's effective functioning and negatively impact[ed] their unit's ability to accomplish the mission." *Id.* at 3. Accordingly, "personnel who are 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 Series Commander into account, finding that as a "series commander responsible for supervising drill instructors" and recruits, Plaintiff is "in close proximity to drill instructors and recruits on a daily basis." *Id.* Vaccination is "a vital component of individual and unit medical readiness" in "recruit training," as "Marines are required to be in close proximity to each other," which "increase[s] their exposure and

susceptibility to illness.” Jeppe Decl. ¶ 15, ECF No. 42-3. Indeed, Plaintiff “is in direct daily contact with three platoons of recruits, roughly two hundred individuals, undergoing the rigorous physical training, academics, marksmanship, land navigation, and many other military-related training events.” Ex. 1 ¶ 4. Over the course of a year, Plaintiff is responsible for—and is in close proximity on a daily basis with—approximately eight hundred recruits over four training cycles. *Id.* Assistant Series Commanders like Plaintiff “are required to get within close proximity of recruits during training” (i.e., “within one arm’s distance or less”) to conduct “daily hygiene inspections in the morning and evening,” as well as inspections of recruits’ uniforms and weapons handling abilities. *Id.* Assistant Series Commanders also supervise recruits and drill instructors during mealtimes in crowded chow halls, during physical training activities, such as martial arts, marksmanship, and use of a gas mask in a gas chamber. *Id.* In addition, Assistant Series Commanders routinely conduct in-person interviews with recruits at various points during the grueling thirteen-week training course to ensure recruits’ basic needs are met and that there is no misconduct by their drill instructors. *Id.* Because certain recruits arrive at Parris Island unvaccinated (and are then required to get vaccinated during the first week of training), they are at an increased risk of exposure to the coronavirus, missing training, and delay in graduation and it is thus even more important for those around them, such as Plaintiff, to be vaccinated. *Id.* ¶ 7.

As the Assistant Commandant found, in “field training,” like the recruit training Plaintiff supervises, “all personnel must be able to perform their individually assigned

duties” to ensure military readiness. Pl.’s Ex. 3 at 3, ECF No. 121-1. The purpose of the Recruit Depot at Parris Island is to turn recruits into Marines and ensure they are ready to join operating units. Ex. 1 ¶ 6. “An outbreak of COVID-19 amongst recruits and drill instructors could jeopardize the mission of Marine Corps Recruit Depot Parris Island to ‘Make Marines,’ as even a brief disruption in the flow of new Marines to operating forces would cause significant ripple effects on mission-ready forces.” *Id.* Because “Marine units around the country depend on new Marines graduating on time and joining their units shortly thereafter,” “[d]elays in graduation result in delays in Marines joining operating units, which results in units operating at less than full capacity, thereby degrading the ability of the Marine Corps to provide for the security of the United States.” *Id.*

Finally, the Assistant Commandant found that vaccination was necessary because, even though Plaintiff is currently not in a deploying command, he is a Marine and “must be world-wide deployable.” Pl.’s Ex. 3 at 3, ECF No. 121-1. Even Marines in non-deployable billets “could be called upon to deploy on short-notice in support of a myriad of operations around the world, all of which would require him to be fully vaccinated.” Ex. 1 ¶ 8. Vaccination is necessary for deployment to “protect against disease,” and “to conform with international health regulations incident to foreign travel or unit deployment.” Jeppe Decl. ¶ 15, ECF No. 42-3.

Plaintiff does not address any of the Assistant Commandant’s findings and instead argues only that “neither COVID-19, nor USMC Captain’s or any other Marine’s vaccination status, has prevented the performance of any mission assigned

to USMC Captain or any unit of which he has been a part.” Mot. 5. While the military was able to continue to function without a vaccination requirement, the record reflects that it is not the case that it did so without interruption, as Plaintiff claims. *See e.g.*, Stanley Decl. ¶¶ 3–19; *see also Church*, 2021 WL 5179215, at \*18 (rejecting a similar argument); Order at 13 n.17, *Short*, No. 2:22-cv-1151 (“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.” Order at 13, *Short*, No. 2:22-cv-1151. Nor should the military have to wait for a communicable disease to “prevent[] the performance of any mission” assigned to a particular service member, Mot. 5, before it takes action to minimize the risk of such an occurrence, *see* Order at 13, *Short*, No. 2:22-cv-1151 (“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.”); Tr. of Order 37:4–7, *Dunn*, No. 22-cv-0028 (“[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*, 2021 WL 4783626, at \*14 (D. Me. Oct. 13, 2021), *aff'd*, 16 F.4th 20 (1st Cir. 2021); *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 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 and safety of service members. The Assistant Commandant found that Plaintiff could not perform his “critical role” of supervising drill instructors and recruits remotely, nor could he adequately social distance because he is in “close proximity to drill instructors and recruits on a daily basis.” Pl.'s Ex. 3 at 3, ECF No. 121-1. 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.* This is especially true for the “recruits and drill instructors” who Plaintiff supervises, as they “eat, sleep, train, and hygiene in a group setting where



traditional mitigation measures are difficult to enforce.” *Id.*; *see also* Order at 10, *Short*, No. 2:22-cv-1151 (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.”). And “[d]ue to the nature of some of the[] [recruits’ training] events, such as swim qualification, martial arts, or the gas chamber, COVID-19 mitigation measures such as social distancing and mask wearing, are not available.” Ex. 1 ¶ 4. Plaintiff even admits that he has worn masks only in the chow halls and that he has “attempted to maintain social distancing as much as possible.” Pl.’s Ex. 1 ¶ 7, ECF No. 121-1. Plaintiff provides no argument rebutting the Assistant Commandant’s findings. *See generally* Mot.

In sum, the military’s vaccine policy is narrowly tailored to serve compelling military interests. The military—not this Court—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; Order at 10, *Short*, No. 2:22-cv-1151 (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 considered whether there are any lesser restrictive means of achieving its interest in military readiness and concluded that there are none. RFRA does not compel the military to adopt a measure that is inferior in the military context to requiring the use of safe and effective 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 spends the majority of his brief arguing that that he faces irreparable harm from an order to get vaccinated or face adverse action. *See generally* Mot. He argues, for example, that if he does not obey the order to get vaccinated, he will suffer “life-altering discipline,” *id.* at 2, and faces an “irreversible vaccinate-or-separate choice,” *id.* at 4. But “[m]ilitary administrative and disciplinary actions, including separation, are not . . . irreparable injuries.” Tr. of Order 45:25–46:2, *Dunn*, No. 22-cv-0028. “[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.’” Order at 13, *Short*, No. 2:22-cv-1151 (quoting *Air Force Officer v. Austin*, 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, that is not so. Instead, the process to discharge a Marine Corps officer has multiple steps, goes through multiple levels of review, and can take months. *See* Furness Decl. ¶¶ 13–21, ECF No. 23-19. In other words, initiation of separation proceedings today does not mean that the service member will be separated tomorrow. And if Plaintiff does proceed to a Board of Inquiry, the Board has a range of options available. *See generally* Ex. 2 (Secretary of the Navy Instruction (SECNAVINST) 1920.6D) at encl. (11) ¶ 13. It

could find that Plaintiff had not committed the misconduct alleged, *see id.* ¶ 13a, 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); Ex. 2 at encl. (11), ¶ 13a(2)–(3); *id.* ¶ 17b. And if Plaintiff is discharged, he can seek review from a Discharge Review Board or the Board for Correction of Naval Records, which may result in him being reinstated into the Marine Corps. *Id.* ¶ 22. These remedies make plain that Plaintiff does not face irreparable harm by the initiation of separation proceedings.

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. Ex. 1 ¶ 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* Ex. 3 (Marine Corps Order 5800.16, Vol. 15) ¶ 0.10401. 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 has an opportunity to provide a rebuttal. *Id.* ¶ 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.

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. *Id.* ¶ 011101. Necessarily, then, entry on the Officer Disciplinary Notebook does not constitute irreparable harm. Likewise, 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 official military 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. 7. 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* Order at 14, *Short*, No. 2:22-cv-01151 (“[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.”); Tr. of Order 45:16–18, *Dunn*, No. 22-cv-0028 (“[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 Temporary Restraining Order.**

Plaintiff entirely failed to address the public interest factor, which alone warrants denial of his motion. *See ACLU of Fla., Inc. v. Miami-Dade Cty. 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. at 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,” Order at 14, *Short*, No. 2:22-cv-01151 (citing *Church*, 2021 WL 5179215, at \*18; *see also* Tr. of Order 47:14–16, *Dunn*, No. 22-cv-0028 (“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.*, Jeppe Decl. ¶¶ 15–16, 19, ECF No. 42-3; Lescher Decl. ¶¶ 2, 11, 17, ECF No. 66-4; Stanley Decl.

¶ 8, ECF No. 23-19; Second Stanley Decl. ¶¶ 3–20, ECF No. 66-6; Rans Decl. ¶¶ 5–39, 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 hundreds of recruits and drill instructors who cannot always practice COVID-19 mitigation measures such as masking and social distancing due to the intense nature of their physical training and the requirements to live and eat in communal, close-quarter settings. *See* Ex. 1 ¶ 4; Jeppe Decl. ¶¶ 15, 18, ECF No. 42-3 (noting the importance of vaccination during “recruit training” when “Marines are required to be in close proximity to each other”); *see also* *Garland v. N.Y.C. Fire Dep’t*, 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 temporary restraining order 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; Journey Decl. ¶ 14, ECF No. 118-7; Ex. 1 ¶ 7; *see also* *Miller v. United States*, 42 F.3d 297, 303 (5th Cir. 1995) (stating that the 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 successfully function where service members feel free to define the terms of their own military service, including which orders they will 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 temporary restraining order 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 temporary restraining orders 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 temporary restraining order. Local Rule 6.01 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 U.S. Dist. LEXIS 205748, at \*9 (M.D. Fla. Nov. 27, 2019) (quoting Fed. R. Civ. P. 65(d)(1)(C)).

Not only did Plaintiff fail to file a proposed order in violation of Local Rule 6.01, he also does not precisely 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 temporary restraining order under Federal Rule of Civil Procedure 65 and Local Rule 6.01. *See Art Headquarters*, 2019 U.S. Dist. LEXIS 205748, at \*9. 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., 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: March 11, 2022

BRIAN M. BOYNTON  
Principal Deputy Assistant Attorney  
General

ALEXANDER K. HAAS  
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Deputy Director

Respectfully submitted,

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**Table of Exhibits**

<b>Exhibit Number</b>	<b>Exhibit Description</b>
1.	Declaration of Major Jason M. Weaver (Mar. 10, 2022)
2.	Secretary of the Navy Instruction (SECNAVINST) 1920.6D
3.	Marine Corps Order 5800.16, Vol. 15
4.	Order, <i>Short v. Berger</i> , No. 2:22-cv-1151 (C.D. Cal. Mar. 3, 2022), ECF No. 25
5.	Transcript of Order, <i>Dunn v. Austin</i> , No. 22-cv-0028 (E.D. Cal. Feb. 22, 2022), ECF No. 22

**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 MAJOR JASON M. WEAVER, USMC**

**[WITH REGARD TO PLAINTIFF MARINE CORPS CAPTAIN]**

I, Jason M. Weaver, hereby state and declare as follows:

1. I am a Major in the United States Marine Corps, currently assigned as Executive Officer, Second Recruit Training Battalion, located on board Marine Corps Recruit Depot Parris Island, South Carolina. 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 10, 2020. Prior to my current assignment, I served in multiple commands and staff billets to include Inspector-Instructor of Communications Company Detachment, 4th Marine Division and Site Commander of Site Support Indianapolis, Combat Logistics Regiment 45, 4th Marine Logistics Group. I have deployed multiple times in support of combat operations in Iraq and Afghanistan. As part of my current duties, I serve as second-in-command within our Battalion and coordinate all staff

functions necessary to carry out the mission of making Marines and for the conduct of Marine Corps entry level training, specifically the thirteen-week recruit training that all enlisted recruits are required to complete in order to become Marines. I am the Battalion Executive Officer for USMC Captain.

3. All individuals who enlist in the Marines are required to attend a thirteen-week training course either at the Marine Corps Recruit Depot in Parris Island, South Carolina or at the Marine Corps Recruit Depot in San Diego, California.<sup>1</sup> “The objective of recruit training is to produce basically trained Marines who have embraced [the Marine Corps’] core values and legacy. . . . Every Marine should leave Parris Island with a mastery of the areas of discipline, character development military bearing, esprit de corps, Marine Corps common combat skills and combat conditioning.” U.S. Marine Corps, *Recruit Training*, <https://www.mcrdpi.marines.mil/Recruit-Training/>. The training consists of a “receiving week” followed by twelve weeks of training weeks. During receiving week, “recruits arrive on Parris Island late at night” and begin “in-processing, haircuts, uniform and gear issue and medical evaluations.” U.S. Marine Corps, *Training Summary by Week*, <https://www.mcrdpi.marines.mil/Recruit-Training/Training-Summary-By-Week-/>. The initial battery of immunizations, to include the COVID-19 vaccine, is administered during receiving week. Recruits also undergo “an initial strength test” and “meet the team of drill instructors who will be responsible for them for the rest of training.” *Id.* Recruits also meet their Series Commander and Assistant Series Commander during this time. In training weeks 1 through 3, “recruits receive instruction on military history, customs and courtesies, basic first aid, uniforms, leadership and core values,” and recruits “begin to learn discipline through close-order drill and hand-to-hand combat skills through the Marine Corps

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<sup>1</sup> The recruit’s training location is determined based on where the recruit lives in the United States.

martial arts program.” *Id.* Training week 4 is “swim week,” during which time “recruits learn to leap into deep water, tread water, use issued equipment to stay afloat and to shed heavy gear that could pull them under water.” *Id.* Training week 5 is “team week,” during which time “recruits take a short break from nonstop training to help out around the island.” *Id.* Training week 6 is “grass week,” during which time “recruits hike to the rifle range and begin to learn the fundamentals of Marine Corps marksmanship,” such as “learn[ing] proper firing procedures” by “spend[ing] hours sitting in grass fields sighting in on practice targets.” *Id.* Training week 7 is “firing week,” during which time recruits “fire live rounds with their M16-A4 rifles.” During training week 8’s “basic warrior training,” recruits are “taught basic skills of survival in combat, such as combat marksmanship skills, land navigation, and how to maneuver under enemy fire.” *Id.* During weeks 9 and 10, recruits undergo various academic and physical tests. *Id.* At the end of week 10, recruits “face the Crucible, a final 54-hour field event that tests the recruits on the knowledge, skills, and values they have been taught throughout training.” *Id.* During the Crucible, “recruits are only allowed a limited amount of food and sleep.” U.S. Marines, *Crucible*, <https://www.mcrdpi.marines.mil/Recruit-Training/Crucible/>. Recruits that complete the Crucible move on to weeks 11 and 12 of training, during which time they are “inspected by their battalion commanding officers” and “they complete final administrative tasks” before their graduation ceremony. U.S. Marine Corps, *Training Summary by Week*, <https://www.mcrdpi.marines.mil/Recruit-Training/Training-Summary-By-Week/>. Following graduation, Marines are given 10 days of leave before they report to Camp Lejeune, North Carolina for additional combat training, and then on to various military occupational specialty schools across the country. *Id.*

4. Plaintiff United States Marine Corps Captain (“USMC Captain”) is on active duty and joined our Battalion in May 2021. He is assigned as an Assistant Series Commander as part of our Recruit Training Battalion. Assistant Series Commanders play a critical role in the supervision of both drill instructors and recruits. In this current billet, USMC Captain is in direct daily contact with three platoons of recruits, roughly two hundred individuals, undergoing the rigorous physical training, academics, marksmanship, land navigation, and many other military-related training events described above. In a full fiscal year the Assistant Series Commanders will have direct daily contact with roughly eight hundred recruits over four distinct training cycles. Assistant Series Commanders are required to get within close proximity of recruits during training for the conduct of daily hygiene inspections in the morning and evening and then uniform inspections where they closely inspect the recruit’s uniforms, weapons handling, and knowledge, which puts them within one arm’s distance or less of the recruit as they inspect and converse at high volume. During meals, the chow halls are crowded and it is extremely difficult to keep distance between individuals. Additionally, Series Commanders and Assistant Series Commanders walk the chow hall during meals to ensure recruits are given adequate time to complete their meals, they are eating their food, and to ensure drill instructors are completing their responsibilities within the chow hall appropriately. Assistant Series Commanders also are required to supervise the execution of physical training events which include any scheduled physical training, Marine Corps Martial Arts Program training, conditioning hikes, recruits conducting pugil stick fighting against each other, descending the rappel tower, maneuvering through and over obstacle courses, learning the fundamentals of marksmanship training, conducting live fire ranges with the service rifle, and physically inspecting a recruit to ensure they did not inadvertently leave live ammunition in their pockets, following a live fire rifle

range. Assistant Series Commanders are also required to supervise the execution of field training events, which include the use of the gas mask and conduct of the gas chamber, movements and land navigation during the day and night, and basic military field training, culminating with the execution of the Crucible. The Crucible is a 54 hour event with 26 simulated military objectives, testing physical and mental endurance, team work, leadership traits, and adherence to our Core Values in order to validate the transformation of a Recruit into a U.S. Marine. Due to the nature of some of these events, such as swim qualification, martial arts, or the gas chamber, COVID-19 mitigation measures such as social distancing and mask wearing, are not always available. Assistant Series Commanders also conduct in-person personal interviews with recruits throughout the training cycle. This is done to confirm that the individual recruits' basic needs are met and to ensure that there is no misconduct by their drill instructors or abuse of recruits.

5. Recruits are not required to receive the COVID-19 vaccination until they arrive at Parris Island. As with all other required vaccines, recruits receive the initial dose of the COVID-19 vaccine during their first week on the Recruit Depot. They are not considered 'fully vaccinated' until 10 days after receiving their second dose. Therefore, for the recruits who do not arrive at Parris Island fully vaccinated, they do not have the full benefit of the immunity provided by the vaccine until the latter part of recruit training. USMC Captain's requirement for vaccination stems from the close and direct daily exposure USMC Captain endures with supervising drill instructors and recruits on a daily basis. Specifically, USMC Captain is in a position in which traditional mitigation measures are not able to be enforced due to the nature of the recruits' training requirements and the direct daily supervision required of an Assistant Series

Commander, to include supervising meals, physical training, martial arts, personal hygiene, and classroom training.

6. The purpose of the Recruit Depot at Parris Island is to ensure the continuous flow of basically trained Marines into the operating forces. An outbreak of COVID-19 amongst recruits and drill instructors could jeopardize the mission of Marine Corps Recruit Depot Parris Island to 'Make Marines,' as even a brief disruption in the flow of new Marines to operating forces would cause significant ripple effects on mission-ready forces. In other words, Marine units around the country depend on new Marines graduating on time and joining their units shortly thereafter. Delays in graduation result in delays in Marines joining operating units, which results in units operating at less than full capacity, thereby degrading the ability of the Marine Corps to provide for the security of the United States.

7. Failure to follow lawfully issued orders harms the Marine Corps' interest in good order and discipline. When a Marine (and especially an officer) do not follow the order to get vaccinated, it sends a message to new recruits who are being introduced to the United States Marine Corps through their recruit entry level training that they do not always have to follow lawfully issued orders. If a recruit was to learn that one of their officers declined to follow the order to get vaccinated, the good order and discipline necessary to properly train entry-level Marines in their warfighting ethos of following lawfully issued orders and working as a unit to carry out the Marine Corps' missions is seriously harmed. Moreover, as of the date of this declaration, approximately thirty-one (31) entry-level recruits at Marine Corps Recruit Depot Parris Island have been separated from the Marine Corps for failing to follow the lawfully issued order to get the COVID-19 vaccination. Permitting officers at the Depot to remain on active duty even though they failed to follow an order to get vaccinated, would send a mixed message

to our recruits. Additionally, this puts the recruit population, many of whom arrive at the Depot unvaccinated, at risk for unnecessary exposure and creating the potential for missed training and delays in graduation requirements, as these recruits will not achieve 'full vaccination' status until late in recruit training, after they have received their second dosage.

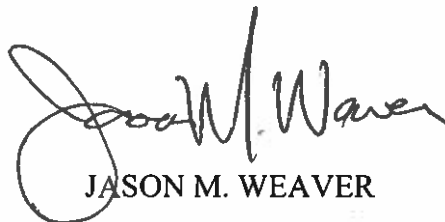
8. The Marine Corps is America's expeditionary force in readiness and has been so since 1775. Marines are expected to be forward deployed, and ready on a moment's notice, to win our nation's battles on land, sea, and in the air. As such, every Marine and Marine Officer, must be prepared and qualified to deploy in support of that mission. In order to be qualified to deploy, a Marine must be medically qualified, which includes obtaining the full battery of required vaccinations. Although USMC Captain is currently in a non-deployable billet at a training installation, he could be called upon to deploy on short-notice in support of a myriad of operations around the world, all of which would require him to be fully vaccinated. Moreover, he could be assigned to a deployable unit in the future.

9. USMC Captain filed his initial Religious Accommodation request on October 1, 2021. He was notified that his request was denied on October 27, 2021. He appealed the denial of his request. On February 23, 2022, the Recruit Training Battalion Commanding Officer of USMC Captain received an email from the Assistant Commandant of the Marine Corps legal office, notifying him that USMC Captain's appeal had been denied. It is my understanding that USMC Captain was ordered to receive the COVID-19 vaccination or face administrative action. USMC Captain has until March 24, 2022, to be vaccinated. At this time, USMC Captain is not facing any pending administrative actions. If USMC Captain fails to be vaccinated within the allotted period, pursuant to Marine Corps Order 5800.16, paragraph 0104, there will be an entry in the Officer Disciplinary Notebook and a report of misconduct will be initiated.



10. USMC Captain has not been subject to any form of discipline or disparate treatment, nor any form of maltreatment, either as a result not taking the vaccine or as a result of this lawsuit.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 10th day of March, 2022.

A handwritten signature in black ink, appearing to read "Jason M. Weaver". The signature is stylized with a large, looping initial "J" and a clear "W" at the end.

JASON M. WEAVER

Major, U.S.M.C.



DEPARTMENT OF THE NAVY  
OFFICE OF THE SECRETARY  
1000 NAVY PENTAGON  
WASHINGTON DC 20350-1000

SECNAVINST 1920.6D  
ASN (M&RA)  
24 Jul 2019

SECNAV INSTRUCTION 1920.6D

From: Secretary of the Navy

Subj: ADMINISTRATIVE SEPARATION OF OFFICERS

Ref: See enclosure (1)

- Encl:
- (1) References
  - (2) Definitions
  - (3) Policy Governing Voluntary Separation
  - (4) Policy Governing Involuntary Separation of Regular Officers - Failure of Selection for Promotion, Mandatory Retirement for Years of Active Service or Age, Selective Early Retirement
  - (5) Policy Governing Involuntary Separation of Reserve Officers - Failure of Selection for Promotion, Mandatory Separation for Years of Service or Age, and Other Bases
  - (6) Policy Governing Involuntary Separation for Cause or Parenthood
  - (7) Guidelines on Separations for Cause
  - (8) Guidelines on Characterization of Service
  - (9) Guidelines on Recommendations - Grade at Retirement
  - (10) Notification Procedure
  - (11) Board of Inquiry Procedures
  - (12) Other Separation Review Requirements
  - (13) Fact Sheet - Purpose and Authority of the Naval Discharge Review Board and the Board for Correction of Naval Records
  - (14) Internal Controls, Records Management, and Reports

1. Purpose. To revise policies, standards, and procedures for the administrative separation of Navy and Marine Corps officers from the naval service per references (a) and (b). This instruction is a complete revision and should be reviewed in its entirety.

2. Cancellation. SECNAVINST 1920.6C.

3. Effective Date

a. This instruction is effective immediately and will control all officer administrative separation processing initiated on or after the effective date. Processing is considered to be initiated on the date a command receives a written request for separation from an officer, or on the date a command delivers to an officer a notice of intent to start separation processing.

b. Separation processing initiated prior to the effective date of this instruction will be continued under policies and instructions in effect prior to that date.

4. Applicability

a. This instruction applies to the separation, discharge, termination of appointments, release from active duty, mandatory retirement for length of service or age, characterization of service, and dropping from the rolls of Regular and Reserve Navy and Marine Corps officers in the grades of Warrant Officer, W-1 to O-8.

b. This instruction does not apply to discharge or dismissal by reason of a court-martial sentence in accordance with reference (a), or discharge or retirement for physical disability in accordance with reference (c).

5. Definitions. See enclosure (2).

6. Policy. It is Department of the Navy (DON) policy to promote the readiness of the naval service by maintaining authorized strength levels in each grade and competitive category and by maintaining the highest standards of conduct and performance in the officer corps. To meet these objectives, it is necessary to provide for orderly and expeditious administrative separation of officer personnel.

a. The administrative separation policies and procedures in this instruction support accession, promotion, redesignation, retirement, and resignation policies in order to:

(1) Maintain authorized strength in each competitive category and grade;

(2) Ensure planned promotion flow and reasonable career opportunities in each competitive category;

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(3) Attain and maintain an all Regular active-duty career force in each competitive category, supplemented when necessary with Reserve officers to meet current authorized strength and special skills requirements; and

(4) Sustain the traditional concepts of honorable military service and special trust and confidence placed in commissioned officers.

b. Officers being processed for separation for cause will be processed expeditiously. During administrative separation processing and subject to the Commanding Officer's (CO) discretion, an officer may be maintained in a unit with sufficient supervision to preclude adverse effects on good order and discipline of the unit, or the officer may be physically separated from the unit by means of leave, temporary assignment, or other methods.

c. Standards and procedures established in execution of these policies are intended to achieve consistency of application in a naval leadership system based on command authority, responsibility, accountability, and discretion. The standards and procedures are set forth in enclosures (3) through (11), under guidance from references (a) through (ap).

7. Completion of Military Service Obligation. Under the Department of Defense (DoD) policy in reference (o), each person who enters military service by appointment as an officer incurs a military service obligation of eight years from that entry date in accordance with reference (a), section 651. Any part of this obligation that is not performed on active duty or active duty for training must be performed in a Reserve Component. Enclosures (3) through (5) provide amplifying guidance and exceptions to the DON policy.

8. Separation Pay. References (l) and (t) govern entitlement to separation pay for Navy and Marine Corps officers, respectively, who are involuntarily separated under the provisions of this instruction.

9. Processing Time Goals. To support policy objectives and further the efficient administration of officer separations, every effort will be made to adhere to the following time goals for processing separations. Failure to process an administrative separation within the prescribed time goals will not create a bar to separation or characterization. Separation processing should be completed:

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a. By the date of fulfillment of service obligation for separations upon fulfillment of service obligation;

b. By the convening authority, 30 calendar days from the date a command notifies an officer of the commencement of separation processing in cases where no Board of Inquiry (BOI) is required;

c. By the convening authority, 90 calendar days from the date a command notifies an officer of the commencement of separation processing in cases where a BOI is required;

d. By the date granted in any extensions. Extensions must be approved in advance by the Show Cause Authority (SCA), or by his or her delegate, based on a written request.

10. Establishment of Additional Reasons for Separation. Should the need arise to separate officers for a reason not established in enclosures (3) through (6) of this instruction, the Chief of Naval Operations (CNO) or the Commandant of the Marine Corps (CMC) may propose to the Secretary of the Navy (SECNAV) the establishment of additional reasons for separation to be included in this instruction. Submissions proposing such additional reasons must contain the basis for separation, recommended characterization of service or description for the separation, and the procedure for the separation. Separation processing under any proposed reason will not be executed until the proposal has been approved by the SECNAV.

11. Responsibilities

a. The Assistant Secretary of the Navy for Manpower and Reserve Affairs (ASN (M&RA)) is designated to act on behalf of the SECNAV for all purposes under this instruction with the exception of cases involving flag and general officers.

b. The CNO and CMC are responsible for implementing the policies, standards, procedures and goals established in this instruction in a manner that ensures consistency in officer administrative separation policy. The CNO and CMC will ensure that only the specific reasons for separations provided in this instruction are used in classifying officer administrative separations and in processing the DD Form 214, Certificate of Release or Discharge from Active Duty, under reference (d) using applicable separation codes. In all cases involving drug offenses, the applicable drug offense will be shown.

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c. The Chief of Naval Personnel (CHNAVPERS) and the Deputy Commandant for Manpower and Reserve Affairs (DC (M&RA)) are designated as the Show Cause Authority for the Navy and the Marine Corps, respectively. Accordingly, they are delegated the authority to review records to determine whether an officer should be required to show cause for retention in the naval service and to convene a Board of Inquiry (BOI) as provided in enclosure (11). CHNAVPERS may further delegate this authority to Commander, Navy Personnel Command and officers exercising general court-martial jurisdiction with a Staff Judge Advocate assigned. The DC (M&RA) may further delegate this authority within the Marine Corps to the Director, Marine Corps Staff and to those Lieutenant Generals and Major Generals in command. When delegated this authority by the DC (M&RA), Lieutenant Generals and Major Generals in command possess authority solely for the purpose of directing an officer to show cause, but not to close a case. Additionally, CHNAVPERS and DC (M&RA) are delegated the authority to approve resignation and/or discharge orders and certificates in routine matters.



RICHARD V. SPENCER

## Distribution:

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<https://www.secnave.navy.mil/doni/>.

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**REFERENCES**

- (a) 10 U.S.C.
- (b) DoD Instruction 1332.30 of 11 May 2018
- (c) SECNAVINST 1850.4E
- (d) DoD Instruction 1336.01 of 20 August 2009
- (e) BUPERSINST 1900.8E
- (f) SECNAVINST 5300.28F
- (g) SECNAV M-5510.30
- (h) SECNAVINST 1412.8C
- (i) SECNAVINST 1412.9C
- (j) SECNAVINST 1420.3
- (k) DoD Directive 1304.19 of 11 June 2004
- (l) OPNAVINST 1900.4A
- (m) SECNAVINST 1000.7G
- (n) DoD Instruction 1304.28 of 11 June 2004
- (o) DoD Instruction 1304.25 of 31 October 2013
- (p) DoD Instruction 1300.06 of 12 July 2017
- (q) DoD Instruction 1315.15 of 19 May 2017
- (r) OPNAVINST 1811.3A
- (s) OPNAVINST 1820.1B
- (t) MCO 1900.16
- (u) SECNAV M-5214.1
- (v) OPNAVINST 6110.1J
- (w) MCO 6100.13A
- (x) MCO 6100.3J
- (y) DoD Instruction 1320.08 of 7 July 2017
- (z) DoD Instruction 1332.20 of 24 June 2014
- (aa) DoD Instruction 1200.15 of 13 March 2014
- (ab) DoD Directive 1200.7 of 18 November 1999
- (ac) DoD Instruction 1332.14 of 27 January 2014
- (ad) MILPERSMAN 1910
- (ae) 5 U.S.C.
- (af) DoD Instruction 1320.04 of 3 January 2014
- (ag) JAGINST 5800.7F
- (ah) CJCSI 1331.01D
- (ai) DoD Instruction 1320.10 of 6 February 2014
- (aj) DoD Instruction 1332.32 of 2 May 2014
- (ak) DoD Instruction 1235.13 of 18 October 2013
- (al) DoD Instruction 1332.18 of 5 August 2014
- (am) SECNAVINST 1412.6M
- (an) SECNAVINST 1920.7C

Enclosure (1)

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(ao) SECNAVINST 1920.8  
(ap) SECNAVINST 5200.35F  
(aq) DoD Instruction 6490.04 of 4 March 2013  
(ar) SECNAVINST 5420.174D  
(as) SECNAVINST 5420.193  
(at) BUPERSINST 1001.40B



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### DEFINITIONS

1. Active Commissioned Service. Service on active duty as a commissioned officer.
2. Active Duty. Full-time duty in the active military service of the United States. This term includes full-time training duty, Annual Training duty, Active Duty for Special Work, Active Duty for Operational Support, Active Duty for Training (ADT), active duty recall, mobilization, and attendance, while in the active military service, at a school designated as a service school by law or by SECNAV.
3. Active Duty for Training (ADT). Active duty for Reserve training with automatic reversion to inactive duty upon completion.
4. Active-Duty List (ADL). A single list for the Navy or Marine Corps, required to be maintained by SECNAV under section 620 of reference (a), which contains the names of all officers of the armed force who are serving on active duty, other than officers described in section 641 of reference (a).
5. Active Service. Service on active duty.
6. Active Status. The status of a Reserve commissioned or Warrant Officer who is not on an inactive status list or in the Retired Reserve.
7. BOI. A board convened under section 1182 or section 14903 of reference (a) to receive evidence and make findings and recommendations as to separation for cause, characterization of service, and, in some cases, retirement grade recommendation of a commissioned officer (other than a Warrant Officer or a retired officer).
8. Board of Officers. A board of at least three commissioned officers, appointed by the SCA or its delegate, who are senior in pay grade to any officer being considered by the board, convened pursuant to reference (b) and this instruction.
9. BOI Report. Includes the BOI summarized record of proceedings (including the transcript, if required), exhibits, and BOI findings and recommendations (results of the Board).

Enclosure (2)

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10. Characterization of Service. Classification of quality of service rendered.

11. Commander. A commissioned or Warrant Officer who, by virtue of rank and assignment, exercises primary command authority over a military organization or prescribed territorial area that, under pertinent official directives, is recognized as a "command."

12. Commissioned Officer. An officer in any of the military services who holds a grade and office under a commission signed by the President, and who is appointed as a Regular or Reserve officer. In the Navy and Marine Corps, Regular and Reserve Chief Warrant Officers in the grades of Chief Warrant Officer, W-2, W-3, W-4, and W-5 are appointed by commission and are commissioned officers.

13. Commissioned Service. All periods of service as a commissioned officer in the Army, Navy, Air Force, or Marine Corps, while on active duty or in an active, inactive, or retired status.

14. Continuous Active Service. Military service, unbroken by any period in excess of 24 hours.

15. Controlled Substance. A drug or other substance included in Schedules I, II, III, IV, or V of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (84 Stat. 1236) (NOTAL) as updated and republished under the provisions of that Act, as amended, and as further defined in reference (f).

16. Convening Authority. SECNAV or his or her delegates authorized to appoint boards under this instruction.

17. Counsel. A judge advocate qualified under Article 27(b), Uniform Code of Military Justice (UCMJ), or a civilian lawyer retained at the officer's expense.

18. Discharge. The termination of an officer's obligation to render service and complete severance from all military status.

19. Dismissal. Separation of a commissioned officer, effected by sentence of a general court-martial, or in commutation of such a sentence, or, in time of war, by order of the President;

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or separation of a Warrant Officer (W-1) who is dismissed by order of the President in time of war. A complete severance from all military status.

20. Drop From the Rolls (DFR). An administrative action that may be taken in limited circumstances that terminates a commissioned officer's military status along with any rights, benefits, and pay to which he or she may have otherwise been entitled because of that status. No characterization of service is awarded. DFR is distinguished from dropping from the unit rolls, which is an administrative procedure used by the Military Services to remove a Service Member from the unit of assignment, but does not end the member's military status.

21. Legal Advisor. A judge advocate certified, per Article 27(b), UCMJ, appointed to assist a BOI.

22. Limited Duty Officer (LDO). A commissioned officer designated for limited duty in a technical field or specialty that requires extensive knowledge, training, and experience. There are two types of Regular LDOs in the Navy and Marine Corps, depending on the type of appointment issued

a. Temporary LDO. A Regular LDO who receives a temporary appointment in the grade of O-1 to O-5 under reference (a), section 8146, and whose permanent status is a Warrant Officer or enlisted member.

(1) In the Navy, a temporary appointment is issued in the case of a Warrant Officer or enlisted member who is selected for the Navy LDO Program and has less than ten years of active naval service upon the date of appointment. The LDO receives a temporary appointment in the grade of O-1.

(2) In the Marine Corps, temporary appointments in the grades of O-1 to O-5 are issued to LDOs in the Marine Corps Band and the Marine Corps Drum and Bugle Corps in accordance with reference (i).

b. Permanent LDO. A Regular LDO who receives a permanent appointment in the grade of O-1 and above under reference (a), section 8139.

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(1) In the Navy, a permanent appointment in the grade of O-1 is issued to a Warrant Officer or enlisted member who is selected for the Navy LDO Program and has more than ten years of active naval service upon the date of appointment. All LDOs promoted to the grades of O-2 to O-6 receive permanent appointments.

(2) In the Marine Corps, permanent appointments are issued to LDOs in the grades of O-3 through O-5 as prescribed by reference (i).

23. Non-Probationary Officer. An officer other than a probationary officer.

24. Officer. The term "officer" means a commissioned or Warrant Officer.

25. Probationary Officer

a. A commissioned officer on the ADL in the grade of O-1 and above with less than six years of active commissioned service, per section 630(1)(A) of reference (a);

b. A Reserve commissioned officer in the grade of Chief Warrant, W-2 and above with less than five years of service as a commissioned officer, per section 12683 of reference (a);

c. A permanent Regular Warrant Officer in any Warrant Officer grade within three years after the date when the officer accepted the original permanent appointment as a Warrant Officer, per section 1165 of reference (a); and

d. Marine Corps Reserve Warrant Officers (W-1) with less than five years of service as a Warrant Officer, per reference (i).

26. Qualified Resignation. A resignation whereby the tendering officer acknowledges upon submission that the characterization of service is subject to the discretion of the Secretary.

27. Release from Active Duty. The transfer of a Reserve officer from active duty to inactive duty.

28. Reserve Active-Status List (RASL). A single list for the

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Navy or Marine Corps, required to be maintained under section 14002 of reference (a), that contains the names of all officers of each armed force except Warrant Officers (including commissioned Warrant Officers) who are in an active status in a reserve component of the Navy or Marine Corps and are not on an ADL.

29. Resignation. The request, by officers, to be divested of their commission or warrant. May be classified as unqualified, qualified, or for the good of the service as defined in this enclosure. Upon acceptance by SECNAV and completion of all administrative procedures, it represents a complete severance from all military status.

30. Resignation for the Good of the Service. A resignation for which the least favorable characterization of service allowed is under Other Than Honorable conditions.

31. Respondent. A commissioned officer or Warrant Officer required to show cause for retention on active duty or as a member on the RASL.

32. Retention on Active Duty. The continuation of an individual on active duty as a commissioned or Warrant Officer of the Regular Navy or Marine Corps or the Navy or Marine Corps Reserve.

33. Separation. A general term that includes discharge, release from active duty, release from custody and control of the Military Services, dismissal, dropping from the rolls, transfer to the Individual Ready Reserve, retirement, resignation, and similar changes in active or Reserve status.

34. Separation Processing. Generally, the administrative procedures established under this instruction for the separation of officers. Although separation processing may take a variety of forms, it is always triggered by the written notification to officers of the intent to separate them from the Naval service.

35. Sexual Misconduct or Perversion. Includes:

a. Rape, sexual assault, mailing obscene material, child sexual abuse, any sexual misconduct, or stalking that could be charged as a violation of or an attempt to violate Articles 120,

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120a, 120b, 120c, or 130 of the UCMJ;

b. Forcible sodomy (for offenses committed prior to 1 January 2019);

c. Viewing, receiving, possessing or distributing child pornography;

d. Bestiality;

e. Soliciting or attempting to solicit a prostitute;

f. Pandering;

g. Engaging in or attempting to engage in prostitution; or

h. Other illegal sexual behavior, including incest illegal under state law.

36. Show Cause Authority. See paragraph 11c of the base instruction.

37. Unlawful Drug Involvement. Includes:

a. Drug abuse - the illegal or wrongful use, possession, manufacture, distribution, or importation of a controlled substance in violation of UCMJ Article 112a;

b. Drug trafficking - the illegal or wrongful distribution or possession with intent to sell or transfer controlled substances;

c. All other misconduct in violation of reference (f);

d. Drug paraphernalia - the illegal or wrongful possession or distribution of drug paraphernalia as set forth in reference (f).

38. Unqualified Resignation. A resignation for which the only characterization of service allowed is Honorable.

39. Warrant Officer. A person who holds a commission or warrant in a Warrant Officer grade. There are five Warrant

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Officer grades: Warrant Officer (W-1) and Chief Warrant Officer  
W-2, W-3, W-4, and W-5.

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**POLICY GOVERNING VOLUNTARY SEPARATION**

1. Voluntary Resignation

a. General. Officers serve at the pleasure of the President and no terminal dates are established for their commissions. In accordance with applicable law and regulations, SECNAV may establish such criteria for the voluntary resignation of an officer's commission as deemed necessary for the maintenance of a sound officer corps.

b. Submission of Requests. CHNAVPERS and DC (M&RA) will establish procedures for the submission of individual resignation requests.

c. Processing Resignation Requests. CHNAVPERS and DC (M&RA) may, on behalf of SECNAV, accept voluntary resignations for the reasons authorized in paragraph 5 of this enclosure, subject to the following guidelines.

(1) CHNAVPERS and DC (M&RA) may deny, for SECNAV, requests that do not satisfy the criteria set forth in paragraphs 4 and 5 of this enclosure. In addition, requests for voluntary resignation for reasons specified in paragraph 5 of this enclosure will normally be denied when:

(a) The officer does not comply with the procedures established by CHNAVPERS and DC (M&RA) for the submission of individual resignation requests;

(b) The officer has not completed the minimum service prescribed by the officer accession program through which the officer's original appointment was tendered;

(c) CHNAVPERS or DC (M&RA) has determined that a significant personnel shortage in the officer's competitive category, designator, occupational field, Military Occupational Specialty (MOS), or other authorized officer classification constitutes a compelling military necessity requiring the officer's retention;

(d) The officer has not completed obligated service incurred for advanced education or technical training requiring additional obligated service, including postgraduate education,

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service school or college, law school, medical residency, flight training, naval flight officer training, and equivalent programs;

(e) The officer has been officially notified of orders, or has executed orders and has not served the required period of time at the new duty station, as prescribed by CHNAVPERS or DC (M&RA); or

(f) The officer has not completed obligated service incurred as a result of:

1. Transfer into the Regular Navy or Marine Corps;

2. Lateral transfer between competitive categories or designators;

3. Entering a program; or

4. Receiving an incentive pay, continuation pay, or bonus.

(2) A resignation has no effect until accepted by SECNAV or by CHNAVPERS or DC (M&RA) when acting on behalf of SECNAV.

(3) Enclosure (7), paragraph 13a, contains guidelines for officers who submit voluntary resignations while being considered for separation for cause under enclosure (6).

d. Characterization of Service. Generally, officers whose resignations are accepted by SECNAV, CHNAVPERS, or DC (M&RA) for any reason set forth in paragraph 5 of this enclosure will be honorably discharged from their respective component. Characterization of service may be General (Under Honorable Conditions) or Other Than Honorable when an officer requests such characterization (for example, in connection with a pretrial agreement). Such characterization must be consistent with guidelines contained in enclosure (8) of this instruction.

2. Release of Reserve Officers from Active Duty. CHNAVPERS or DC (M&RA) may, acting for SECNAV, release Reserve officers from active duty upon their request for reasons set forth in

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paragraph 5 of this enclosure, unless processing for separation for cause under paragraph 1 of enclosure (6) is warranted.

3. Regular Officers Requesting Reserve Commissions Upon Resignation

a. A Regular officer requesting resignation under this enclosure who has completed the eight-year military service obligation outlined in paragraph 4a of this enclosure and who requests a Reserve commission upon resignation from the Regular Navy or Marine Corps will normally be tendered such a commission, provided a requirement exists for the officer's skill in the grade and competitive category in which the officer would serve in the Navy or Marine Corps Reserve. CHNAVPERS and DC (M&RA) will neither tender nor award Reserve commissions to such officers whose voluntary resignation request is incident to separation in lieu of trial by court-martial under enclosure (6) or in lieu of separation for cause processing under enclosure (7).

b. The Marine Corps Reserve has no LDOs. Marine Corps Regular LDOs requesting resignation from the Regular Marine Corps who request a Reserve commission will normally be tendered such a commission in the Warrant Officer grade they would have held had they been serving as a Warrant Officer in the Regular Marine Corps, provided a requirement exists for their MOS in that grade in the Marine Corps Reserve.

c. Regular officers whose requests for Reserve commissions are approved will be assigned in the Ready Reserve upon resignation from the Regular Navy or Marine Corps and acceptance of the appointment in the Navy or Marine Corps Reserve.

4. Military Service Obligation

a. DON Policy. Under the DoD policy in reference (o), each person who enters military service by appointment as an officer incurs a military service obligation of eight years from that entry date in accordance with reference (a), section 651. Any part of this obligation that is not performed on active duty or active duty for training must be performed in a Reserve Component. Subject to the exceptions in paragraph 4b of this enclosure, CHNAVPERS or DC (M&RA) will:

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(1) Approve a resignation request from a Regular officer who has not completed the military service obligation only upon the officer's acceptance of a Reserve commission that must be held at least until completion of such obligation;

(2) Approve a request for release from active duty from a Reserve officer who has not completed the military service obligation if the officer transfers to and remains in the Ready Reserve until completion of such obligation, unless medical reasons preclude such transfer and subject to the requirements of reference (a), section 12313, in times of war or national emergency; and

(3) Deny a resignation request from a Reserve officer who has not completed the military service obligation.

b. Exceptions

(1) Dependency or Hardship. If a Regular or Reserve officer who has a remaining military service obligation submits a voluntary resignation request on the basis of dependency or hardship under paragraph 5d(1) of this enclosure, then CHNAVPERS or DC (M&RA) may approve the resignation request and discharge the officer before completion of the military service obligation.

(2) Waiver for Selected Reserve Affiliation. When a Regular officer who is released from the Active Component with a remaining military service obligation directly affiliates with the Selected Reserve and participates in accordance with reference (a), section 10147, the CHNAVPERS or DC (M&RA) may grant a waiver that reduces the eight-year military service obligation to six years.

(3) Discharge to Become a Minister. If a Reserve officer who has a remaining military service obligation submits a voluntary resignation request in order to become a minister under paragraph 5h of this enclosure, then CHNAVPERS or DC (M&RA) may approve the resignation request and discharge the officer before completion of the military service obligation.

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(4) No Potential for Service in a Reserve Component. If a Regular or Reserve officer has no potential for service in a Reserve Component as prescribed in reference (a), section 12301, then CHNAVPERS or DC (M&RA) may recommend that ASN (M&RA) or designee discharge the officer before completion of the eight-year military service obligation. When determining if an officer has potential for service in a Reserve Component, the following factors should normally be considered:

(a) All fitness reports and other portions of the service record which indicate potential for further service;

(b) The officer's conduct and its relation to, and effect on, the performance of military duties;

(c) Adverse information as defined by enclosure (4) of reference (af);

(d) Whether the officer is pending separation for cause on the basis of substandard performance of duty, misconduct, or moral or professional dereliction, or because retention is not clearly consistent with the interest of national security, or otherwise could be directed to show cause for retention in the naval service on such bases for separation; and

(e) Other relevant matters presented by the record, the officer, or the chain of command.

(5) Critically Short Health Professions Specialty. When a person is appointed as a commissioned officer in a critically short health professions specialty specified by the SECNAV or designee, CHNAVPERS or DC (M&RA) may waive the eight-year military service obligation in accordance with reference (a), section 651(c). The minimum period of obligated service for an officer under this exception is the greater of two years or, in the case of an officer who accepts an accession bonus or executes an agreement for the multiyear receipt of special pay for service in the Armed Forces, the period of obligated service specified in the agreement.

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5. Reasons for Voluntary Separation

a. Expiration of Military Service Obligation. An officer may be separated upon completion of the military service obligation in paragraph 4a of this enclosure provided the officer has no other obligated service.

b. Expiration of Other Obligated Service. An officer who completed the military service obligation in paragraph 4a of this enclosure but incurred other obligated service may be separated upon completion of all such other obligated service, to include that prescribed in the officer program through which accessed, any other obligation incurred by the officer in consideration for being tendered an initial appointment, and any additional obligated service incurred by the officer while serving on active duty, or in an active status in the Ready Reserve.

c. Change of Career Intention. Some officers who completed their minimum service requirement and then decided to remain on active duty intending to serve full careers may later seek separation before attaining retirement eligibility to pursue a civilian career. Officers who submit resignations after continuing in service beyond their minimum service requirement will be separated for Change of Career Intention unless retention is warranted by the criteria set forth in paragraph 1c(1) of this enclosure.

d. Convenience of the Government. An officer may be separated for the Convenience of the Government for the reasons set forth below. Separation of an officer for the Convenience of the Government is subject to the resolution of any outstanding disciplinary actions involving the officer.

(1) Dependency or Hardship. Separation of an officer may be directed when genuine dependency or undue hardship exists under these circumstances:

(a) The hardship or dependency is not temporary;

(b) Conditions have arisen or have been aggravated to an excessive degree since entry into the service, and the officer has made every reasonable effort to remedy the situation;

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(c) Separation will eliminate or materially alleviate the condition; and

(d) There are no other means of alleviation reasonably available.

(2) Pregnancy or Childbirth. A pregnant officer may request separation from active duty. Requests for separation will not normally be approved unless there are extenuating circumstances or the request otherwise complies with criteria for separation contained in this instruction. CHNAVPERS and DC (M&RA) will prescribe the maximum period possible for eligible officers to consider this course of action, in order to minimize subsequent separations for parenthood or dependency and provide prompt replacement of separated personnel.

(3) Conscientious Objection. An officer may be separated if authorized under reference (p).

(4) Surviving Family Member. An officer must be separated if authorized under reference (q).

(5) Separation of Aliens. An officer who is an alien, an individual who is neither a natural-born nor a naturalized citizen of the United States, may be separated on the basis of being an alien who no longer wishes to serve.

(a) The request will normally be denied when retention is warranted by the criteria set forth in paragraph 1c(1) of this enclosure.

(b) Notwithstanding the limitations in subparagraph 5d(5)(a), a request for separation may be approved when, in the judgment of CHNAVPERS or DC (M&RA), the applicant has demonstrated overriding and compelling factors of a personal need that justify separation.

(6) Separation to Accept Public Office. Unless retention is warranted by the criteria set forth in paragraph 1c(1) of this enclosure, an officer who has completed the obligated service referred to in paragraphs 4a and 5b of this enclosure may be separated to perform the duties of the President or Vice President of the United States; a Presidential appointee to a statutory office; a member of either of the

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legislative bodies of the United States; a Governor; any other State official chosen by the voters of the entire State or States; or a judge of courts of record of the United States, the States, or the District of Columbia.

(7) Officers Married to Other Service Members. Unless retention is warranted by the criteria set forth in paragraph lc(1) of this enclosure, an officer may be separated who has completed the obligated service, referred to in paragraphs 4a and 5b of this enclosure, and who cannot be stationed near enough to the spouse to permit the maintenance of a joint residence.

(8) Separation to Attend College. At the discretion of CHNAVPERS or DC (M&RA), officers may be separated to enroll in a full-time course of study leading to a baccalaureate degree or graduate degree, provided such separation occurs within 90 days of the date of expiration of the obligated service, referred to in paragraph 5b of this enclosure, and retention is not warranted by the criteria set forth in paragraph lc(1) of this enclosure.

e. Interservice Transfers. Interservice transfer requests will be processed in accordance with reference (m).

f. Selected Changes in Service Obligations. An officer may be separated under specific programs established by the CNO or CMC permitting separation within 90 days of the date of expiration of active obligated service. Such programs will have as objectives the maintenance of prudent management flexibility and the conservation of limited resources. An example of such a program is the release of an officer from active duty before extended deployment to avoid separation outside the continental United States. The CNO and CMC must submit to SECNAV, for approval and incorporation into this instruction, the reasons for separation under these programs before their implementation. These reasons for separation are authorized under this paragraph when CHNAVPERS or DC (M&RA) determines that such separations are more economical or efficient for the Government:

(1) Separation upon Completion of Overseas Tours. Officers having less than 90 days of other obligated service, referred to in paragraph 5b of this enclosure, remaining upon completion of an overseas tour other than Hawaii, may be

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separated upon completion of that tour, unless retention is warranted by the criteria set forth in paragraph lc(1) of this enclosure.

(2) Separation for Major Federal Holidays. Officers whose other obligated service, referred to in paragraph 5b of this enclosure, expires during a Federal holiday may be separated at the commencement of that holiday, unless retention is warranted by the criteria set forth in paragraph lc(1) of this enclosure.

g. Retirement. An officer may be retired if requested and if eligible and authorized under references (r), (s), or (t).

h. Discharge of a Reservist to Become a Minister. A Reserve Component officer, on written application, may be discharged from the Navy or Marine Corps if the officer has become a member of the clergy and establishes all of these pursuant to reference (aa):

(1) The ministry is his or her primary vocation;

(2) His or her religious faith group is recognized substantially for religious purposes;

(3) His or her standing in the faith group is recognized as that of a minister or leader;

(4) He or she is certified by an applicable official of the faith group to be a fully qualified member of the clergy in good standing.

i. Failure to Receive Initial Appointment Benefits. Newly appointed officers may be separated at their request or with their consent for failure or inability on the part of the naval service to give the benefits promised incident to initial appointment, for example, service credit or entry grade credit. The screening for mobilization potential specified in paragraph 16 of enclosure (5) for Reserve component officers is not applicable. Newly appointed officers separated for this reason have not served the statutory service obligation prescribed in reference (o).



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j. Expiration of Term of Active-Duty Orders in the Case of Reservists. Reservists may be released from active duty at the expiration of their term of service specified in their orders to active duty.

6. Expungement of Resignations from Officer Service Record

a. CHNAVPERS and DC (M&RA) will, upon their approval of an officer's written request to withdraw a resignation, expunge these from the officer's official record:

(1) For officers on active duty - resignations, disapproved resignations, and related correspondence in their entirety.

(2) For officers who resign and subsequently return to active duty in the naval service - portions of resignation correspondence which contain reasons for resignation. Such expungements will include portions from letters of intent to resign and letters of resignation and endorsements.

b. Other resignation-related material, such as separation orders, fitness reports, and DD Form 214s, will not be expunged.

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**POLICY GOVERNING INVOLUNTARY SEPARATION OF REGULAR OFFICERS -  
FAILURE OF SELECTION FOR PROMOTION, MANDATORY RETIREMENT FOR  
YEARS OF ACTIVE SERVICE OR AGE, SELECTIVE EARLY RETIREMENT**

1. Purpose. This enclosure contains the DON policy governing the involuntary separation and mandatory retirement of Regular officers in the Navy and Marine Corps in the grades of Warrant Officer, W-1 through O-8, for bases other than separation for cause. The authority to involuntarily separate or retire officers under this enclosure will not be used when separation for cause under enclosures (6) and (7) is appropriate. If an officer in the grade of O-1 or above is subject to separation or retirement under this enclosure and any action has been commenced with a view to trying such officer by court-martial, then ASN (M&RA), pursuant to reference (a), section 639, may delay the officer's separation or retirement until completion of the disciplinary action. Regular LDOs are excluded from some provisions and addressed separately where noted because different statutory authorities in reference (a) apply.

2. Permanent Regular Warrant Officers. In this paragraph, the term "creditable active service" means active service that could be credited to a Warrant Officer under section 511 of the Career Compensation Act of 1949, as amended (70 Sta. 114).

a. Warrant Officers (W-1) and Chief Warrant Officers (W-2): Not qualified for promotion to the grades of Chief Warrant Officer, W-2 or W-3. Per reference (a), section 1165, the SECNAV or designee may terminate the appointment of a permanent Regular Warrant Officer at any time within three years after the date when the officer accepted his or her original permanent appointment as a Warrant Officer in the Navy or Marine Corps. This three-year probationary period applies irrespective of the Warrant Officer grade held. See enclosure (2), paragraphs 25c and 39 (defining the terms "probationary officer" and "Warrant Officer"). In accordance with reference (a), section 1165, the CHNAVPERS and DC (M&RA) will approve the involuntary separation of Warrant Officers pursuant to the following guidelines.

(1) Warrant Officer (W-1). A non-retirement eligible Warrant Officer (W-1) with less than three years of continuous active service since the date of the original permanent appointment in the grade of Warrant Officer (W-1) who is found not qualified for promotion to the grade of Chief Warrant

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Officer, W-2, must be honorably discharged not later than the last day of the three-year period beginning on the date on which the officer accepted his or her original permanent appointment.

(2) Chief Warrant Officer, W-2. A non-retirement eligible Chief Warrant Officer, W-2, with less than three years of continuous active service since the date of the original permanent appointment in the grade of Chief Warrant Officer, W-2, who is found not qualified for promotion to the grade of Chief Warrant Officer, W-3, must be honorably discharged not later than the last day of the three-year period beginning on the date on which the officer accepted his original permanent appointment.

(3) Enlistment. A Warrant Officer (W-1) or Chief Warrant Officer (W-2), who is subject to separation under this paragraph may request enlistment and, in the discretion of SECNAV, be enlisted in a grade prescribed by SECNAV, but no lower than the enlisted grade held immediately before the original permanent appointment as a Warrant Officer. The CHNAVPERS and DC (M&RA) should review the officer's request and provide SECNAV with a recommendation that considers the individual's record of service as a Warrant Officer, the length of service performed as a Warrant Officer, and the relationship of inventory to approved authorizations in the Navy Enlisted Classification (NEC) or Marine Corps Military Occupational Specialty (MOS) in which the individual would serve in an enlisted status.

b. Regular Chief Warrant Officers, W-2, W-3, and W-4: Failure of Selection for Promotion. Unless retired or separated sooner under another provision of this instruction, or continued on active duty by SECNAV under references (h) or (i), a Regular Chief Warrant Officer in the grade of Chief Warrant Officer W-2, W-3, or W-4, who has twice failed of selection for promotion to the next higher Warrant Officer grade will be retired or separated from the Navy or Marine Corps as outlined below.

(1) Mandatory Retirement: More Than 20 years of Service. If the Chief Warrant Officer has more than 20 years of creditable active service on the date when SECNAV or designee approves the report of the promotion selection board under reference (a), section 576(e), or the date when the officer's name was removed from a promotion list under reference (a), section 579, whichever applies, then the officer will be retired

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with an effective retirement date not later than the first day of the seventh calendar month beginning after the foregoing applicable date.

(2) Mandatory Retirement: 18 to 20 Years of Service. If the Chief Warrant Officer has at least 18 but not more than 20 years of creditable active service on the date when SECNAV or designee approves the report of the promotion selection board under reference (a), section 576(e), or the date when the officer's name was removed from a promotion list under reference (a), section 579, whichever applies, then the officer will be retired. The SECNAV or designee will specify the effective date of retirement, which will not be later than the first day of the seventh calendar month beginning after the date when the Warrant Officer completes 20 years of active service, unless the officer is selected for promotion to the next higher Regular Warrant Officer grade before such date.

(3) Involuntary Separation: Less Than 18 Years of Service. If the Chief Warrant Officer has less than 18 years of creditable active service on the date when SECNAV or designee approves the report of the promotion selection board under reference (a), section 576(e), or the date when the officer's name was removed from a promotion list under reference (a), section 579, whichever applies, then the officer will be separated not later than the first day of the seventh calendar month beginning after the foregoing applicable date, subject to the following exceptions.

(a) 18 Years of Service on Separation Date. If on the separation date the Chief Warrant Officer has at least 18 years of creditable active service, then the officer will be retained on active duty until retired under paragraph 2b(2) of this enclosure in the same manner as if the officer had at least 18 years of service on the applicable date under that paragraph.

(b) Temporary Appointment in Grade of O-1 or Above. If the Chief Warrant Officer is serving on active duty in a temporary appointment in the grade of O-1 or above, then the officer will remain on active duty in that status until qualified for retirement under reference (a), section 580. The officer's temporary appointment in the grade of O-1 or above will terminate on the date of retirement in the Warrant Officer grade.

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(c) Enlistment. The Chief Warrant Officer may request enlistment and, in the discretion of SECNAV or designee, be enlisted in a grade prescribed by SECNAV, but not in a grade lower than that held immediately before original permanent appointment as a Warrant Officer. In making recommendations to SECNAV, CHNAVPERS and DC (M&RA) must consider the individual's record of service as a Warrant Officer, the length of service performed as a Warrant Officer, and the relationship of inventory to approved authorizations in the NEC or MOS in which the individual would serve in an enlisted status.

c. Mandatory retirement for age or years of service

(1) Age. In accordance with reference (a), section 1263, a permanent Regular Warrant Officer who has at least 20 years of creditable active service, and who is at least 62 years of age, must be retired 60 days after becoming that age, unless retired under paragraph 2c(2) of this enclosure and subject to the uniform retirement date under reference (ae), section 8301.

(2) 30 Years of Creditable Active Service. In accordance with reference (a), section 1305, unless continued on active duty under references (h) or (i), a Regular Warrant Officer (other than a Regular Navy Chief Warrant Officer, W-5) who has at least 30 years of creditable active service must be retired 60 days after the date on which the officer completes that service, subject to the uniform retirement date under reference (ae), section 8301. In the case of a regular Navy Chief Warrant Officer, W5, the officer must be retired 60 days after the date on which the officer completes 33 years of total active service.

d. Selective Early Retirement

(1) In accordance with reference (a), section 581, and reference (aj), a Regular Chief Warrant Officer in the grade of Chief Warrant Officer (W-2) and above whose name is not on a list of Warrant Officers recommended for promotion and who is eligible to retire under any provision of law may be considered for early retirement by a selection board convened by SECNAV under reference (a), section 573(c).

(2) A Chief Warrant Officer who is recommended for selective retirement and whose retirement is approved by the

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SECNAV must be retired, under any provision of law under which he is eligible to retire, on the date requested by him and approved by the SECNAV, but not later than the first day of the seventh calendar month beginning after the month in which the SECNAV approves the report of the board which recommended the officer for retirement.

(3) The SECNAV may defer, for not more than three months and on a case-by-case basis, the early retirement in order to prevent a personal hardship to the officer or for other humanitarian reasons. If approved for deferral, the Chief Warrant Officer must be retired on the date requested by the officer, and approved by the SECNAV, but not later than the first day of the tenth calendar month beginning after the month in which the SECNAV approves the report of the board which selected the officer for early retirement.

(4) The selective early retirement of a Chief Warrant Officer under reference (a), section 581, is an involuntary retirement for purposes of any provision of law or regulation.

e. Delay of Retirement to Complete Disciplinary Action. If a regular Warrant Officer is subject to separation or retirement under this enclosure and any action has been commenced with a view to trying such Warrant Officer by court-martial, then ASN (M&RA) may delay the regular Warrant Officer's separation or retirement until completion of the disciplinary action.

### 3. Regular Officers in the Grade of O-1 (excluding LDOs) Found Not Qualified for Promotion to O-2

a. General Rule. Per reference (a), section 630 and reference (am), a Regular O-1 who is found not qualified for promotion to the grade of O-2 must, unless sooner promoted, be discharged at the end of the 18-month period beginning on the date on which the officer is first found not qualified for promotion.

b. Minimum Six-Month Retention Period. Per reference (ai), DoD policy recognizes that O-1s are new to commissioned military service and should be afforded a reasonable opportunity to overcome their deficiencies before discharge action is taken. Accordingly, an O-1 found not qualified for promotion will be retained for a minimum of six months after the date on which the

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promotion would have occurred, unless retention is inconsistent with good order and discipline. If the O-1 qualifies for promotion to the grade of O-2 during or at the completion of the retention period, then the O-1 will be promoted. If the O-1 does not qualify for promotion at any time after completion of the retention period, then the officer will be discharged in accordance with reference (am) and this instruction.

c. Military Service Obligation. If a Regular O-1 is subject to discharge under this paragraph and has not completed the eight-year military service obligation, then CHNAVPERS or DC (M&RA) will:

(1) Require the officer to accept an appointment in a Reserve Component in an active status in order to complete the remaining period of the military service obligation in accordance with reference (a), section 651; or

(2) Recommend that ASN (M&RA) or designee discharge the officer before completion of the military service obligation based on a determination that the officer has no potential for service in a Reserve Component in accordance with enclosure (3), paragraph 4b(4), of this instruction.

4. Regular Officers in the Grade of O-2 (excluding LDOs):  
Failure of Selection for Promotion

a. General Rule. Per reference (a), section 631, an O-2 who twice fails of selection for and who is not on a list of officers recommended for promotion to O-3 will be Honorably discharged on the date requested by the officer and approved by SECNAV, but not later than the first day of the seventh calendar month beginning after the month in which the report of the selection board or the All-Fully-Qualified-Officers List (AFQOL) that considered the officer for the second time is approved.

b. Military Service Obligation. If a Regular O-2 is subject to discharge under this paragraph and has not completed the eight-year military service obligation, then CHNAVPERS or DC (M&RA) will:

(1) Require the officer to accept an appointment in a Reserve Component in an active status in order to complete the



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remaining period of the military service obligation in accordance with reference (a), section 651; or

(2) Recommend that ASN (M&RA) or designee discharge the officer before completion of the military service obligation based on a determination that the officer has no potential for service in a Reserve Component in accordance with enclosure (3), paragraph 4b(4) of this instruction.

5. Regular Officers in the Grade of O-3 and O-4 (excluding LDOs): Failure of Selection for Promotion

a. General Rule. Per reference (a), section 632, an O-3 or O-4 who twice fails of selection for and is not on a list of officers recommended for promotion to the next higher grade will be Honorably discharged on the date requested by the officer and approved by SECNAV, but not later than the first day of the seventh calendar month beginning after the month in which the report of the selection board that considered the officer for the second time is approved, subject to the exceptions below and reference (a), section 639.

b. Exceptions

(1) Retirement-eligible. If an O-3 or O-4 is subject to discharge under reference (a), section 632, but is retirement-eligible under any provision of law, then the officer must be retired under that law on the date requested by him and approved by the SECNAV or designee, which date will not be later than the first day of the seventh calendar month beginning after the month in which the report of the selection board that considered the officer for the second time is approved.

(2) Within Two Years of Retirement. If an O-3 or O-4 is within two years of qualifying for retirement under reference (a), section 8323, on the required date of discharge under reference (a), section 632, then the officer must be retained on active duty until qualified for retirement and retired under section 8323, unless sooner retired or discharged under another provision of law, including but not limited to, separation for cause under any other provision of this instruction.

(3) Continuation for Approaching Retirement Eligibility. If an O-3 or O-4 will qualify for retirement under reference



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(a), section 8323, between two to six years after the required date of discharge under reference (a), section 632, then the officer may be continued on active duty if selected by a continuation selection board convened by the SECNAV in accordance with reference (a), section 637(a), and reference (y). Reference (an) sets forth the DON policy on continuation.

(4) Continuation for Critical Skill. If an O-3 or O-4 is subject to discharge under reference (a), section 632, and has a SECNAV-designated critical skill as defined by reference (an), then the officer may be continued on active duty if selected by a continuation selection board convened by the SECNAV in accordance with reference (a), section 637a, and reference (y). Reference (an) sets forth the DON policy on continuation.

(5) Health Professions Officers. If an O-3 or O-4 in the Medical Corps, Dental Corps, or Nurse Corps is subject to discharge under reference (a), section 632, and, as of the date of such discharge, has not completed a period of active duty service obligation incurred under reference (a), section 2005, 2114, 2123, or 2603, then the officer must be retained on active duty until completion of such active duty service obligation, and then be discharged under reference (a), section 632, unless sooner retired or discharged under another provision of law. However, ASN (M&RA) may waive the foregoing requirement and discharge the officer if the completion of the active duty service obligation is not in the best interest of the service.

6. Regular Officers in Grades O-5 to O-10 (excluding LDOs):  
Mandatory Retirement for Years of Active Commissioned Service

a. Regular O-5s. Per reference (a) section 633, an O-5 who is not on a promotion list to O-6 must be retired on the first day of the month after the month in which the officer completes 28 years of active commissioned service, subject to the exceptions in paragraph 6g of this enclosure. This rule does not apply to a permanent military professor at the U.S. Naval Academy in the grade of O-5. See paragraph 10a(3) of this enclosure.

b. Regular O-6s. Per reference (a), section 634, an O-6 who is not on a promotion list to O-7 or retired earlier must be retired on the first day of the month after the month in which

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the officer completes 30 years of active commissioned service, subject to the exceptions in paragraph 6g of this enclosure. This rule does not apply to a permanent military professor at the U.S. Naval Academy in the grade of O-6. See paragraph 10a(3) of this enclosure.

c. Regular O-7s. Per reference (a), section 635, an O-7 who is not on a promotion list to O-8 or retired earlier must be retired on the first day of the first month beginning after the date of the fifth anniversary of their appointment to the grade of O-7 or on the first day of the month after the month in which they complete 30 years of active commissioned service, whichever is later, subject to the exceptions in paragraph 6g of this enclosure.

d. Regular O-8s. Per reference (a), section 636, an O-8 must, if not retired earlier, be retired on the first day of the first month beginning after the date of the fifth anniversary of the appointment to the grade of O-8 or on the first day of the month after the month in which the officer completes 35 years of active commissioned service, whichever is later, subject to the exceptions in paragraph 6g of this enclosure.

e. Regular O-9s. Per reference (a), section 636, an O-9 must, if not earlier retired, be retired on the first day of the first month beginning after the date of the fifth anniversary of appointment to the grade of O-9 or on the first day of the month in which the officer completes 38 years of active commissioned service, whichever is later, subject to the exceptions in paragraph 6g of this enclosure.

f. Regular O-10s. Per reference (a), section 636, an O-10 must, if not earlier retired, be retired on the first day of the first month beginning after the date of the fifth anniversary of appointment to the grade of O-10 or on the first day of the month in which the officer completes 40 years of active commissioned service, whichever is later, subject to the exceptions in paragraph 6g of this enclosure.

g. Exceptions. In addition to reference (a), section 639, there are two statutory exceptions to the rules governing mandatory retirement for years of active commissioned service:

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deferral of mandatory retirement pursuant to reference (a), section 637(b), and continuation for a critical skill pursuant to reference (a), section 637a.

(1) Deferral of mandatory retirement

(a) Regular O-5s and O-6s. If an officer in the grade of O-5 or O-6 is subject to mandatory retirement under reference (a), section 633 or 634, then SECNAV may, subject to the needs of the Navy or Marine Corps, defer the mandatory retirement if the officer is selected by a continuation selection board convened by the SECNAV pursuant to reference (a), section 637(b), and references (y) and (an). The deferral period cannot exceed five years, subject to the statutory maximum age requirement of 62 years in reference (a), section 1251.

(b) Regular O-7s and O-8s. If an officer in the grade of O-7 or O-8 is subject to mandatory retirement under reference (a), section 635 or 636, then SECNAV may, subject to the needs of the Navy or Marine Corps, defer the retirement for a period not to exceed 5 years, subject to the statutory maximum age requirement of 64 years in reference (a), section 1253. A continuation selection board is not required.

(c) Regular O-9s and O-10s. If an officer in the grade of O-9 or O-10 is subject to mandatory retirement under reference (a), section 636, then the President, pursuant to reference (a), section 637(b), may defer the retirement and continue the officer on active duty for a period not to exceed five years, subject to the statutory maximum age requirement of 64 years in reference (a), section 1253.

(2) Continuation for Critical Skill. If an officer in the grade of O-5 through O-10 is subject to mandatory retirement under reference (a), section 633, 634, 635, or 636, and has a SECNAV-designated critical skill as defined by reference (an), then the officer may be continued on active duty if selected by a continuation selection board convened by the SECNAV in accordance with reference (a), section 637a, and references (y) and (an). If continued, then the officer must be retired on the first day of the first month after the month in which the officer completes 40 years of active service, unless retired earlier. The statutory maximum age requirement of reference

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(a), section 1251 or 1253, as applicable, may mandate an officer's retirement prior to 40 years of active service.

7. Regular Temporary LDOs in the Grades of O-1 to O-5.

Reference (a), section 8146, provides the SECNAV with authority to prescribe regulations governing the appointment, promotion, separation, and retirement of temporary LDOs. In accordance with reference (a), section 8146(e), the SECNAV may terminate the temporary appointment of an LDO at any time; this authority is delegable. The term "temporary LDO" is defined in enclosure (2), paragraph 22a, of this instruction. The Navy has temporary LDOs in the grade of O-1 only, whereas the Marine Corps has temporary LDOs in the grades of O-1 to O-5.

a. Regular Temporary LDOs in the grade of O-1 found not qualified for promotion to the grade of O-2

(1) General Rule. If a temporary LDO in the grade of O-1 is found not qualified for promotion to the grade of O-2, then SECNAV or designee will terminate the appointment, subject to the exceptions in paragraph 7c of this enclosure.

(2) Minimum Retention Period. Per reference (ai), a temporary LDO in the grade of O-1 found not qualified for promotion will be retained for a minimum of six months after the date on which the promotion would have occurred, unless retention is inconsistent with good order and discipline. If the LDO qualifies for promotion to the grade of O-2 during or at the completion of the retention period, then the LDO will be promoted. If the LDO does not qualify for promotion at any time after completion of the retention period, then the LDO's temporary appointment will be terminated by the SECNAV or designee.

b. Regular Temporary LDOs in Grades of O-2 to O-4: Failure of Selection for Promotion. If a temporary LDO in the grade of O-2, O-3, or O-4 has twice failed of selection for promotion to the next higher grade, then the SECNAV or designee will terminate the temporary appointment on the date requested by the officer, but not later than the first day of the seventh calendar month beginning after the month in which the report of the selection board that considered the officer for the second time is approved, subject to the exceptions in paragraph 7c of this enclosure.

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c. Exceptions. In accordance with reference (a), section 8146, the following exceptions apply to a temporary LDO whose appointment is subject to termination by SECNAV under this paragraph.

(1) 18-Year Retirement Sanctuary. If, on the date when the temporary appointment will terminate, the temporary LDO is not qualified for retirement under any provision of law, but is within two years of qualifying for retirement under reference (a), section 8323, in the grade held as a temporary LDO, then the SECNAV or designee may retain the officer on active duty as a temporary LDO until qualified for retirement under section 8323, unless the officer is sooner retired or discharged under another provision of law, or elects to revert to a permanent Warrant Officer or enlisted status in accordance with paragraphs 7c(3) or 7c(4) of this enclosure.

(2) Retirement-eligible. If, on the date when the temporary appointment will terminate, a temporary LDO is qualified for retirement under reference (a), section 8323, in the grade held as a temporary LDO, then the officer will be retired under section 8323 on the date requested by the officer, but not later than the first day of the seventh calendar month beginning after the month in which the report of the selection board that considered the officer for the second time is approved.

(3) Reversion to Permanent Warrant Officer Status. If, on the date when the temporary appointment will terminate, the temporary LDO is not eligible for retirement under any provision of law, is not within the 18-year retirement sanctuary of paragraph 7c(1) of this enclosure, and had a permanent status of a Warrant Officer when first appointed as a LDO, then the officer may request reversion to the permanent Warrant Officer grade and status.

(4) Reenlistment. If, on the date when the temporary appointment will terminate, the temporary LDO is not eligible for retirement under any provision of law, is not within the 18-year retirement sanctuary of paragraph 7c(1) of this enclosure, and was in an enlisted grade when first appointed as a LDO, then the officer may, upon his or her request and in the discretion

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of SECNAV or designee, be enlisted in a grade prescribed by the SECNAV or designee upon termination of the temporary appointment.

d. Mandatory Retirement for Years of Active Service. In accordance with reference (a), section 8146 and except as provided by reference (a), section 639, a temporary LDO in the grade of O-1 to O-5 must be retired on the last day of the month following the month in which the officer completes 30 years of active naval service, exclusive of active duty for training in a Reserve Component.

8. Regular Permanent LDOs in Grades O-1 to O-6. The term "permanent LDO" is defined in enclosure (2), paragraph 22b, of this instruction. The involuntary separation and mandatory retirement of Regular permanent LDOs are governed by reference (a), section 8372. The statutory rules are set forth below.

a. Regular Permanent LDOs in Grade of O-1 Found Not Qualified for Promotion to O-2. A permanent LDO in the grade of O-1 who is found not qualified for promotion to the grade of O-2 must be honorably discharged on the date requested by the officer and approved by SECNAV, but not later than the first day of the seventh calendar month beginning after the month in which the officer was found not qualified for promotion, subject to the retirement-sanctuary exception in paragraph 8d(1) of this enclosure.

b. Regular Permanent LDOs in grades of O-2 to O-5: Failure of selection for promotion

(1) Permanent LDOs in Grade of O-2. A permanent LDO in the grade of O-2 who twice failed of selection for promotion to the grade of O-3 must be honorably discharged on the date requested by the officer and approved by SECNAV, but not later than the first day of the seventh calendar month beginning after the month in which the report of the selection board or AFQOL that considered the officer a second time is approved, subject to the retirement-sanctuary exception in paragraph 8d(1) of this enclosure.

(2) Permanent LDOs in Grade of O-3. A permanent LDO in the grade of O-3 who has twice failed of selection for promotion to the grade of O-4 and is not on a promotion list must be

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honorably discharged on the date requested by the officer and approved by SECNAV, but not later than the first day of the seventh calendar month beginning after the month in which the report of the selection board that considered the officer for the second time is approved, subject to the exceptions in paragraphs 8d(1) and 8d(2) of this enclosure.

(3) Permanent LDOs in Grade of O-4. A permanent LDO in the grade of O-4 who has twice failed of selection for promotion to the grade of O-5 and is not on a promotion list must be retired, if eligible to retire, or be honorably discharged on the date requested by the officer and approved by SECNAV, but not later than the first day of the seventh calendar month beginning after the month in which the report of the selection board that considered the officer for the second time is approved, subject to the exceptions in paragraphs 8d(1) and 8d(2) of this enclosure.

(4) Permanent LDOs in Grade of O-5 (Navy only). Subject to the exception in paragraph 8d(2) of this enclosure, a Navy permanent LDO in the grade of O-5 who has twice failed of selection for promotion to the grade of O-6 and is not on a list of officers recommended for promotion must:

(a) If eligible for retirement as a commissioned officer under any provision of law, be retired under that provision of law on the date requested by the officer and approved by SECNAV, but not later than the first day of the seventh calendar month beginning after the month in which the report of the selection board that considered the officer for the second time is approved; or

(b) If not eligible for retirement as a commissioned officer, be retired on the date requested by the officer and approved by SECNAV after the officer becomes eligible for retirement, but not later than the first day of the seventh calendar month beginning after the month in which the officer becomes eligible for retirement as a commissioned officer.

c. Regular Permanent LDOs: Mandatory retirement for years of active naval service

(1) Navy Permanent LDOs in Grades of O-1 to O-4; Marine Corps Permanent LDOs in Grades of O-1 to O-5. A Navy permanent



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LDO in the grade of O-1 to O-4, and a Marine Corps permanent LDO in the grade of O-1 to O-5, must be retired on the last day of the month following the month in which the officer completes 30 years of active naval service, exclusive of active duty for training in a Reserve Component, subject to the exception in paragraph 8d(2) of this enclosure.

(2) Navy Permanent LDOs in Grade of O-5. A Navy permanent LDO in the grade of O-5 who is not on a list of officers recommended for promotion to the grade of O-6 must, if not retired earlier, be retired on the last day of the month following the month in which the officer completes 35 years of active naval service, exclusive of active duty for training in a Reserve Component, subject to the exception in paragraph 8d(2) of this enclosure.

(3) Navy Permanent LDOs in Grade of O-6. A Navy permanent LDO in the grade of O-6 must, if not retired earlier, be retired on the last day of the month following the month in which the officer completes 38 years of active naval service, exclusive of active duty for training in a Reserve Component, subject to the exception in paragraph 8d(2) of this enclosure.

d. Exceptions

(1) 18-Year Retirement Sanctuary. If a permanent LDO in the grade of O-1 through O-4 is subject to discharge under paragraphs 8a or 8b of this enclosure, and is not qualified for retirement under any provision of law as of the date of such discharge, but is within two years of qualifying for retirement under reference (a), section 8323, then the officer must be retained on active duty as a LDO until qualifying for retirement under section 8323, unless the officer is sooner retired or discharged under another provision of law or reverts to a Warrant Officer grade under reference (a), section 8372(h), as outlined in paragraph 8e(1) of this enclosure.

(2) Deferral of Mandatory Retirement or Discharge. When the needs of the Navy or Marine Corps require, the SECNAV may defer a permanent LDO's mandatory retirement or discharge under paragraphs 8a or 8b of this enclosure upon the recommendation of a continuation selection board convened under reference (a), section 611(b), and with the consent of the officer concerned. A LDO whose retirement is deferred and who is not subsequently



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promoted may not be continued on active duty beyond 20 years active commissioned service, if in the grade of O-3; beyond 24 years active commissioned service, if in the grade of O-4; or beyond 28 years active commissioned service if in the grade of O-5; or beyond age 62, whichever is earlier.

e. Reversion to Permanent Warrant Officer or Enlisted Status. In accordance with reference (a), section 8372(i), when determining the grade and status to which a LDO may revert, all active service as a temporary or permanent LDO or as a Reserve officer will be included.

(1) Reversion to Warrant Officer Grade. A permanent LDO in the grade of O-1 to O-4 who is subject to discharge under paragraphs 8a or 8b of this enclosure, who is not eligible for retirement under any provision of law, and who had the permanent status of a Warrant Officer when first appointed as a LDO may, at the officer's option, revert to the Warrant Officer grade and status that the officer would hold if the officer had not been appointed as a LDO. This rule applies to an officer subject to retention under the 18-year retirement sanctuary of reference (a), section 8372(f).

(2) Reenlistment. A permanent LDO in the grade of O-1 to O-4 who is subject to discharge under paragraphs 8a or 8b of this enclosure and who was in an enlisted grade when first appointed as a LDO, may, upon the officer's request and in the discretion of SECNAV or designee, be enlisted in a grade prescribed by the SECNAV or designee upon discharge. To be eligible for reenlistment, the LDO must not be eligible for retirement under any provision of law, and must not be in the 18-year retirement sanctuary of reference (a), section 8372(f).

9. Regular O-5s to O-8s: Selective Early Retirement. Regular officers in the grades of O-5 through O-8 may be considered for early retirement by a selection board convened by SECNAV pursuant to reference (a), sections 638 or 638a, and reference (aj). Selective early retirement will not be used in cases where separation for cause under paragraph 1 of this enclosure is warranted. Regular officers in the grades of O-5 through O-8 may be subject to selective early retirement unless approved for voluntary retirement under reference (a), section 8323, or involuntarily retired under any provision of law during the fiscal year in which the selective early retirement board is

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convened or during the following fiscal year. The statutory eligibility requirements for selective early retirement are set forth below.

a. Regular O-5s. An O-5 whose name is not on a promotion list to O-6 may be subject to selective early retirement after two or more failures of selection for promotion to O-6 (reference (a), section 638) or after one failure of selection for promotion to O-6 (reference (a), section 638a).

b. Regular O-6s. An O-6 whose name is not on a promotion list to O-7 may be subject to selective early retirement after serving at least four years in the grade of O-6 (reference (a), section 638) or after serving at least two years in the grade of O-6 (reference (a), section 638a).

c. Regular O-7s. An O-7 whose name is not on a promotion list to O-8 may be subject to selective early retirement under reference (a), section 638, after serving at least three and one-half years in the grade of O-7.

d. Regular O-8s. An O-8 may be subject to selective early retirement under reference (a), section 638, after serving at least three and one-half years in the grade of O-8.

10. Regular O-1s to O-10s: Mandatory Retirement for Age

a. Regular O-1s to O-6s (including temporary and permanent LDOs). Unless retired or separated earlier, each Regular officer in the grade of O-1 to O-6 will be retired on the first day of the month following the month in which the officer becomes 62 years of age pursuant to reference (a), section 1251, subject to the following exceptions.

(1) Health Professions Officers in the Medical Corps, Dental Corps, and Nurse Corps. In the case of an officer in the Medical Corps, Dental Corps, or Nurse Corps, SECNAV may defer the officer's mandatory retirement for becoming 62 years of age if, during the period of the deferment, the officer will be performing duties consisting primarily of providing patient care or performing other clinical duties. The deferment will not extend beyond the first day of the month following the month in which the officer reaches 68 years of age. See reference (a), section 1251(b).

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(2) Chaplains. In the case of an officer serving as a chaplain, SECNAV may defer the officer's mandatory retirement for becoming 62 years of age as required in the best interests of the Navy, but not beyond the first day of the month following the month in which the officer reaches 68 years of age. See reference (a), section 1251(c).

(3) Permanent Military Professors (O-5 and O-6). Unless retired or separated earlier, a Regular O-5 or O-6 who is a permanent military professor at the U.S. Naval Academy must be retired on the first day of the month following the month in which the officer becomes 64 years of age. See reference (a), section 1252.

b. Regular O-7s and O-8s. Unless retired or separated earlier, an officer in the grade of O-7 or O-8 will be retired on the first day of the month following the month in which the officer becomes 64 years of age pursuant to section 1253 of reference (a). Pursuant to reference (a), section 1251(c), and as outlined in paragraph 10a(2) of this enclosure, SECNAV may defer the retirement of a Navy flag officer serving in the position of Chief of Chaplains or Deputy Chief of Chaplains.

c. Regular O-9s and O-10s. An officer in the grade of O-9 or O-10 will be retired on the first day of the month following the month in which the officer becomes 64 years of age. However, pursuant to reference (a), section 1253(b), the Secretary of Defense (SECDEF) may extend the deferment not later than the first day of the month following the month in which the officer becomes 66 years of age, and the President may extend the deferment not later than the first day of the month following the month in which the officer becomes 68 years of age. In accordance with reference (af), the CNO or CMC will provide a recommendation for deferment to the SECNAV, who, if in support, will submit the recommendation to the President via the SECDEF.

11. Force Shaping of Regular Probationary Officers. In accordance with reference (a), sections 630(a)(1) and 647, and reference (b), the SECNAV may discharge or transfer to the RASL Regular officers (other than Warrant Officers) with less than six years of active commissioned service in order to meet budgetary or force size requirements. When using this authority, the procedures for discharging probationary officers

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in reference (b), section 6, do not apply and a selection board is not required. The CNO or CMC will provide the SECNAV with a force shaping plan that details the number of officers by grade and competitive category who will be discharged or transferred to the RASL, the budgetary or force management requirements that justify SECNAV's use of the force shaping authority, and a draft notice to affected officers. Officers subject to discharge will receive an Honorable service characterization and sufficient notice of the discharge to permit career and personal planning. Discharges pursuant to this authority are subject to the requirements of the eight-year military service obligation under reference (a), section 651, reference (o) and this instruction.

12. Declining Appointment to the Grade of O-2 or O-3. A Regular probationary officer who declines an appointment to the grade of O-2 or O-3 will be processed for an Honorable discharge using the notification procedure of enclosure (10), subject to the requirements of the eight-year military service obligation in enclosure (3), paragraph 4 of this instruction.

13. Deferral for Hospitalization or Medical Observation. Per reference (a), section 640, SECNAV or designee may defer, for not more than four months, the retirement or separation of a Regular officer if, because of unavoidable circumstances, evaluation of the officer's physical condition and determination of entitlement to retirement or separation for physical disability require hospitalization or medical observation that cannot be completed before the retirement or separation date.

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**POLICY GOVERNING INVOLUNTARY SEPARATION OF RESERVE OFFICERS -  
FAILURE OF SELECTION FOR PROMOTION, MANDATORY SEPARATION FOR  
YEARS OF SERVICE OR AGE, AND OTHER BASES**

1. Purpose. This enclosure contains the DON policy governing the involuntary separation and mandatory retirement of Navy and Marine Corps Reserve officers in the grades of Warrant Officer, W-1 through O-8, for bases other than separation for cause. The authorities in this enclosure will not be used when separation for cause under enclosures (6) and (7) is appropriate.

2. Permanent Reserve Warrant Officers

a. Not qualified for promotion to Warrant Officer (W-1) or Chief Warrant Officer, W-2. In accordance with sections 12241(c) and 12242 of reference (a), a non-retirement eligible Reserve Warrant Officer with less than 60 months of service since the date of original appointment who is serving in the grade of Warrant Officer (W-1) or Chief Warrant Officer, W-2, and is found not qualified for promotion to the next higher grade will be honorably discharged not later than the end of the 60-month period beginning on the date on which the Warrant Officer was first appointed.

b. Failure of Promotion. Unless retired or separated under some other provision of this instruction, a Reserve Warrant Officer in the grade of Chief Warrant, W-2, W-3, and W-4, who has twice failed of selection for promotion to the next higher Warrant Officer grade and is not on a promotion list will be separated or retired in accordance with the following procedures.

(1) More Than 20 Years of Service. A Warrant Officer who performed more than 20 years of active service or who has performed at least 20 years of service computed under section 12732 of reference (a) on the date when SECNAV approves the report of the promotion selection board, or the date when his or her name was removed from a promotion list, whichever applies, must be transferred to the inactive status list, or upon the officer's request, to the Retired Reserve or Navy or Marine Corps Reserve retired list, as appropriate.

(2) At Least 18, but Less Than 20 Years of Service. A Warrant Officer who performed at least 18 but less than 20 years

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of service computed under section 12732 of reference (a) on the date when SECNAV approves the report of the promotion selection board, or the date when his or her name was removed from the promotion list, whichever applies, will not be discharged or transferred from an active status without the officer's consent, unless sooner separated for cause under paragraph 1 of enclosure (6), before the earlier of these dates:

(a) The date on which the officer is entitled to be credited with 20 years of service computed under section 12732 of reference (a).

(b) If the officer has at least 19 years of service computed under section 12732 of reference (a), the second anniversary of the date on which the officer would otherwise be discharged or transferred from an active status.

(c) If the officer has at least 18 but less than 19 years of service computed under section 12732 of reference (a), the third anniversary of the date on which the officer would otherwise be discharged or transferred from an active status.

(3) Less Than 18 Years of Service. A Warrant Officer who performed less than 18 years of service computed under section 12732 of reference (a) on the date when SECNAV approves the report of the selection board, or the date when the officer's name is removed from the promotion list, whichever applies, may request enlistment and, at the discretion of SECNAV, be enlisted in a grade prescribed by SECNAV, but not in a grade lower than that held immediately before the original appointment as a Warrant Officer. In making a recommendation to SECNAV, CHNAVPERS, and DC (M&RA) must consider the individual's record of service as a Warrant Officer, the length of service performed as a Warrant Officer, and the needs of the Service in the NEC or MOS in which the individual would serve in an enlisted status.

(4) Honorable Discharge. A Warrant Officer who has not requested transfer to the Navy or Marine Corps Reserve retired list as provided in paragraph 2b(1) of this enclosure is not eligible for retention in an active status as provided in paragraph 2b(2) of this enclosure and does not request

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enlistment as provided in paragraph 2b(3) of this enclosure, or is denied enlistment, will be Honorably discharged from the Navy or Marine Corps Reserve.

c. 18-year Retirement Sanctuary. A Reserve Warrant Officer on active duty (other than active duty for training) who, on the date when he or she would be otherwise discharged or removed from an active status without consent under paragraph 2b of this enclosure, and has completed 18 or more years of active service, will not be involuntarily released from active duty before qualifying for retirement under that section, unless the officer is not physically qualified, is being separated for cause, or has been approved for release by SECNAV.

d. Mandatory Retirement for years of service

(1) A permanent Reserve Warrant Officer (other than a Navy Chief Warrant Officer, W-5) who has at least 30 years of active service, other than active duty for training, or has completed at least 30 years of service computed under section 12732 of reference (a), must be transferred to the Retired Reserve or the Navy or Marine Corps Reserve Retired List, as appropriate, not later than six months after they complete that service. Navy and Marine Corps Reserve Warrant Officers who are subject to retirement under this subparagraph may be selectively continued to meet requirements identified for their grade, competitive category, and designator in accordance with references (h) and (i), respectively, or in this instruction.

(2) In the case of a Reserve Navy Warrant Officer in the grade of Chief Warrant Officer, W5, the officer will be retired 60 days after the date on which the officer completes 33 years of service computed under section 12732 of reference (a).

3. Reserve Officers in the Grade of O-1 Found Not Qualified for Promotion to O-2

a. General Rule. Per reference (a), section 14503 and reference (am), a Reserve O-1 who is found not qualified for promotion to the grade of O-2 must, unless sooner promoted, be discharged at the end of the 18-month period beginning on the date on which the officer is first found not qualified for promotion.



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b. Minimum Retention Period. Per reference (ai), DoD policy recognizes that O-1s are new to commissioned military service and should be afforded a reasonable opportunity to overcome their deficiencies before discharge action is taken. Accordingly, Reserve O-1s found not qualified for promotion will be retained for a minimum of six months after the date on which the promotion would have occurred, unless retention is inconsistent with good order and discipline. If the officer does not qualify for promotion at any time after completion of the six-month retention period, then the officer will be discharged in accordance with reference (am) and this instruction.

c. Military Service Obligation. If a Reserve O-1 is subject to discharge under this paragraph and has not completed the eight-year military service obligation, then CHNAVPERS or DC (M&RA) will:

(1) Retain the officer in an active status in accordance with reference (a), section 12645; or

(2) Recommend that ASN (M&RA) or designee discharge the officer before completion of the military service obligation based on a determination that the officer has no potential for service in a Reserve Component in accordance with enclosure (3), paragraph 4b(4) of this instruction.

#### 4. Reserve Officers in the Grades of O-2 through O-6

a. Reserve O-2s and O-3s: Failure of Selection for Promotion. Subject to the exceptions in paragraph 5 of this enclosure, a Reserve O-2 or O-3 who twice fails of selection for promotion to the next higher grade and whose name is not on a list of officers recommended for promotion must, not later than the first day of the seventh month after the month in which the SECDEF approves the report of the board or AFQOL, in the case of an O-3, which considered the officer for the second time, be separated in accordance with paragraph 4c of this enclosure.

b. Reserve O-4s: Failure of Selection for Promotion. Subject to the exceptions in paragraph 5 of this enclosure, a Reserve O-4 (including an O-4 in the Navy Full-Time Support (FTS) or Marine Corps Active Reserve (AR) Program) who twice fails of selection for promotion to the next higher grade and



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whose name is not on a list of officers recommended for promotion must, if not earlier removed, be removed from the RASL in accordance with paragraph 4c of this enclosure on the later of:

(1) The first day of the month after the month in which the officer completes 20 years of commissioned service; or

(2) The first day of the seventh month after the month in which the report of the selection board that considered the officers for the second time is approved.

c. Separation of Reserve O-2s or O-3s; Removal of Reserve O-4s from the RASL. If a Reserve O-2, O-3, or O-4 is subject to separation or removal from the RASL under this paragraph, then the officer will be:

(1) Involuntarily released from active duty if the officer is in an active-duty status while participating in the Navy FTS Program or Marine Corps AR Program; and either

(2) Removed from an active status and transferred to an inactive status if the CHNAVPERS or DC (M&RA) determines that the officer has skills which may be required to meet the mobilization needs of the Navy or Marine Corps; or

(3) Transferred to the Retired Reserve if the officer is qualified for such transfer and does not request not to be transferred to the Retired Reserve; or

(4) Discharged with an Honorable characterization of service.

d. Reserve O-5s and O-6: Removal from the RASL for Years of commissioned Service. Subject to the exceptions in paragraph 5 of this enclosure, a Reserve O-5 or O-6 (including an O-5 or O-6 in the Navy FTS or Marine Corps AR Program) whose name is not on a list of officers recommended for promotion to the next higher grade will be removed from the RASL (if not earlier removed from the RASL) on the first day of the month after the month in which the O-5 completes 28 years of commissioned service or the O-6 completes 30 years of commissioned service.

e. Officers serving in the Navy FTS Program and Marine

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Corps AR Program may also be subject to the service policies governing involuntary release from active duty set forth in paragraphs 9 and 10 of this enclosure.

5. Exceptions to Involuntary Separation or Removal from the RASL. The following exceptions may apply to a Reserve officer in the grades of O-2 through O-6 who is subject to separation or removal from the RASL under paragraph 4 of this enclosure. The applicability of the exception to the specific grade(s) is indicated.

a. Reserve O-2s Only: Retention Until Completion of Military Service Obligation. If a Reserve O-2 has not completed the eight-year military service obligation, then CHNAVPERS or DC (M&RA) will:

(1) Retain the officer in an active status in accordance with reference (a), section 12645; or

(2) Recommend that ASN (M&RA) or designee discharge the officer before completion of the military service obligation based on a determination that the officer has no potential for service in a Reserve Component in accordance with enclosure (3), paragraph 4b(4) of this instruction.

b. Reserve O-2s Only: Retention for Planned Mobilization Needs. If the CHNAVPERS or DC (M&RA) determines that a Reserve O-2's retention in an active status is necessary to meet the planned mobilization needs of the Navy or Marine Corps, then the officer may be retained in an active status, pursuant to reference (a), section 14504(b), for a period not to exceed 24 months beginning on the date when the SECDEF approved the report of the board or AFQOL which resulted in the second failure of selection for promotion. This exception applies to Reserve O-2s who either have or have not completed the eight-year military service obligation. If, on the date when SECDEF approved the board report, the O-2 has a remaining military service obligation of less than 24 months, then the officer may be retained in an active status for a period not to exceed 24 months pursuant to reference (a), section 14504(b).

c. Reserve O-2s to O-6s: Retention for 18 or More, but Less than 19, Years of Service. In accordance with reference (a), section 12646, if, on the date of involuntary discharge or

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transfer from an active status, a Reserve officer in the grade of O-2 through O-6 is entitled to be credited with at least 18, but less than 19, years of service computed under reference (a), section 12732, then the officer will not be discharged or transferred from an active status without his or her consent before the earlier of:

(1) The date on which the officer is entitled to be credited with 20 years of service computed under reference (a), section 12732; or

(2) The third anniversary of the date on which the officer would otherwise be discharged or transferred from an active status.

d. Reserve O-2s to O-6s: Retention for 19 or More, but Less Than 20 Years of Service. In accordance with reference (a), section 12646, if, on the date of involuntary discharge or transfer from an active status, a Reserve officer in the grade of O-2 through O-6 is entitled to be credited with at least 19, but less than 20, years of service computed under reference (a), section 12732, then the officer will not be discharged or transferred from an active status without his or her consent before the earlier of:

(1) The date on which the officer is entitled to be credited with 20 years of service, computed under reference (a), section 12732;

(2) The second anniversary of the date on which the officer would otherwise be discharged or transferred from an active status;

(3) This exception does not apply in cases of separation for cause, disability, or reaching maximum age at which transfer from an active status or discharge is required by law.

e. Reserve O-2s to O-6s: On Active Duty Within Two Years of Eligibility for Retired or Retainer Pay. In accordance with reference (a), section 12686, a Reserve officer who is on active duty (other than for training) and is within two years of becoming eligible for retired pay or retainer pay under a military retirement system other than the system under reference

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(a), chapter 1223 (retired pay for non-Regular service), cannot be involuntarily released from active duty before becoming eligible for such pay unless the SECNAV or designee approves the release. Officers who are retained on active duty under this provision may not be removed from an active status while they are on that active duty, except when separated for cause or physical disability, or if eligible for retired pay under reference (a), section 12731.

f. Reserve O-3s to O-6s: Continuation on the RASL. In accordance with reference (a), section 14701, and reference (y), the SECNAV may convene a continuation selection board to consider for continuation on the RASL Reserve O-3s or O-4s who are subject to separation or removal from the RASL on the basis of two failures of selection for promotion to the next higher grade, and Reserve O-5s or O-6s who are subject to removal from the RASL for years of commissioned service. If approved by SECNAV for continuation, an officer may be continued on the RASL no later than a period ending on the last day of the month in which the officer completes:

(1) 20 years of commissioned service in the case of a Reserve O-3;

(2) 24 years of commissioned service in the case of a Reserve O-4;

(3) 33 years of commissioned service in the case of a Reserve O-5; or

(4) 35 years of commissioned service in the case of a Reserve O-6;

6. Reserve Officers in the Grades of O-7 and O-8: Removal from the RASL for Years of Service or Years in Grade

a. Reserve O-7. Unless retired, transferred to the Retired Reserve, or discharged at an earlier date, a Reserve O-7 who has not been recommended for promotion to the grade of O-8 must, 30 days after completing 30 years of commissioned service or on the fifth anniversary of the date of the officer's appointment to the grade of O-7, whichever is later, be transferred to the Retired Reserve if qualified and the officer applies thereto, or be discharged from the officer's Reserve appointment if not

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qualified for transfer to the Retired Reserve or the officer has requested not to be so transferred.

b. Reserve O-8s. Unless retired, transferred to the Retired Reserve, or discharged at an earlier date, a Reserve O-8 must, 30 days after completing 35 years of commissioned service or on the fifth anniversary of the date of the officer's appointment to the grade of O-8, whichever is later, be transferred to the Retired Reserve if qualified and the officer applies thereto, or be discharged from the officer's Reserve appointment if not qualified for transfer to the Retired Reserve or the officer has requested not to be so transferred.

7. Declining Appointment to the Grade of O-2 or O-3. A Reserve probationary officer who declines an appointment to the grade of O-2 or O-3 will be processed for an Honorable discharge using the notification procedure of enclosure (10), subject to the requirements of the eight-year military service obligation in enclosure (3), paragraph 4, of this instruction.

8. Force Management of Reserve Probationary Officers. In accordance with reference (a), section 14503(a)(1) and reference (b), the SECNAV may discharge Navy or Marine Corps Reserve officers with less than six years of service in an active status in order to meet budgetary or force management requirements. When using this authority, the procedures for discharging probationary officers in reference (b), section 6, do not apply and a selection board is not required. Officers subject to discharge will receive an Honorable service characterization and sufficient notice of the discharge to permit career and personal planning. Discharges pursuant to this authority may be made without regard to the eight-year military service obligation under reference (a), sections 651 and 12645, as implemented by this instruction.

9. Release from Active Duty

a. When determined to be in the best interest of the service, SECNAV may release a Navy or Marine Corps Reserve officer from active duty without the requirement for the officer to be heard by a board of officers before the release, subject to the following statutory limitations.

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(1) War or National Emergency. Under reference (a), section 12313(b), a Reserve officer may be released from active duty (other than for training) in time of war or national emergency declared by Congress or the President only upon the recommendation of a board of officers approved by CHNAVPERS or DC (M&RA), as appropriate, unless the officer waives the board or the release is otherwise authorized by law. Specific procedures governing the convening of such boards will be established by SECNAV as required. This subparagraph does not apply to either the Navy or Marine Corps during a period of demobilization or reduction in strength of that service.

(2) Active-duty Agreement. Under reference (a), section 12312, a Reserve officer serving on active duty under an active-duty agreement executed under reference (a), section 12311, may not be involuntarily released from active duty during the period of the agreement because of a reduction in actual personnel strength, or for any other reason unless such release is recommended by a board of officers, except when the officer is:

(a) Dismissed or discharged under the sentence of a court-martial;

(b) Released because of an unexplained absence without leave for at least three months;

(c) Released because of a conviction and sentence to confinement in a Federal or State penitentiary or correctional institution and the sentence has become final; or

(d) Released under paragraph 4 of this enclosure for having twice failed of selection for promotion.

(3) On active Duty Within Two Years of Eligibility for Retired or Retainer Pay. See paragraph 5e of this enclosure.

b. Service Policies for Navy FTS Officers

(1) A Navy FTS O-4 who twice fails of selection for promotion to O-5 is subject to involuntary release from active duty and removal from the RASL in accordance with paragraph 4c of this enclosure, unless retained on active duty or continued

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on the RASL under paragraphs 5e or 5f of this enclosure to enable the officer to become eligible for retirement under reference (a), section 8323.

(2) A Navy FTS O-5 who twice fails of selection for promotion to the grade of O-6 and is not on a promotion list to a higher grade must be involuntarily released from active duty not later than the first day of the seventh calendar month beginning after the month in which the report of the selection board that considered the officer for promotion for the second time is approved, unless the officer:

(a) Is considered for retention on active duty by a Selective Retention (SELRET) board under this paragraph;

(b) Is retained on active duty by CHNAVPERS to enable the officer to become eligible for retirement with pay under reference (a), section 8323; or

(c) Is sooner released from active duty as a result of selection by a Selective Early Release from Active Duty (SERAD) board under paragraph 10 of this enclosure.

(3) A Navy FTS O-6 who is not on a promotion list to a higher grade must be involuntarily released from active duty not later than the first day of September of the third fiscal year following the fiscal year of promotion to the grade of O-6, unless the officer is retained by a SELRET Board under this paragraph or retained on active duty by CHNAVPERS to enable the officer to become eligible for retirement with pay under reference (a), section 8323.

(4) FTS SELRET Boards. CHNAVPERS or designee may convene a FTS SELRET Board whenever required to retain those FTS commanders or captains best qualified to meet requirements. The following procedural guidelines apply.

(a) FTS O-5 SELRET Boards

1. FTS O-5s considered and not retained by the SELRET board will be released from active duty not later than the first day of the seventh calendar month beginning after the month in which the SELRET board results are released.

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2. FTS O-5s retained by the SELRET board will be released from active duty not later than the first day of September of the third fiscal year following the SELRET board.

(b) FTS O-6 SELRET Boards. FTS O-6s retained by a SELRET board will be released from active duty not later than the first day of September of the fifth fiscal year following the fiscal year of promotion to the grade of O-6, unless retained by a second FTS Captain SELRET board until completion of 30 years of commissioned service.

(5) In no case will retention of FTS O-5s on active duty under this paragraph extend beyond the first day of the month following the month in which the officers complete 28 years of commissioned service, subject to the exceptions in paragraphs 5c through 5f of this enclosure, as applicable.

(6) In no case will retention of FTS O-6s on active duty under that paragraph extend beyond the first day of the month following the month in which the officers complete 30 years of commissioned service, subject to the exceptions in paragraphs 5c through 5f of this enclosure, as applicable.

c. Service Policies for Marine Corps AR Officers

(1) Marine Corps AR non-career-designated officers and statutory-tour officers serving on active duty will be released from active duty upon expiration of active service, as specified in the active-duty agreement under which serving.

(2) Marine Corps AR career-designated officers in the grade of O-4 who twice fail of selection for promotion to O-5 are subject to involuntary release from active duty and removal from the RASL in accordance with paragraph 4c of this enclosure.

(3) Marine Corps AR career-designated O-5s who twice fail of selection for promotion to the grade of O-6, if not on a promotion list to a higher grade and if not earlier removed from the RASL, must be involuntarily released from active duty not later than the first day of the seventh calendar month beginning after the month in which the report of the selection board that considered the officers for the second time is approved. DC (M&RA) may defer the involuntary release from active duty to enable an officer to become eligible for an active service



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retirement, unless the officer is selected for early release from active duty by a Selective Early Release from Active Duty (SERAD) Board convened pursuant to paragraph 10 of this enclosure. Deferral will not be later than the first day of the month following the month in which the officer completes 28 years total commissioned service, at which time the officer will be subject to removal from the RASL for years of commissioned service in accordance with paragraph 4d of this enclosure.

(4) Unless selected for early release from active duty by a SERAD Board convened pursuant to paragraph 10 of this enclosure, a Marine Corps AR career-designated O-6 may serve on active duty until completing 30 years of commissioned service, at which time the officer will be subject to removal from the RASL for years of commissioned service in accordance with paragraph 4d of this enclosure.

(5) There are no approved general officer billets in the Marine Corps AR competitive category. An AR O-6 who desires to compete for the grade of Reserve O-7 and is otherwise eligible to compete for O-7 except for being a member on the AR program must be released from active duty in the AR program at least 60 days before the convening date of the Reserve general officer selection board.

d. Release of Reserve Officers on Temporary Recall. Temporary recall officers not on the Active-Duty List (Three Year Recall / One Year Recall / Active Duty for Special Work) will be released from active duty not later than the end of their specified orders unless specifically extended by subsequent orders or retained under reference (a), section 12686.

#### 10. SERAD

a. Navy. When required, CHNAVPERS will convene a SERAD Board to recommend the early release from active duty of Navy FTS officers in the grade of O-5.

(1) CHNAVPERS will establish the zone of eligibility by grouping FTS O-5s by competitive category and promotion fiscal year group. The SERAD board must review the record of all eligible FTS officers in each competitive category as of the board's convening date. Normally, FTS O-5s will become SERAD-

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eligible during the fourth fiscal year after their date of appointment to the grade of O-5. A FTS O-5 who is selected by the SERAD board, is not on a promotion list, and has attained 20 or more years of commissioned service must be involuntarily released from active duty by 1 September of the fiscal year in which the SERAD board was convened, or the first day of the seventh month following the month in which the SERAD board's report is approved, whichever is later. A FTS O-5 who is selected by the SERAD board, is not on a promotion list, and has less than 20 years of active service on 1 September of the fiscal year in which the SERAD board was convened must be released from active duty on the first day of the month after the month in which the officer attains 20 years of active service. If necessary, officers will be retained on active duty to enable the officers to qualify for retirement with pay (including early retirement).

(2) Retention of a SERAD-selected FTS O-5 on active duty will not extend beyond the first day of the month following the month in which the officer qualifies for retirement with pay (including early retirement) or beyond the first day of the month following the month in which the officer completes 28 years of commissioned service, unless the officer is selected for continuation on the RASL pursuant to reference (a), section 14701 or retained on active duty under section 12686 thereof. FTS O-5s considered but not selected by a SERAD board will not be considered again while in the grade of O-5.

b. Marine Corps. When required, DC (M&RA) will convene SERAD boards to recommend the early release from active duty of Marine Corps AR officers in the grades of O-4, O-5, and O-6. Specific procedures governing the convening of SERAD Boards, including the number of officers in each field grade that will be considered by a SERAD Board, will be established by DC (M&RA).

(1) Normally, Marine Corps AR O-4s and O-5s will become SERAD-eligible upon attaining three years' time-in-grade, and AR O-6s will become SERAD-eligible upon attaining two years' time-in-grade.

(2) An officer who is selected by the SERAD board, is not on a promotion list, and has attained 20 or more years of active commissioned service must be involuntarily released from

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active duty by 1 September of the fiscal year in which the SERAD board was convened, or the first day of the seventh month following the month in which the SERAD board's report is approved, whichever is later.

(3) An officer who is selected by the SERAD board, is not on a promotion list, and has less than 20 years of commissioned service on 1 September of the fiscal year in which the SERAD board was convened must be released from active duty on the first day of the month after the month in which the officer attains 20 years of active commissioned service. If necessary, the officer will be retained on active duty to enable the officer to qualify for retirement with pay. Retention will not extend beyond the first day of the month following the month in which the officer qualifies for retirement with pay, or the day on which the officer must be removed from an active status under reference (a), section 14506 or 14507.

11. Involuntary Release from Active Duty (IRAD). When required, CHNAVPERS will convene an IRAD board to control end strength ceilings, grade allowances, or other requirements of the Navy Reserve Canvasser Recruiter (CANREC) program. CANREC officers selected for IRAD must be involuntarily released from active duty not later than the first day of the seventh calendar month beginning after the month in which the report of the IRAD board was approved, unless the officers are retained on active duty under section 12686 of reference (a). Additionally, CANREC officers may be released from active duty at the end of their specified orders for performance or other reasons as promulgated in reference (at).

12. Selective Early Removal of Reserve Officers from the RASL. In accordance with reference (a), section 14704, whenever the SECNAV determines that there are too many Navy or Marine Corps Reserve officers on the RASL in any grade and competitive category who have at least 30 years of service under reference (a), section 14706, or at least 20 years of service computed under reference (a), section 12732, the SECNAV may convene a selection board under reference (a), section 14101(b), to consider such officers for removal from the RASL.

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13. Mandatory Retirement for Age

a. Reserve Officers in the Grades of Warrant Officer, W-1 to O-6. In accordance with reference (a), sections 14509 and 14515, unless retired or separated earlier, a Reserve officer in the grade of Warrant Officer, W-1 through O-6 who is in an active status or on an inactive-status list, has not been recommended for promotion to the grade of O-7, and is not a member of the Retired Reserve will, on the last day of the month in which the officer becomes 62 years of age, be separated in accordance with paragraph 13d of this enclosure.

b. Reserve O-7s. In accordance with reference (a), sections 14510, 14521, and 14515, unless retired, transferred to the Retired Reserve, or discharged at an earlier date, a Reserve O-7 who is in an active status or on an inactive-status list and has not been recommended for promotion to the grade of O-8 will, on the last day of the month in which the officer becomes 62 years of age, be separated in accordance with paragraph 13d of this enclosure unless the SECNAV defers the retirement and retains the officer in an active status until the officer becomes 66 years of age.

c. Reserve O-8s, O-9s, and O-10s. In accordance with reference (a), sections 14511, 14512, and 14515, unless retired, transferred to the Retired Reserve, or discharged at an earlier date, a Reserve O-8, O-9, or O-10 who is in an active status or on an inactive-status list will, on the last day of the month in which the officer becomes 64 years of age, be separated in accordance with paragraph 13d of this enclosure unless the officer's retirement is deferred as follows:

(1) In the case of a Reserve O-8, the SECNAV may defer the retirement and retain the officer in an active status until the officer becomes 66 years of age.

(2) In the case of a Reserve O-9 or O-10, the officer's retirement may be deferred:

(a) By the SECDEF for a period not to extend beyond the first day of the month following the month in which the officer becomes 66 years of age; or

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(b) By the President for a period not to extend beyond the first day of the month following the month in which the officer becomes 68 years of age

d. Separation Procedures. In accordance with reference (a), section 14515, a Reserve officer who reaches the statutory maximum age as outlined in paragraphs 13a through 13c of this enclosure will be:

(1) Transferred to the Retired Reserve if the officer is qualified for such transfer and does not request not to be transferred to the Retired Reserve; or

(2) Discharged from the officer's Reserve appointment if the officer is not qualified for transfer to the Retired Reserve or has requested not to be so transferred.

e. Deferral Limitations. In accordance with reference (a), section 14512(b)(1), not more than 10 officers in the grades of O-7 through O-10 may be in a deferred status at any one time under paragraphs 13b and 13c of this enclosure, with numbers distributed between the Navy Reserve and the Marine Corps Reserve as determined by SECNAV.

f. Chief of the Navy Reserve or Commander of the Marine Forces Reserve. In accordance with reference (a), section 14512(b)(2), the SECDEF may defer the retirement of a Reserve officer serving in the position of Chief of Navy Reserve or Commander, Marine Forces Reserve, but such deferment may not extend beyond the first day of the month following the month in which the officer becomes 66 years of age. Such deferment will not count toward the limitation on the total number of officers whose retirement may be in a deferred status under paragraph 13e of this enclosure.

g. Retention of Certain Professional Category Officers on the RASL. Notwithstanding the maximum statutory age requirements for Reserve officers set forth in paragraphs 13a through 13f of this enclosure, certain professional category Reserve officers may be retained on the RASL no later than the date on which the officer becomes 68 years of age.

(1) General Rule. In accordance with reference (a), section 14703, and reference (y), the SECNAV may, with the

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officer's consent, retain in an active status any Reserve officer appointed in the Medical Corps, Dental Corps, Nurse Corps, or Chaplains Corps or appointed in the Medical Service Corps and designated to perform as a veterinarian, optometrist, podiatrist, allied health officer, or biomedical sciences officer, provided that such officers are not subject to discharge or removal from the RASL under reference (a), sections 14503, 14504, 14505, or 14506 as implemented by paragraphs 3, 4a, and 4b of this enclosure. No officer will be retained in an active status later than the date on which the officer becomes 68 years of age.

(2) DON Policy and Limitations. The SECNAV will normally authorize retention in Reserve officer continuation plan, but may also authorize retention on an individual basis upon the recommendation of CHNAVPERS or CMC. Retention under this authority will be authorized for Reserve officers in the professional categories listed above who possess skills for which a military requirement exists that cannot be met by Regular or Reserve officers on active duty under age 62, or by Reserve officers in the Ready Reserve under age 62. Reserve officers will not be retained in an active status, or retained on or recalled to active duty in a retired status, solely for increasing retired pay or as a reward for long, distinguished service. If service under these limitations is authorized for an officer who is eligible for retired pay, then such service will be credited to the officer under reference (a), section 12308.

14. Removal from the RASL. In accordance with reference (a), sections 10149 and 10152, and references (ab), and (ak), CHNAVPERS or DC (M&RA) may remove a Reserve officer from the RASL and transfer the officer to the Inactive Status List under any of these circumstances:

a. A Reserve officer is qualified to receive non-Regular retired pay, has not reached an age of entitlement for retired pay under reference (a), section 12731, and failed to earn 50 points (including membership points) during an anniversary year in accordance with references (aa) or (ak).

b. A Reserve officer completed the military service obligation under reference (a), section 651, and reference (o), earned less than 27 retirement points (including membership

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points), per anniversary year and for whom no shortage of officers with the same skills exists in the officer's competitive category and grade. However, a Reserve officer will not be removed from the RASL for failure to meet this standard if training during the anniversary year is denied by reason of lack of funds or facilities to provide appropriate training, or if circumstances of an unusual nature exist which preclude the officer from attaining at least 27 retirement points.

c. A Reserve officer completed the military service obligation under reference (a), section 651, and reference (o), and lacks mobilization potential as identified during the annual screenings required by reference (a), section 10149, and reference (ab). These screenings provide a Ready Reserve force composed of members who meet Navy and Marine Corps wartime standards of mental, moral, professional, and physical fitness; possess the military qualifications required in the various ranks, ratings, and specialties; and are available immediately for active duty during a mobilization or as otherwise required by law.

d. A Reserve officer is required by law to be separated and is retirement eligible, but whose retirement has not been completed by the date of required separation. Transfer to the Inactive Status List under this authority is an interim measure and is not to be used in lieu of final separation actions requiring retirement or discharge.

15. Separation and Retirement of Reserve Officers in an Inactive Status in the Standby Reserve. Under reference (a), section 12683, CHNAVPERS and DC (M&RA) may honorably discharge or retire Reserve officers in an inactive status in the Standby Reserve under these circumstances:

a. The officers have been on the Inactive Status List (Standby Reserve) for at least one year.

b. In cases where officers are not eligible for Retired Reserve benefits at age 60 (or if applicable, the appropriate age as specified in section 12731 of reference (a)), the officers may be honorably discharged if they have been notified per paragraph 2 of enclosure (10) and did not reply within the specified period of time or did not object to the discharge.



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c. In cases where officers are qualified for Retired Reserve benefits at age 60 (or if applicable the appropriate age as specified in section 12731 of reference a), the officers must be notified and offered options of returning to the Ready Reserve (if appropriate) or transferring to the Retired Reserve. If no response is received within the specified time period, the officers may be transferred to the Retired Reserve if qualified.

16. Separation of Reserve Officers Not on Active Duty for Lack of Mobilization Potential

a. Under reference (a), sections 12641, 12642, and 12683, SECNAV will, when necessary, convene a board of officers to screen Reserve officers not on active duty for their potential and availability for mobilization to active duty. Such screening will include, but is not limited to, officers in these categories:

(1) Officers who have been found by Chief, Bureau of Medicine and Surgery (CHBUMED) to be not physically qualified for active duty or retention in the Navy or Marine Corps Reserve. Such officers must be afforded an opportunity for full and fair hearing before a Physical Evaluation Board before final action on their cases.

(2) Officers who have been found by CHBUMED to be unfit or unsuitable for military service as a result of a medical finding or conditions not amounting to a disability. See paragraph 1e of enclosure (6) for additional guidance. Such officers are not entitled to a hearing before a Physical Evaluation Board.

(3) Officers who fail to undergo a physical examination as required by current regulations.

(4) Officers who fail to keep the command or activity to which the officers are attached informed of the officer's current mailing address.

(5) Officers who fail to respond to or comply with official correspondence within a reasonable period of time.

(6) Officers who decline to accept a permanent appointment to the next higher grade within six months of



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approval of the report of the promotion selection board that recommended the officers for promotion.

(7) Officers who have lost professional qualifications for the designator/MOS held and for whom no other designator/MOS is appropriate.

(8) Officers who fail to mobilize when ordered to do so.

(9) Officers who fail to maintain physical readiness standards.

(10) Officers who fail to maintain prescribed service standards.

b. Before the convening of a board referred to in this paragraph, officers considered must be notified and afforded an opportunity to submit matters for consideration by the board.

c. CHNAVPERS or DC (M&RA), upon the board's recommendation that officers referred to in this paragraph should be separated for lack of mobilization potential, will take these actions:

(1) Transfer the officers to the Inactive Status List if the officers are not qualified or do not request transfer to the Retired Reserve;

(2) Recommend to SECNAV the officers be transferred to the Retired Reserve if the officers are qualified and request such transfer; or

(3) Recommend to SECNAV the officers be honorably discharged from the Navy or Marine Corps Reserve.

17. Release from Active Duty of Navy Reserve Officers on the Active-Duty List by Reason of Retirement Eligibility. Navy Reserve commissioned officers and Warrant Officers on the ADL who are eligible to retire with pay under the provisions of any retirement law will be released from active duty with a minimum of six months advance notice not later than the first day of the month following the month in which they become eligible to retire, unless:

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- a. Earlier separation is dictated under any other provisions of this instruction;
- b. They officially request retirement in lieu of release from active duty;
- c. They are retained on active duty through the administrative Retention Board and consent to being so retained; or
- d. The conditions described in section 12313(b) of reference (a) apply. To obtain retirement benefits, officers must officially request and be approved for retirement. Officers eligible to retire under section 12731 of reference (a) and qualified for retired pay who are retained on active duty must have prior approval of SECNAV in order to receive active status credit per section 12308 of reference (a).

18. Removal of Ecclesiastical Endorsement. Officers in the Navy Chaplain Corps who can no longer continue professional service as a chaplain because an ecclesiastical endorsing agency has withdrawn its endorsement must be processed for separation in accordance with reference (a), section 643, reference (n), and this instruction using the notification procedure contained in reference (n). Processing under this paragraph is not authorized when there is reason to process for separation for cause under this instruction, except when authorized by SECNAV in unusual circumstances based upon a recommendation by CHNAVPERS.

19. Former Members. Members of the Navy and Marine Corps Reserve who have achieved eligibility to receive non-regular retired pay per section 12731 of reference (a), but are required per this instruction to be discharged rather than transferred to the Retired Reserve, become "Former Members." Having been discharged, these individuals no longer possess any military status. They do, however, remain entitled to receive benefits approved in chapter 54 of reference (a). Additionally, their age 60 compensation will necessarily be adjusted to account for any reduced pay grade resultant from a "Retired Grade Determination" and the fact that they were required to separate earlier from the naval service.

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20. Boards Authorized By This Instruction. Boards that are convened by CHNAVPERS or DC (M&RA) under this instruction will be convened per regulations prescribed by CHNAVPERS or DC (M&RA) as appropriate.

21. Secretarial Authority. Nothing in this instruction will be interpreted as preventing SECNAV from separating, releasing from active duty, or requiring officers to show cause for retention where otherwise authorized by law or regulation.

22. Deferral of Retirement or Separation for Medical Reasons. Per reference (a), section 14519, SECNAV or designee may defer, for not more than four months, the retirement or separation of a Reserve officer if, because of unavoidable circumstances, evaluation of the officer's physical condition and determination of entitlement to retirement or separation for physical disability require hospitalization or medical observation that cannot be completed before the retirement or separation date.

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**POLICY GOVERNING INVOLUNTARY SEPARATION FOR CAUSE OR PARENTHOOD**

1. Separation for Cause. Officers who do not maintain required standards of performance of duty, or professional or personal conduct may be processed for separation for cause per this instruction when there is reason to believe that one or more of these circumstances exist. Nothing in this instruction is intended to preclude disciplinary action, to include trial by court-martial, when appropriate.

a. Substandard Performance of Duty. Inability of an officer to maintain adequate levels of performance or conduct as evidenced by one or more of these reasons:

(1) Failure to demonstrate acceptable qualities of leadership required of an officer in the member's grade;

(2) Failure to achieve or maintain acceptable standards of proficiency required of an officer in the member's grade;

(3) Failure to properly discharge duties assigned to or expected of an officer in the member's grade;

(4) Failure to satisfactorily complete any course of training, instruction, or indoctrination which the officer has been ordered to undergo;

(5) A record of marginal service over an extended time as reflected in fitness reports covering two or more positions and signed by at least two reporting seniors;

(6) Failure, through inability or refusal, to participate in or successfully complete a rehabilitation program for personal abuse of drugs upon referral. Nothing in this provision precludes separation of an officer who has been referred to such a program under any other provision of this instruction in appropriate cases;

(7) Failure, through inability or refusal, to participate in or successfully complete a rehabilitation program for alcohol abuse upon referral. Nothing in this provision precludes separation of an officer who has been referred to such program under any other provision of this instruction in appropriate cases;

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(8) Failure to conform to prescribed standards of dress, weight, personal appearance, or military deportment. This includes failure of Physical Fitness Assessment standards, as outlined in reference (v) for Navy officers, and Physical Fitness Test and Combat Fitness Test standards as set forth in references (w) and (x) for Marine Corps officers;

(9) Unsatisfactory performance of a Warrant Officer, not amounting to misconduct, or moral or professional dereliction.

b. Misconduct, or Moral or Professional Dereliction. Performance or personal or professional conduct (including unfitness on the part of a Warrant Officer) which is unbecoming an officer as evidenced by one or more of these reasons:

(1) Commission of a military or civilian offense which could be punished by confinement of six months or more, or any other misconduct which would require specific intent for conviction;

(2) Unlawful Drug Involvement. Processing for separation is mandatory. Officers will be processed for separation on the basis of unlawful drug activity using BOI procedures in enclosure (11) of this instruction. Exceptions to mandatory processing may be made on a case-by-case basis by SECNAV;

(3) Sexual Misconduct or Perversion. Processing for separation is mandatory for all instances of sexual misconduct or perversion, to include officers who are convicted by a court-martial of an offense constituting sexual misconduct or perversion, but who are not dismissed from the naval service for such a conviction once the conviction is final. If the member is convicted at a court-martial or in a civilian court of federal, state or local U.S. jurisdiction, then the conviction is binding on the issue of whether misconduct occurred and the BOI is required to find that misconduct did occur. See paragraph 1b(12) of this enclosure;

(4) Intentional Misrepresentation or Omission of Material Fact in Obtaining Appointment.

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(5) Fraudulent entry into an Armed Force or the fraudulent procurement of commission or warrant as an officer in an Armed Force;

(6) Intentional misrepresentation or omission of material fact in official written documents or official oral statements;

(7) Failure to satisfactorily complete any course of training, instruction, or indoctrination which the officer has been ordered to undergo when such failure is willful or the result of gross indifference;

(8) Marginal or unsatisfactory performance of duty over an extended period, as reflected in successive fitness reports, when such performance is willful or the result of gross indifference;

(9) Intentional mismanagement or discreditable management of personal affairs, including financial affairs;

(10) Misconduct or dereliction resulting in loss of, or failure to obtain, professional status, including withdrawal, suspension, or abandonment of license, endorsement, certification, or clinical medical privileges necessary to perform military duties in the officer's competitive category or Marine Corps Occupational Field. When the loss of professional qualification results solely from the removal of the ecclesiastical endorsement, processing under paragraph 18 of enclosure (5) is required;

(11) A pattern of serious or recurring misconduct, punishable by military or civilian authorities, notwithstanding the fact that such misconduct has not resulted in judicial or nonjudicial punishment under the UCMJ;

(12) Conviction by civil authorities (foreign or domestic) or action taken which is tantamount to a finding of guilty, which would amount to an offense under the UCMJ. Officers may be separated based on civilian convictions or actions tantamount to findings of guilt, including but not limited to: adjudication withheld; deferred prosecution; entry in adult/juvenile pretrial intervention programs; or any similar disposition of charges that includes imposition of fines,

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probation, community service, etc., when the offense would warrant a punitive discharge as set forth in Appendix 12 of the Manual for Courts-Martial (MCM) for the same or closely related offenses; specific circumstances of the offense warrant separation; or the civil sentence includes confinement for six or more months without regard to suspension, probation, or early release. All civilian convictions (federal, state, and local), including any actions tantamount to findings of guilt as set out above, are binding on the issue whether misconduct has occurred, and a BOI is required to find that such misconduct did occur;

(13) One or more substantiated incidents of misconduct resulting from the officer's active participation in extremist or supremacist activities which, in the independent judgment of the Show Cause Authority, is more likely than not to undermine unit cohesion or be detrimental to the good order, discipline, or mission accomplishment of the command or unit. Such misconduct must relate to:

(a) Illegal discrimination based on race, color, national origin, religion, sex (including gender identity), or sexual orientation; or

(b) Advocating the use of force or violence against any Federal, State, or local Government, or any unit or agency thereof, in contravention of Federal, State, or local laws.

(14) An officer who has been referred to a program of rehabilitation, education and/or counseling for sex offenders may be separated for failure, through inability or refusal, to participate in such a program. Nothing in this provision precludes separation of an officer who has been referred to such a program under any other provision of this instruction in appropriate cases;

(15) Failure of an officer to obtain or maintain a required level of security clearance is a basis for separation. All officers must be eligible to obtain a security clearance in order to be retained in the naval service.

c. Retention is not Clearly Consistent with the Interests of National Security. An officer (except a retired officer) may be separated from the naval service when it is determined that the officer's retention is not clearly consistent with the

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interests of national security. This provision applies when a determination has been made under the provisions of reference (g) that administrative separation is appropriate.

d. Resignation in Lieu of Trial by Court-Martial

(1) Basis. In cases where an officer is pending a trial by court-martial (charges preferred with respect to an offense for which a punitive discharge is authorized), the officer may submit a request for resignation in lieu of trial by court-martial. This provision will not be used when Rule for Courts-Martial 1003(d) of the MCM provides the sole basis for a punitive discharge unless the charges have been referred to a court-martial authorized to adjudge a punitive discharge.

(2) Characterization of Service. Characterization of service should normally be under Other Than Honorable conditions, but General (under Honorable conditions) may be warranted under the guidelines in enclosure (8). Characterization of service as Honorable is not authorized unless the respondent's record is otherwise so meritorious that any other characterization would be clearly inappropriate.

(3) Procedures

(a) The resignation must be submitted in writing and signed by the officer.

(b) The officer must be afforded an opportunity to consult with qualified counsel. If the member refuses to do so, the CO will prepare a statement to this effect which will be attached to the file, and the officers must state that he or she waived the right to consult with counsel.

(c) Unless the officer has waived the right to counsel, the request must also be signed by counsel.

(d) In the written request, the officer must state that he or she understands:

1. The elements of the offense or offenses charged;



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2. That characterization of service under Other Than Honorable conditions is authorized, and

3. The adverse nature of such a characterization and possible consequences.

(e) The request must also include:

1. An acknowledgment of guilt of one or more of the offenses charged, or of any lesser included offense, for which a punitive discharge is authorized, and

2. A summary of the evidence or list of documents (or copies thereof) provided to the officer pertaining to the offenses for which a punitive discharge is authorized.

(f) Statements by the officer or the officer's counsel submitted in connection with a request under this subsection are not admissible against the member in a court-martial except as provided by Military Rules of Evidence (M.R.E.) 410, MCM.

e. Conditions Not Constituting a Physical Disability. In accordance with reference (b), section 9, an officer may be subject to involuntary separation using notification procedures on the basis of a condition not constituting a physical disability that interferes with the assignment to or performance of duty and that is not specifically listed as compensable under the Veteran Affairs Schedule for Rating Disabilities (VASRD). Officers with conditions that interfere with the performance of duty and that are listed as compensable under the VASRD will be referred into the Disability Evaluation System (DES) under reference (c). In situations where the officer has both types of conditions, referral to the DES is required. Separation on the basis of a condition not constituting a physical disability will not be used when separation is warranted on the basis of substandard performance of duty, misconduct, or moral or professional dereliction.

(1) Procedures. The following procedures will be used if an officer has a condition not constituting a physical disability that interferes with the assignment to or performance of duty and that is not listed as compensable under the VASRD.

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(a) Counseling. Separation processing will not be initiated until the officer:

1. Is formally counseled on his or her deficiencies and given an opportunity to correct those deficiencies; and

2. Is counseled in writing that the condition does not qualify as a disability.

(b) Medical Officer Evaluation. The command will refer the officer to the cognizant medical officer for evaluation of the condition not constituting a physical disability. The medical officer will forward the medical evaluation to a Medical Evaluation Board (MEB) convening authority for endorsement.

(c) MEB Convening Authority Endorsement. A MEB convening authority appointed by the Bureau of Medicine and Surgery (BUMED) must endorse a medical officer's evaluation for the administrative separation of an officer on the basis of a condition not constituting a physical disability within five business days of receipt. In cases not requiring Flag medical officer review, the MEB convening authority will route the endorsement to the cognizant command. The appropriate International Statistical Classification of Diseases and Related Health Problems (ICD-10) code must be included. BUMED and the services will use the ICD-10 code to track and analyze this basis for separation. The Navy and Marine Corps will retain copies of the MEB convening authority's recommendation for separation, the processing history, and the MEB decision.

(d) Flag Medical Officer Review. A Flag medical officer review is required if the officer meets one or more of these criteria: a Personality Disorder (PD) is the underlying condition not constituting a physical disability; the officer has greater than four years of service; the officer has deployed to an imminent danger pay area during the previous 24 months; or the officer has completed or will complete a Post-Deployment Health Assessment.

1. In the case of a Navy officer, the MEB convening authority will forward the separation recommendation

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to the Commander, Navy Medicine East, or Commander, Navy Medicine West, for Flag medical officer review.

2. In the case of a Marine Corps officer or a Navy officer assigned to the Marine Corps, the MEB convening authority will forward the separation recommendation to the Medical Officer/Director of Health Services of the Marine Corps for Flag medical officer review.

3. The Flag medical officer will complete review of the MEB convening authority's separation recommendation within five business days of receipt, and forward the package to the cognizant command.

(2) PD; Other Mental Disorder. Separation on the basis of a personality disorder or other mental disorder not constituting a physical disability is authorized only if these criteria are met:

(a) An examination is made by an authorized mental health provider in accordance with reference (a), the Diagnostic and Statistical Manual of Mental Disorders, and DON procedures, and the health provider concludes that the disorder is so severe that the officer's ability to function effectively in the military environment is significantly impaired. Observed behavior of specific deficiencies should be documented in appropriate counseling or personnel records. Documentation will include history from supervisors, peers, and others, as necessary, to establish that the behavior is persistent, interferes with assignment to or performance of duty, and continued after the officer was counseled and afforded an opportunity to overcome the deficiencies.

(b) The officer was formally counseled in writing on deficiencies as reflected in appropriate counseling or personnel records and has been afforded an opportunity to overcome those deficiencies.

(c) The officer was counseled in writing on the diagnosis of a personality disorder or other mental disorder not constituting a physical disability.

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(d) If the officer served or is currently serving in an imminent danger pay area, then a diagnosis of PD or other mental disorder not constituting a physical disability will:

1. Be corroborated by a peer, or higher-level, mental health professional;

2. Be endorsed by the Surgeon General of the Navy;

3. Address Post Traumatic Stress Disorder (PTSD) and other mental illness co-morbidity. A separation for personality disorder or other mental disorder not constituting a physical disability is not authorized if service-related PTSD is also diagnosed unless the officer is found fit for duty by the DES.

(3) Separation for PD or other mental disorder not constituting a physical disability is not appropriate when separation is warranted on the basis of substandard performance of duty, misconduct, or moral or professional dereliction. In such circumstances, the officer should not be separated under paragraph 1e of this enclosure regardless of the existence of a personality disorder.

f. Multiple Reasons. An officer must be processed for separation for all of the aforementioned reasons that are applicable.

2. Parenthood. Officers may be separated by reason of parenthood if it is determined that the officers are unable to perform their duties satisfactorily or are unavailable for worldwide assignment or deployment. Officers who are separated by reason of parenthood will be assigned an Honorable or General (Under Honorable Conditions) characterization of service.

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**GUIDELINES ON SEPARATIONS FOR CAUSE**

1. Advance Notification. COs must report to the SCA all incidents (including information received through any source, e.g., Naval Criminal Investigative Service (NCIS), Naval Inspector General) involving any officer whose performance or conduct is such that processing for separation may be appropriate under this instruction.
2. Action of the SCA. The SCA will:
  - a. Review and evaluate the officer's record and all information presented about the case under consideration.
  - b. Determine whether the record contains sufficient information as to one or more of the reasons specified in this instruction to require the officer to show cause for retention.
  - c. Close the case and cease all processing if the record does not contain sufficient information to require the officer concerned to show cause for retention.
  - d. Process the officer for separation pursuant to the guidelines set forth in paragraphs 3 through 6 of this enclosure.
  - e. If an officer is directed to show cause for retention in the naval service before a BOI, the SCA will provide the officer with written notification of the reasons for making such a show cause determination.
3. Processing Probationary Officers for Separation
  - a. In cases where the SCA deems that an Other Than Honorable discharge may be appropriate, or in other cases deemed appropriate, the SCA may refer the case directly to a BOI using the procedures in enclosure (11) of this instruction.
  - b. If a probationary officer is being considered for separation for one or more of the reasons contained in paragraph 1 (Separation for Cause) or paragraph 2 (Parenthood) of enclosure (6), and the SCA determines that an Honorable or General (Under Honorable Conditions) service characterization is

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appropriate, then the SCA may initiate separation without a BOI using the notification procedures in enclosure (10).

c. Notwithstanding any other provision of this instruction, an inactive-duty probationary officer undergoing initial qualification training, who fails to successfully complete the program required for retention of the appointment or issuance of the subsequent required reappointment, as appropriate, may be honorably discharged by the SCA, after notification per enclosure (10) of this instruction.

d. Notwithstanding any other provision of this instruction, Regular probationary officers, other than Warrant Officers, and Reserve probationary officers may, upon approval of SECNAV, be discharged when there is a need to reduce the number of officers in either the Navy or the Marine Corps to meet budgetary or force management requirements. See enclosure (4), paragraph 11 and enclosure (5), paragraph 8. The provisions of enclosure (10) do not apply to the discharge of probationary officers under this authority, which will be exercised per procedures established by CHNAVPERS and DC (M&RA) and submitted for approval to SECNAV before implementation.

e. SECNAV may refer any case which he considers appropriate to a BOI.

#### 4. Processing Non-Probationary Officers for Separation

a. If a non-probationary officer is being considered for separation for one or more of the reasons contained in paragraph 1 (Separation for Cause) or paragraph 2 (Parenthood) of enclosure (6), then the SCA will process such officer for separation using the BOI procedures in enclosure (11).

b. In all other cases, the SCA may process a non-probationary officer for separation whose performance or conduct is such that processing is considered appropriate under this instruction.

c. Limitation for Retirement-Eligible Officers. Only CHNAVPERS and DC (M&RA) may authorize a retirement-eligible officer to show cause for retention in the naval service with the least favorable service characterization of General (Under Honorable Conditions) or Other Than Honorable. Other Navy and

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Marine Corps SCAs must obtain approval from CHNAVPERS and DC (M&RA) before a BOI may recommend a service characterization less favorable than Honorable. If CHNAVPERS and DC (M&RA) grant such approval, then the SCA may direct show cause and instruct the BOI to make recommendations regarding the service characterization and retirement grade in accordance with the guidance in enclosures (8) and (9) of this instruction.

5. Processing Officers Recommended for Separation by Promotion Selection Boards

a. CHNAVPERS and DC (M&RA), as the Navy and Marine Corps SCAs, respectively, may also initiate processing for separation under these circumstances:

(1) If the report of a promotion selection board convened under chapters 36 or 1403 of reference (a) notifies SECNAV that an officer's record, in the opinion of the majority of the board members, indicates that the officer should be required to show cause for retention on active duty or in an active status because of substandard performance of duty, misconduct, moral, or professional dereliction, or because retention is not clearly consistent with the interests of national security; or

(2) If the report of a selection board convened under references (h) or (i) notifies SECNAV that a Warrant Officer's record, in the opinion of the majority of the board members, establishes the Warrant Officer's unfitness or unsatisfactory performance.

b. CHNAVPERS and DC (M&RA) will take action on a promotion selection board's recommendation using the procedures outlined in paragraph 2 of this enclosure.

6. Processing Certain Permanent Reserve Warrant Officers for Separation

a. Reserve Warrant Officers with less than five years of service as a Warrant Officer may be separated from the Navy or Marine Corps Reserve at any time without the benefit of a hearing or board procedure for any reason discussed in paragraphs 1 (Separation for Cause) or 2 (Parenthood) of

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enclosure (6). The notification procedure contained in enclosure (10) must be used.

b. Reserve Warrant Officers, regardless of length of commissioned service or service as a Warrant Officer, may be separated from the Navy or Marine Corps Reserve at any time without the requirement of a hearing or board procedure for any reason discussed in paragraphs 13a (Age Restrictions) or 16 (Lack of Mobilization Potential) of enclosure (5).

c. Reserve Warrant Officers with more than five years of service as a Warrant Officer may be separated for any reason set forth in paragraphs 1 (Separation for Cause) or 2 (Parenthood) of enclosure (6) only upon recommendation of a BOI as provided in enclosure (11).

7. Regular LDOs and Warrant Officers with Temporary Appointments. As prescribed by reference (a), section 8146, SECNAV may at any time terminate the temporary appointment of Regular LDOs or Warrant Officers of the naval service without the requirement for a hearing or a board of officers. The notification procedure of enclosure (10) must be used. Accordingly, individuals whose temporary appointments are terminated may revert to their permanent status as Warrant Officers or enlisted members. The provisions of this instruction apply to the administrative processing of temporary LDOs who revert to Warrant Officer status. The provisions of references (ac), (ad), and (t), as applicable, apply to the administrative processing of Navy or Marine Corps members who revert to enlisted status.

8. Permanent Regular Warrant Officers

a. Permanent Regular Warrant Officers who, from the date when they accepted their original permanent appointments as Warrant Officers in that component, have not completed three years of continuous active service may, under section 1165 of reference (a), have their appointments terminated at any time without the requirement of a hearing or board processing. The notification procedure of enclosure (10) must be used.

b. Permanent Regular Warrant Officers who have completed three or more years of continuous active service from the date when they accepted their original permanent appointments as



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Warrant Officers may have their appointments terminated for any reason contained in paragraphs 1 (Separation for Cause) or 2 (Parenthood) of enclosure (6) only upon recommendation by a BOI as provided in enclosures (9) and (11).

c. Permanent Regular Warrant Officers, who are not eligible for retirement, may apply for enlistment in the highest enlisted grade previously held under section 515 of reference (a) if discharged because of any reason contained in paragraph 1a (Substandard Performance of Duty) or 1b (Misconduct) of enclosure (6). Permanent Regular Warrant Officers with three or more years of continuous active service from the date of acceptance of original permanent appointment who are identified by a promotion selection board as being unfit or unsatisfactory in the performance of duty will be afforded the opportunity to appear before a BOI before separation or termination of appointment.

9. Retention to Fulfill Military Service Obligation

a. A Regular officer who has not completed the eight-year military service obligation in paragraph 4a of enclosure (3), and who is honorably discharged from the Regular component by SECNAV for reasons set forth in paragraph 1a (Substandard Performance of Duty) or paragraph 2 (Parenthood) of enclosure (6), may be tendered a Reserve commission and transferred to the Ready Reserve to complete that obligation, unless medical reasons preclude availability to meet mobilization requirements or SECNAV determines the officer has no potential for service in the Reserve Component.

b. A Reserve officer who has not completed the eight-year military service obligation in paragraph 4a of enclosure (3), and who would otherwise be honorably discharged from the Navy or Marine Corps Reserve by SECNAV for reasons set forth in paragraph 1a (Substandard Performance of Duty) or paragraph 2 (Parenthood) of enclosure (6), may, if on active duty, be released from active duty and transferred to the Ready Reserve, or, if in an active status, be retained in the Ready Reserve, to fulfill that obligation, unless medical reasons preclude availability to meet mobilization requirements or SECNAV determines the officer has no potential for service in the Reserve Component.

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c. To assist SECNAV in making the determination under this paragraph, CHNAVPERS or CMC must include an assessment of the officer's potential for service in a Reserve Component in the endorsement to SECNAV under the provisions of enclosures (10) or (11).

10. Dropping from the Rolls

a. Pursuant to reference (a), sections 1161, 8375, and 12684, any commissioned officer may be dropped from the rolls of the Navy or Marine Corps if he or she:

(1) Has been absent without authority for at least three months;

(2) Has been sentenced to confinement in a Federal or State penitentiary or correctional institution after having been found guilty of an offense by a court other than a court-martial or other military court, and whose sentence has become final; or

(3) Except for Warrant Officers (W-1) has been sentenced to confinement for more than six months by a court-martial, when the officers have served in confinement for a period of six months and their sentence becomes final.

b. For purposes of this paragraph, finality of the sentence of a civilian or military court will occur upon completion of all appeals to which the defendant is entitled by law.

c. Action to initiate dropping an officer from the rolls will normally be undertaken by CHNAVPERS or DC (M&RA) on a case-by-case basis after a finding that one or more of the above conditions exist.

d. Neither a hearing nor a Board is required in order to drop an officer from the rolls. However, any officer so considered must be notified of such prospective adverse action (or reasonable efforts will be made to provide such notification if actual notification cannot be made) and provided the opportunity to respond within 30 calendar days of receipt of notification. Upon completion of the dropping from the rolls action, notification will be addressed to the officer concerned.

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11. Special Provisions

a. No officer will be discharged under this instruction under Other Than Honorable conditions without first being afforded the opportunity to have his or her case heard before a BOI.

b. If processing by a BOI is mandatory in order to release an officer from active duty or discharge the officer, such action will not be taken except upon the approved recommendation of such a board, or upon the officer's voluntary written waiver of the right to a hearing before the board.

c. The Separation Authority will not consider requests for reconsideration unless the officer ordered discharged presents material new evidence in support of retention that the Separation Authority had not previously considered. The officer must provide substantial evidence in the reconsideration request that, through no fault of the officer, and despite exercising reasonable diligence during separation processing, the evidence was unknown to the officer before the Separation Authority's action on the original separation request. An officer requesting reconsideration may only make such a request before his or her separation from the naval service.

12. Limitations

a. Subject to subparagraph 12c, an officer who is processed for separation because of Substandard Performance of Duty (subparagraph 1a of enclosure (6)) or Parenthood (paragraph 2 of enclosure (6)) and who is determined to have established that he or she should be retained on active duty may not again be processed for separation for the same reasons within a one-year period beginning on the date of that determination.

b. Subject to subparagraph 12c, an officer who is processed for separation for Misconduct, Moral or Professional Dereliction (subparagraph 1b of enclosure (6)), or in the Interest of National Security (subparagraph 1c of enclosure (6)) and who is determined to have established that he or she should be retained on active duty may again be required to show cause for retention at any time.

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c. An officer will not again be processed for separation under subparagraphs 12a or 12b of this enclosure solely because of performance or conduct which was the subject of previous separation processing, unless the findings and recommendations of the board that considered the case are determined to have been obtained by fraud or collusion.

d. Unless consideration of evidence of pre-service misconduct is authorized pursuant to subparagraph 2d(1) of enclosure (8), whenever evidence of pre-service misconduct is presented to a board, the board may consider it only for deciding whether to recommend separation or retention of the respondent; such evidence cannot be used in determining the recommendation for characterization of service; and the board must affirmatively state in its report that such evidence was considered only for purposes of determining whether it should recommend retention or separation of the officer.

e. Performance or conduct identified more than five years before the initiation of processing for separation under paragraph 3 of this enclosure cannot form the basis for processing under this enclosure. Performance or conduct is deemed to have been "identified" when it is reported to the SCA. "Initiation of processing" is deemed to have occurred when officers are officially notified of administrative separation processing by the SCA.

f. Only CHNAVPERS and DC (M&RA) have authority to direct a retirement-eligible officer to show cause for retention in the naval service with the least favorable service characterization of General (under Honorable conditions) or Other Than Honorable. Paragraph 4c of this enclosure contains additional procedural guidance for SCAs.

13. Final Disposition of Cases Processed Under Board Procedures. SECNAV will take final action in any case wherein the commission or warrant of officers are to be terminated or the officers are to be discharged under board action. In addition to directing retention on active duty, SECNAV may take these actions:

a. Retirement and Resignation. An officer (Regular or Reserve, Temporary or Permanent) who is being considered for removal from active duty in accordance with this instruction and

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who is eligible for voluntary retirement under any provision of law on the date of such removal, may, upon approval by SECNAV, be retired in the highest grade in which he or she served satisfactorily as determined by SECNAV under the guidelines of enclosure (9). Such a retirement is considered voluntary for purposes of determination of the officer's retirement. An officer who is not eligible for retirement may submit a request for a qualified or unqualified resignation or a resignation for the good of the service. Eligibility for retired pay of an officer convicted by a court other than a court-martial or other military court will be determined pursuant to section 8312 of reference (a) or pursuant to paragraph 10 of enclosure (7) of this instruction.

(1) A requests for such resignation and retirement will be addressed to SECNAV, via CHNAVPERS or the DC (M&RA), as appropriate.

(2) CHNAVPERS or DC (M&RA) must, unless the request is denied, submit the request to SECNAV with the case file and recommendations. CHNAVPERS and DC (M&RA) will normally deny, on behalf of SECNAV, such resignations and requests for retirement while actions against the officer under the UCMJ are pending.

(3) Unless the requested characterization of service is consistent with the guidelines contained in enclosure (8) of this instruction, such resignations will normally be denied.

(4) Under section 8329 of reference (a), no officer of the Navy or Marine Corps may be retired because of misconduct for which trial by court-martial would be appropriate.

(5) A request for resignation or retirement has no effect unless accepted or approved by SECNAV.

b. Discharge. An officer (Regular or Reserve, Temporary or Permanent) discharged for cause in accordance with this enclosure, if ineligible for voluntary retirement under any provision of law on the date of such removal, will, at the direction of SECNAV, be:

(1) Honorably discharged in the grade then held when the only basis for discharge is Substandard Performance of Duty under subparagraph 1a of enclosure (6);

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(2) Honorably discharged in the grade then held when the only basis for discharge is Parenthood under paragraph 2 of enclosure (6); or

(3) Discharged with an appropriate characterization of service under guidelines in enclosure (8) when the grounds for discharge are misconduct, moral or professional dereliction, or because retention is not clearly consistent with the interests of national security under subparagraphs 1b or 1c of enclosure (6).

c. SECNAV may retain the officer under the provisions of paragraph 9 of this enclosure.

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**GUIDELINES ON CHARACTERIZATION OF SERVICE**

1. General Guidance. Characterization of service incident to separation for cause will be based on the officer's record of performance and conduct, including particularly the acts or omissions giving rise to separation for cause.

a. In accordance with sections 576, 1186, and 14902 of reference (a), when the separation is solely for reasons constituting substandard performance of duty, the characterization will be Honorable.

b. When the separation is solely for removal of ecclesiastical endorsement, the characterization will be Honorable.

c. The serious nature of misconduct or moral or professional dereliction on the part of an officer normally requires separation be under Other Than Honorable conditions. However, characterization as General (under Honorable conditions) may be warranted under the guidelines below. Characterization as Honorable is not authorized unless the officer's record is otherwise so meritorious that under the particular circumstances any other characterization would be clearly inappropriate.

d. When separation is for reasons of national security, the characterization should be based on the seriousness of the acts or omissions and the guidelines below.

e. An appropriate characterization of service must be determined for all officer separations.

2. Characterization of Service

a. Honorable. Officers whose quality of service has generally met the standards of acceptable conduct and performance of duty for officers of the naval service, or is otherwise so meritorious that any other characterization would be clearly inappropriate, will have their service characterized as Honorable.

b. General (Under Honorable Conditions). If an officer's service has been honest and faithful, but negative aspects of

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the officer's conduct or performance of duty outweigh the positive aspects of his or her conduct or performance of duty as documented in the officer's military record, it is appropriate to characterize that service as General (Under Honorable Conditions).

c. Under Other Than Honorable Conditions. This characterization is appropriate when the officer's conduct or performance of duty, particularly the acts or omissions that give rise to the reasons for separation, constitute a significant departure from that required of officers of the naval service. Examples of such conduct or performance include acts or omissions which, under military law, are punishable by confinement for six months or more; abuse of a special position of trust; an act or acts which bring discredit upon the armed services; disregard by a superior of customary superior-subordinate relationships; acts or omissions that adversely affect the ability of the military unit or the organization to maintain discipline, good order, and morale or endanger the security of the United States or the health and welfare of other members of the Armed Forces; and deliberate acts or omissions that seriously endanger the capability, security, or safety of the military unit or health and safety of other persons. An officer being separated under Other Than Honorable conditions must be informed, in writing, that he or she may petition the Veterans Benefits Administration of the Department of Veterans Affairs (VA) for certain benefits under the laws administered by the Secretary of VA, despite the characterization of the officer's service.

d. Limitations

(1) Service will be characterized as Honorable when the grounds for separation are based solely on preservice activities, other than intentional misrepresentation, or intentional omission of facts, in obtaining an appointment or in official statements or records.

(2) Service will be characterized as Honorable when the sole reason for discharge is personal abuse of drugs, as defined in reference (f), and the evidence of the unlawful drug involvement is developed solely as a result of the officer's volunteering for treatment under a self-referral program for treatment of drug abuse, per reference (f).



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(3) Conduct in the civilian community of members of a Reserve component who are not on active duty or active duty for training may form the basis for characterization as under Other Than Honorable conditions only if such conduct directly affects the performance of the members' military duties. Such conduct may form the basis for characterization as General (Under Honorable conditions) only if such conduct has an adverse effect on the overall effectiveness of the naval service, including military morale and efficiency.

(4) If an officer tests positive for the presence of illegal drugs in the officer's body while in an active or inactive duty status, or while otherwise subject to Article 2 of the UCMJ, the drug abuse will be deemed to have directly affected the officer's readiness and performance of military duties. In such cases, drug abuse by a Reserve officer may form the basis for characterization as Under Other Than Honorable conditions or General (Under Honorable conditions).

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**GUIDELINES ON RECOMMENDATIONS - GRADE AT RETIREMENT**

1. Introduction

a. General Rule. In accordance with section 1370(a) of reference (a), a commissioned officer (other than a commissioned Warrant Officer) shall be retired in the highest grade in which he or she served on active duty satisfactorily, as determined by SECNAV, for not less than six months. This rule does not apply to commissioned officers subject to retirement for disability under reference (a), chapter 61, or those eligible for retired pay for non-Regular service under reference (a), chapter 1223.

b. Three-Year Time-in-Grade Requirement. In addition to serving on active duty satisfactorily in the present grade for not less than six months, commissioned officers in the grade of O-5 or O-6 are expected to serve a minimum of three years' time-in-grade in order to be eligible for voluntary retirement in that grade.

c. BOI Recommendation for Retirement Grade

(1) If a BOI recommends that a retirement-eligible officer be separated for cause based on substandard performance of duty under subparagraph 1a of enclosure (6), misconduct or moral or professional dereliction under subparagraph 1b of enclosure (6), or because retention is not clearly consistent with the interests of national security under paragraph 1c of enclosure (6), then the BOI must also make a recommendation as to retirement grade. The BOI will determine the highest grade in which the officer served on active duty satisfactorily for not less than six months and make a recommendation as to retirement grade. Six months of satisfactory service in the present grade does not preclude retirement in a lesser grade. Rather, as a threshold matter, it is a requirement that an officer must serve six months satisfactorily, in addition to having the requisite time in grade, to retire in his or her present grade.

(2) In those cases where a BOI has determined that no substandard performance of duty, misconduct or moral or professional dereliction occurred, or where a BOI has recommended that an officer should be retained notwithstanding such substandard performance of duty, misconduct or moral or

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professional dereliction, the case will be closed. If the case is closed, then no retirement grade determination will be required unless subsequently there is evidence uncovered of fraud or collusion on the BOI or additional misconduct or dereliction of duty independently warranting a second BOI.

2. Satisfactory Service Determination for Retirement Grade. In the case of an officer whom SECNAV determines committed misconduct in a lower grade, SECNAV may determine the officer has not served satisfactorily in any grade equal to or higher than that lower grade. This determination will be made by SECNAV without a BOI in those cases, forwarded per paragraph 2d or 3 of this enclosure, where the officer has submitted a voluntary retirement request. In any other case where CHNAVPERS or DC (M&RA) determines that retirement in a lesser grade may be appropriate, a BOI must be convened, per enclosure (11), to recommend whether the officer should be retired in the current grade or a lesser grade. In making this recommendation, the BOI must determine the highest grade in which the officer served on active duty satisfactorily. Regardless of whether the factual basis for separation for cause occurred before or after the passage of six months of satisfactory service in the current grade, the BOI may find and recommend that the highest grade in which the officer served satisfactorily is the grade prior to the grade in which the conduct in question occurred. The BOI determination is merely a recommendation and the final decision as to retirement grade rests with SECNAV. Finally, the procedures in this enclosure do not apply to officers retiring in the grades of O-9 and O-10. Reference (af) governs retirements in the grades of O-9 and O-10.

a. General Guidance. A recommendation that an officer has or has not served satisfactorily in the grade currently held will be based on a determination made after considering all relevant factors, such as the nature of the particular substandard performance of duty, misconduct or moral or professional dereliction, or national security interests affected by the officer's conduct. If a BOI is held, the record must support such a determination. In the case of a retirement-eligible officer, the BOI or officials reviewing the retirement request should recommend retirement in a lesser grade if the BOI or reviewing officials determine that the officer's performance, misconduct, moral or professional dereliction, or national security interests affected by the officer's conduct was serious

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enough to constitute a significant departure from the conduct required of officers of the naval service. Examples of such conduct include, but are not limited to: abuse of a special position of trust; an act which brings discredit upon the armed services; disregard by a superior of customary superior-subordinate relationships; an act or omission that adversely affects the ability of the military unit or the organization to maintain discipline, good order, and morale or endangers the security of the United States or the health and welfare of other members of the Armed Forces; and a deliberate act or omission that seriously endangers the capability, security, or safety of the military unit or health and safety of other persons. However, when the officer's record, in spite of the substandard performance of duty, misconduct, moral or professional dereliction, or national security interests affected, is otherwise so meritorious as to demonstrate that the officer served satisfactorily in the grade currently held, the recommendation should be for retirement in that grade.

b. Specific Factors. In considering the highest grade in which an officer served satisfactorily, these factors should normally be considered:

(1) The nature and severity of the substandard performance of duty, misconduct, moral or professional dereliction, or national security interests affected by the officer's conduct;

(2) The officer's conduct and its relation to, and effect on, the performance of military duties;

(3) All fitness reports and other portions of the service record which reflect performance in the current grade. In this regard, it is appropriate to consider whether the misconduct was known by reporting seniors, and if not, what effect, if any, it might have had on the officer's record;

(4) Time in current grade, and relation between such time and the time of the officer's conduct;

(5) Other relevant matters presented either by the record or the officer; and

(6) Chain of command recommendations.

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c. Conditional Retirement Grade Determination. When an officer is under investigation for alleged misconduct at the time of retirement, a BOI should not consider the alleged misconduct when making the retirement grade determination. In such cases, the SECNAV may conditionally determine the highest grade of satisfactory service of the officer pending completion of the investigation. Such grade is subject to resolution under section 1370(b)(3) of reference (a). A determination or certification of the retired grade of an officer will be resolved following a conditional determination or conditional certification if the investigation of or personnel action against the officer, as applicable, results in adverse findings. If the retired grade of an officer is reduced, the retired pay of the officer will be recalculated, and any modification of the retired pay of the officer will go into effect on the effective date of the reduction in retired grade.

d. Forwarding Procedures

(1) All voluntary retirement requests from officers who have been the subject of any substantiated adverse finding or conclusion from an officially documented investigation or inquiry (except minor infractions as determined by CHNAVPERS or DC (M&RA)) must be forwarded to SECNAV for a retirement grade determination if: for officers in grades O-7 and O-8, the investigation or inquiry was completed subsequent to the officer's most recent Senate confirmation; or, for officers in grades O-5 and O-6, the investigation or inquiry was completed within two years of the date the voluntary retirement request is submitted. However, CHNAVPERS or DC (M&RA) may, in their discretion, forward a case completed prior to the two years before the date of the voluntary retirement request if circumstances warrant.

(2) Before forwarding a voluntary retirement request to SECNAV, CHNAVPERS, or DC (M&RA) must notify the officer in writing:

(a) That the officer's voluntary retirement request is being forwarded to SECNAV for a retirement grade determination;

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(b) The factual basis supporting the substantiated adverse finding or conclusion from the officially documented investigation or inquiry;

(c) The recommended retirement grade and, if specifically authorized, characterization of service;

(d) That the officer may submit a rebuttal or decline to make a statement;

(e) That the officer has the right to confer with counsel, as provided in paragraph 3 of enclosure (10);

(f) That the officer will, upon request, be provided copies of the records or documents to be forwarded to SECNAV, provided that the documents would not be exempt from release under any provisions of the Freedom of Information Act or Privacy Act (classified documents may be summarized);

(g) That the officer has the right to waive subparagraphs (d), (e), and (f) of this paragraph and that failure to respond will constitute waiver of the rights in these paragraphs; and

(h) That the officer has a specified period of time to respond to the notification as provided in paragraph 4 of enclosure (10).

(3) The officer's response must be forwarded to CHNAVPERS or DC (M&RA) with appropriate command recommendations. CHNAVPERS or DC (M&RA) will review the request and all related material and forward the case file to SECNAV, via CNO or CMC for officers in the paygrade O-7 or O-8, with a retirement grade recommendation;

e. The final determination of retirement grade rests exclusively with SECNAV. Commanders, COs, or Officers in Charge are not authorized to enter into agreements in which an officer is to be retired at a particular grade level.

### 3. Retirement-Eligible Officer

a. Any officer being considered for administrative show cause processing per this instruction who is eligible for

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voluntary retirement under any provision of law may request voluntary retirement. The request must be submitted via CHNAVPERS or DC (M&RA) and will include this information:

(1) A statement that the officer understands that a BOI will not be convened to make a recommendation to SECNAV on retirement grade or characterization of service (if specifically authorized);

(2) A statement that the officer understands that SECNAV may retire him or her in a lesser paygrade than currently held; and the retirement grade will be the highest grade in which the officer served satisfactorily, as determined by SECNAV, for not less than six months;

(3) A statement that the officer has consulted with counsel, including counsel's name, grade, and branch of service. If civilian counsel is retained, provide the name and address. If the officer waives his or her right to consult with counsel, then a statement stating the same must be included;

(4) A statement that the officer admits that his or her performance of duty was substandard, and if the officer is being required to show cause for misconduct, moral or professional dereliction, or because retention is not clearly consistent with the interests of national security, or if the officer could have been ordered to show cause for one or more of such bases but for the officer's voluntary retirement request, that he or she admits committing the misconduct or conduct that constituted the moral or professional dereliction, or affected the interests of national security. The statement must include that the officer understands that he or she could receive a General (under Honorable conditions) or an Other Than Honorable discharge, if characterization of service has been specifically authorized;

(5) A statement by the officer that the request is voluntary and may be withdrawn only with the permission of SECNAV; and

(6) A statement by the officer that he or she does or does not desire to provide supplemental material to SECNAV for consideration. Any supplemental material provided by the officer will be attached to the request.

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b. The request must also include a copy of the investigation or other documentation pertaining to the substandard performance of duty, misconduct, moral or professional dereliction, or impact on the interests of national security.

c. The request will be forwarded with appropriate command endorsements. Each endorsement must include a recommendation to approve or disapprove the request, a statement indicating the highest grade in which the officer served satisfactorily for not less than six months, and, if specifically authorized per paragraph 4c of enclosure (7), a recommended characterization of service. Any relevant information or investigative material not included in the original request should also be included. Any new factual material, however, must be provided to the officer for review and comment.

#### 4. Retired Officer

a. Retirement Grade Determinations. Officer grade determinations are normally accomplished upon retirement, and the officer's grade is fixed at that time. However, a retirement grade determination may be reopened by SECNAV, or his or her delegate, after retirement if any of these conditions are met:

(1) The retirement and/or accompanying grade determination was procured by fraud;

(2) Substantial new evidence comes to light after the retirement that could have led to a lower retired grade if known by competent authority at the time of the retirement;

(3) A mistake of law or mathematical miscalculation led to an improper separation or grade determination;

(4) When the SECNAV made a conditional retirement grade determination or certification, if the investigation of or personnel action against the officer, as applicable, results in adverse findings. In such case, SECNAV may not make an adverse determination on the retired grade of the officer until the officer has had a reasonable opportunity to respond regarding the basis of the reopening.



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(5) If SECNAV determines, pursuant to regulations prescribed by SECDEF, that good cause exists to reopen the determination or certification.

b. Procedures

(1) Written Notice. Following SECNAV approval of an officer's voluntary retirement request, the officer must be informed in writing via naval correspondence. All such Navy and Marine Corps notifications will include the following language with citation to the three references listed:

Ref: (a) Uniform Code of Military Justice  
(b) SECNAVINST 1920.6D  
(c) JAGINST 5800.7F CH-1

1. Your request for voluntary retirement has been approved by SECNAV in the grade of \_\_\_\_\_ with an effective date of \_\_\_\_\_.

2. Approval of the subject voluntary retirement request does not affect SECNAV's authority to reconsider your retirement grade or service after your effective retirement date pursuant to existing statutes and regulations, including references (a) through (c).

(2) Reopening the Retirement Grade Determination. Information relevant to a reopened retirement grade determination will be forwarded to SECNAV for consideration as part of SECNAV's determination in accordance with the guidance, specific factors, and procedural requirements set forth in paragraph 2 of this enclosure.

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**NOTIFICATION PROCEDURE**

1. The Notification Procedure Must Be Used When:

a. A probationary officer is processed for separation for any reason specified in paragraph 1 (Separation for Cause) or 2 (Parenthood) of enclosure (6);

b. Action is taken to terminate the appointment of a temporary LDO or temporary Warrant Officer for any reason specified in paragraph 1 (Separation for Cause) or 2 (Parenthood) of enclosure (6);

c. Action is taken to process a Regular or Reserve probationary officer for separation for the reason specified in paragraph 12 (Declining Appointment to O-2 or O-3) of enclosure (4) or paragraph 7 (Declining Appointment to O-2 or O-3) of enclosure (5);

d. Action is taken to separate an Inactive Duty Reserve officer per paragraph 15 (Separation and Retirement of Reserve Officers in an Inactive Status in the Standby Reserve) of enclosure (5).

2. Notification. The SCA must notify the officer in writing of:

a. The reason or reasons specified in enclosure (6) for which the action was initiated, including the specific factual basis supporting the reason;

b. The recommended characterization of service is Honorable or General (Under Honorable Conditions);

c. That the officer may submit a rebuttal or decline to make a statement;

d. That the officer may tender a resignation in lieu of separation processing per subparagraph 13a of enclosure (7);

e. That the officer has the right to confer with appointed counsel as provided in paragraph 3 of this enclosure;

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f. That the officer will, upon request, be provided copies of the records or documents to be forwarded to SECNAV to support the proposed separation, provided the documents would not be exempt from release under any provisions of the Freedom of Information Act or Privacy Act (classified documents may be summarized);

g. That the officer has the right to waive subparagraphs c, e, and f of this paragraph, and that failure to respond will constitute waiver of the rights in these subparagraphs; and

h. That the officer has a specified period of time to respond to the notification as provided in paragraph 4.

### 3. Right to Counsel

a. A respondent has the right to consult with qualified counsel when the notification procedure is initiated, except under these circumstances:

(1) The respondent is attached to a vessel or unit operating away from or deployed outside the United States or away from its overseas homeport, or to a shore activity remote from Judge Advocate resources;

(2) No qualified counsel is assigned and present at the vessel, unit, or activity, or reasonably available in the activity's geographical area;

(3) The CO does not anticipate having access to qualified counsel from another vessel, unit, or activity, for at least the next ten working days; and

(4) The CO determines the needs of the naval service require processing before qualified counsel will be available.

b. Nonlawyer counsel will be appointed whenever qualified counsel is not available under paragraph 3a. An appointed nonlawyer counsel must be a commissioned officer with no prior involvement in the circumstances leading to the basis of the proposed separation, and no involvement in the separation process itself. The nonlawyer counsel will be encouraged to seek advice by telephone or other means from any judge advocate on any legal issue relevant to the case whenever practicable.

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When a nonlawyer counsel is appointed, the appointing letter must state that qualified counsel is unavailable for the applicable reasons in paragraph 3a of this enclosure and the needs of the naval service warrant processing before qualified counsel will be available. A copy of the appointing letter will be attached to each copy of the written notice of separation processing. The respondent may also consult with a civilian counsel at the respondent's own expense. Respondent's use of a civilian counsel does not eliminate the requirement to furnish counsel in paragraph 3a or 3b of this enclosure. Consultation with civilian counsel will not delay orderly processing per this instruction.

#### 4. Response

a. The respondent must be provided a reasonable time period, normally ten working days, but more if, in the judgment of the CO, additional time is necessary, to act on the notice. An extension may be granted by the CO upon a timely showing of good cause by the officer.

b. If the respondent fails to acknowledge receipt of notification or submit a timely reply, normally ten working days, that fact will constitute a waiver of rights. An appropriate notation will be recorded on a retained copy of the appropriate form.

c. If the respondent declines to respond as to the selection of rights, such declination will constitute a waiver of rights, and an appropriate notation will be made in the case file. If the respondent indicates that one or more of the rights will be exercised, but declines to sign the appropriate notification statement, the selection of rights will be noted and notation as to the failure to sign will be made.

#### 5. Submission to SECNAV

a. The CO must forward the case file to SECNAV via CHNAVPERS or DC (M&RA), as appropriate. The case file must contain a copy of the written notification to the respondent, documentation substantiating the conduct or performance, and any written statement which the respondent desires to make. If the respondent tenders a resignation, it will accompany the case file.

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b. CHNAVPERS or DC (M&RA) must forward the case file to SECNAV with recommendations on each reason for separation and the facts supporting it, the recommendation for separation, and a recommendation for acceptance or rejection of a resignation, if one is tendered.

c. CHNAVPERS or DC (M&RA) may disapprove the separation of probationary commissioned officers and determine that the case be closed, or may determine that the officer should show cause for retention at a BOI.

6. Action of SECNAV

a. SECNAV will determine whether there is sufficient evidence supporting the allegations set forth in the notification for each of the reasons for separation.

b. If there is sufficient factual basis for separation, SECNAV may order the officer separated. If the officer tenders a resignation, SECNAV may accept or reject it.

c. If SECNAV determines the recommended Honorable or General (under Honorable conditions) characterization of service is inappropriate, he may refer the case directly to a BOI.

d. SECNAV may retain the officer under the provisions of paragraph 9 of enclosure (7).

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### **BOARD OF INQUIRY PROCEDURES**

1. Purpose. The purpose of a BOI is to give officers a full and impartial hearing at which they may respond to and rebut the allegations which form the basis for separation for cause or retirement in the current grade or a lesser grade and present matters favorable to their case on the issues of separation and, if applicable, characterization of service.

2. Convening Authority. The SCA must convene, or direct to be convened, a BOI upon determination that an officer should be required to show cause for retention. A BOI must also be convened by such authority when required under the provisions of enclosures (6), (7), or (9). In accordance with paragraph 4c of enclosure (7), a SCA may not direct a BOI to recommend a service characterization less favorable than Honorable for a retirement-eligible officer unless CHNAVPERS and DC M&RA approved the SCA's request to direct the BOI to provide such recommendation.

3. Board Membership. A BOI must consist of not less than three officers in the same Armed Force as the respondent. As outlined below, membership qualifications differ depending upon whether the respondent is a commissioned officer on the ADL or is a Reserve officer on the RASL.

a. Respondent on the ADL

(1) With the exception of a respondent who is a temporary LDO or a Warrant Officer on the ADL, the BOI members will be highly qualified and experienced Regular officers on the ADL in the grade of O-5 or above, except that at least one member must be in the grade of O-6 or above. Each member must be senior in grade (at least one grade higher) to the respondent.

(2) If the respondent is a temporary LDO or Warrant Officer on the ADL, then the BOI members must be senior in grade (at least one grade higher) to the respondent.

(3) If qualified officers are not available in sufficient numbers to comprise a board, the board membership may be completed by appointing to the board a retired officer as

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long as the retired officer meets the criteria found in section 1187 of reference (a).

b. Respondent on the RASL

(1) With the exception of a respondent who is a Warrant Officer on the RASL, the BOI members will be highly qualified and experienced officers serving on active duty or in an active status in the grade of O-5 or above, except that at least one member must be in the grade of O-6 or above. Each member must be senior in grade (at least one grade higher) to the respondent. One member must be a Reserve officer, except in cases where the respondent is serving on active duty in an initial period of obligated service.

(2) If the respondent is a Warrant Officer on the RASL, then the BOI members must be senior in grade (at least one grade higher) to the respondent, and at least one member must be a Reserve officer.

c. Competitive Category. For all Navy cases, a BOI must have at least one member from the same competitive category as the respondent. This requirement is especially important when considering an officer for substandard performance. However, in cases involving small competitive categories, isolated geographic locations, or for reasons of operational necessity, the convening authority may waive the competitive category membership requirement if no suitable officer is reasonably available. The competitive category membership requirement does not apply to Marine Corps cases.

d. Unrestricted Line Officer. For all cases, at least one member must be an unrestricted line officer. Such officers should have command experience, whenever possible.

e. The convening authority is not limited to officers under his or her direct command when selecting qualified officers to serve on a BOI.

f. Officers with personal knowledge pertaining to the respondent's case cannot be appointed to serve as a member of the Board considering the case. No officer may be a member of more than one board convened under this instruction to consider the same officer.

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g. The senior member will be the presiding officer and, if no legal advisor is appointed, will rule on all matters of procedure and evidence, but may be overruled by a majority of the Board. Board members are subject to challenge only for cause.

4. Recorder. The convening authority must appoint a nonvoting recorder to perform such duties as appropriate. The recorder cannot participate in closed sessions of the Board.

5. Legal Advisor. The convening authority may appoint a nonvoting legal advisor to perform such duties as the Board desires. The legal advisor cannot participate in closed sessions of the Board. If appointed, the legal advisor will rule finally on all matters of procedure, evidence, and challenges, except challenges to his or her appointment as legal advisor. The convening authority will rule finally on all challenges for cause to the legal advisor.

6. Notice to Respondent. The respondent must be notified in writing at least 30 days before the BOI hearing convenes.

a. The notice must include:

(1) Each of the reasons for which the respondent is being required to show cause for retention in the naval service;

(2) The specific alleged acts, omissions, or traits supporting the reasons for which the respondent is being required to show cause for retention;

(3) The least favorable characterization of service that the Board may recommend (for retirement-eligible officers, characterization less than Honorable must have been specifically authorized, per paragraph 4c of enclosure (7)); and

(4) The rights of a respondent before a BOI.

b. In the case of a retirement-eligible officer, the notice must also include provisions stating:

(1) That the BOI must consider whether to recommend the respondent for retirement, and regardless of whether the BOI recommends the respondent for retirement or not, in the event



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that the Secretary approves the respondent's retirement, the BOI must consider whether to recommend respondent for retirement in the current grade or a lesser grade; and

(2) That the respondent has the right to present evidence that his or her service, in the grade currently held, has been satisfactory for not less than six months.

c. The respondent will be notified by personal service and the officer's written acknowledgement will be obtained (if the respondent refuses to acknowledge receipt, the acknowledgement can be witnessed by a third party). When personal service is unavailable, the respondent will be notified by:

(1) Registered or certified mail or electronic mail equivalent, with a return receipt or equivalent requested; and

(2) Notification will be sent to the respondent's last known address, or to the respondent's next of kin.

7. Rights of a Respondent. The respondent has these rights, which may be exercised or waived:

a. In addition to the 30 days provided in paragraph 6 of this enclosure, the respondent may, for good cause, further petition in a timely manner for a continuance not to exceed 30 calendar days. The convening authority will rule on a request for continuance if the request is made before the convening of the BOI. Once the BOI is convened, the senior member may rule on such requests or refer them to the convening authority for decision. The SCA must approve any request for continuance which would delay the completion of the BOI hearing beyond a total of 60 calendar days from the date of notification to the respondent, per paragraph 6 of this enclosure.

b. The right to counsel, as provided in paragraph 8 of this enclosure.

c. The opportunity to present matters in one's own behalf.

d. Full access to, and copies of, records relevant to the matters to be determined by the BOI, as finally determined by the convening authority, that are within the custody and control of the convening authority and that are not privileged or

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otherwise exempt by law or regulation from disclosure, except that information or material must be withheld if the SCA determines that such information should be withheld in the interest of national security. When information or material is so withheld, a summary of the information or material will be provided to the extent the interest of national security permits. The respondent will timely request such records in writing, setting forth with reasonable particularity their identity, location, and relevance to the matters to be determined by the BOI.

e. The Names of All Witnesses in Advance of BOI Proceedings. Failure to provide any information or the name of a witness cannot preclude the board from considering the information or hearing the witness, provided the respondent has the opportunity to examine any statement, or talk with any witness presented, before consideration by the Board.

f. The Right to Challenge Any Member for Cause. The respondent may submit for appropriate action any relevant matter which, in his or her view, indicates that a particular member or members should not consider the case. The convening authority must excuse a member if the member is found unable to render a fair and impartial decision in the respondent's case, as determined by the legal advisor or by the convening authority if a legal advisor has not been appointed. If an excusal results in the membership of the Board falling below the number required in paragraph 4 of this enclosure, the convening authority will appoint a new member who is qualified per that paragraph. This new member may be challenged in the same manner as the member who was previously appointed and excused.

g. The right to request from the convening authority or the BOI the appearance before the Board of any witness whose testimony is pertinent to the case, as provided in paragraph 11.

h. The right to submit, at any time before the Board convenes or during the proceedings, any matter from the respondent's service record, or any letters, answers, depositions, sworn or unsworn statements, affidavits, certificates, or stipulations. This includes, but is not limited to, depositions of witnesses not deemed to be reasonably available or witnesses unwilling to appear voluntarily.

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i. The respondent and counsel may question any witness who appears before the BOI. Testimony of witnesses will be under oath or affirmation.

j. The right to give sworn or unsworn testimony. The respondent may only be examined on sworn testimony and should be warned against self-incrimination as required by Article 31, UCMJ. However, failure to warn the respondent will not preclude consideration of the respondent's testimony by the BOI.

k. The respondent or counsel may present oral or written argument, or both, on the matter to the Board.

l. The convening authority must serve on the respondent a copy of the BOI report. In cases involving classified matter withheld in the interest of national security, any record or information provided to the respondent will be appropriately redacted before delivery to the respondent in order to remove classified material and preserve its integrity.

m. The respondent may submit a statement in rebuttal to the findings and recommendations of the BOI for consideration by SECNAV.

n. The respondent may appear in person, with or without counsel, at all open proceedings of the BOI. The respondent's inability to obtain release from incarceration to attend the BOI will not preclude convening the BOI in absentia.

o. Failure of the respondent to invoke any of these rights is not a bar to the BOI proceedings, findings, or recommendations.

#### 8. Counsel

a. A respondent is entitled to have appointed as counsel by the convening authority a lawyer certified per Article 27(b), UCMJ.

b. A respondent may request military counsel of his or her choice, and such request will be granted provided the requested counsel is reasonably available.

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c. The determination as to whether individual counsel is reasonably available will be made per the procedures set forth in section 0131 of reference (ag) for determining the availability of Individual Military Counsel for courts-martial. Upon receipt of notice of the availability of the individual counsel, the respondents must elect between representation by appointed counsel and representation by individual counsel. A respondent may be represented in the proceedings by both appointed counsel and individual counsel only if the convening authority, in his or her sole discretion, approves a written request from the respondent for representation by both counsel. The respondent's written request must set forth in detail why representation by both counsel is essential to ensure a fair hearing.

d. A respondent may also engage civilian counsel at no expense to the Government, in addition to, or in lieu of, military counsel. Consultation with or retention of civilian counsel will not delay orderly processing per this instruction.

e. A respondent should be advised that retained counsel will be expected to comply with any established board schedule.

9. Waiver. A respondent may waive any of the aforementioned rights at any time before the BOI convenes or during the proceedings. Failure to appear, without good cause, at a hearing constitutes waiver of the right to be present at the hearing. If the respondent fails to appear, or cannot attend because of incarceration or other similar circumstances, then the BOI can be held in absentia. Failure to respond after being afforded a reasonable opportunity to consult with counsel constitutes a waiver of the rights in paragraph 7 of this enclosure.

10. Notification to Board Members. All members of a BOI must read this at some point before deliberations; however, failure to read the following advisements will not create a bar to separation processing or characterization:

a. The central purpose of a BOI is to protect the interests of the Navy and Marine Corps, and by extension, America's interests, by promoting readiness through the maintenance of high standards of conduct and performance. Convening authorities are encouraged to draw upon the experience of more

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senior officers, especially those with command experience, when appointing BOI members. It is DoD policy to separate from military service those officers who will not or cannot meet rigorous and necessary standards of duty, performance, and discipline; maintain those high standards of performance and conduct through appropriate actions that sustain the traditional concept of honorable military service; or exercise the required level of responsibility, fidelity, integrity, or competence.

b. As part of the BOI process, board members must consider the respondent's potential for future service and how retention of the officer will affect the strength of the Navy and Marine Corps. BOI members must understand that the purpose of this process is not to punish an officer. The primary purpose is to promote the readiness of the Navy and Marine Corps by maintaining high standards of conduct and performance. SECNAV relies upon BOI members to make difficult, but necessary, decisions that judge the respondent's suitability for military service based on his or her conduct and ability or willingness to meet required standards of duty, performance, and discipline.

c. Leaders in today's Navy and Marine Corps have an enduring obligation to maintain a Naval force that produces leaders and teams who learn and adapt to achieve maximum possible performance, and who achieve and maintain high standards to be ready for decisive operations and combat. Success requires the establishment and maintenance of a professional identity, on and off duty, guided by four core attributes: Integrity, Accountability, Initiative, and Toughness.

d. When an officer has committed misconduct, or otherwise satisfies one of the bases for separation under this instruction, board members should carefully consider the individual's suitability for continued service. Accordingly, all BOI members must carefully consider the following in the course of their deliberations:

(1) The totality of the officer's record and assessment of his or her suitability for continued military service;

(2) Whether the officer can meet rigorous and necessary standards of duty, performance, and discipline;

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(3) Whether the officer can maintain those high standards of performance and conduct through appropriate actions that sustain the traditional concept of honorable military service; and

(4) Whether the officer can exercise the responsibility, fidelity, integrity, or competence required of them.

e. BOI members have the important duty of assessing whether an officer should be retained and, if not, characterizing that officer's service. The effectiveness of the Navy and Marine Corps depends in part upon the decisions made by BOI members, which requires impartial and thoughtful consideration.

#### 11. Witnesses

a. Witnesses whose testimony will add materially to the case will be invited to appear to offer testimony before the Board if such witnesses are reasonably available.

b. Witnesses not within the immediate geographical area of the Board are considered not reasonably available, except as provided for in subparagraph 11d, below.

c. Statements or depositions from witnesses not reasonably available to testify during a board proceeding will be admitted and considered by the BOI.

d. The convening authority will request that COs make available, for personal appearance before a BOI, an active-duty or civilian witness under their jurisdiction whose personal appearance is essential to a fair determination, unless the witness is unavailable within the meaning of M.R.E. 804(a). Civilian employees may be directed to appear by their supervisors. Military personnel can be ordered to appear by their CO.

e. The respondent will specify in the request for witnesses to the convening authority or, once proceedings have commenced, the BOI, the type of information that the witness is expected to provide. The request must contain:

(1) A synopsis of the testimony that the witness is expected to give;

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(2) An explanation of the relevance of such testimony to the issues of separation or characterization, or, if applicable, retirement grade; and

(3) An explanation as to why written, recorded, telephonic, or video teleconferencing testimony would not be sufficient to provide for a fair determination.

f. Requests for witnesses may be denied if untimely.

g. Witnesses who are not on active duty and who are not civilian employees of the DON must appear voluntarily and at no expense to the Government, except as provided for by subparagraph 11i, below.

h. The convening authority will make all final decisions regarding the production of witnesses.

i. If the convening authority determines that the personal appearance of a witness is necessary, he or she will authorize expenditure of funds for production of the witness only if the presiding officer (after consultation with a judge advocate) or the legal advisor (if appointed) advises that:

(1) The testimony of the witness is not cumulative;

(2) The personal appearance of the witness is essential to a fair determination of the issues of separation or characterization, or, if applicable, retirement grade;

(3) Written, recorded, telephonic, or video teleconferencing testimony will not be sufficient to provide for a fair determination; and

(4) The significance of the personal appearance of the witness, when balanced against the practical difficulties in producing the witness, favors production of the witness. Factors to be considered in relation to the balancing test include, but are not limited to, the cost of producing the witness, the timing of the request for production of the witness, the potential delay in the proceeding that may be caused by producing the witness, or the likelihood of significant interference with military operational deployment, mission accomplishment, or essential training.

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j. If it is determined that the personal testimony of a witness is required, the hearing will be postponed or continued for a reasonable time, if necessary, to permit the attendance of the witness.

k. The hearing may be postponed or continued to provide the respondent with a reasonable opportunity to obtain a written statement from the witness or arrange for alternate means of testimony, if a witness requested by the respondent is unavailable, when:

(1) The presiding officer determines the personal testimony of the witness is not required;

(2) The CO of a military witness determines that military necessity precludes the witness' attendance at the hearing; or

(3) A civilian witness not employed by the DON declines to attend the hearing.

12. Hearing. The BOI hearing will be conducted in a fair and impartial manner to ensure that the respondent has the opportunity to present his or her case. At the discretion of the convening authority, a BOI may be convened to hear the cases of joint respondents.

a. A BOI is not a court-martial and the rules of evidence for courts-martial and other judicial proceedings do not apply.

b. Oral or written matter not admissible in a court of law may be accepted by BOIs.

c. Oral or written matter presented may be subject to reasonable restrictions as to authenticity, relevancy, competency, cumulativeness, and materiality of evidence presented as determined by the legal advisor if appointed, and if not appointed, then as determined by the senior member.

d. Except for closed sessions during which the Board will deliberate on the evidence presented, the proceedings of the Board should normally be open to the public at the discretion of the convening authority. Once convened, the legal advisor, if appointed, or the senior member may close the proceedings, or a



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portion thereof, upon a motion by either side and a showing of good cause.

13. Decision of BOI. The Board must make these determinations, by a majority vote, based on the evidence presented at the hearing:

a. The Board must make a finding on each of the reasons for separation specified and one of these (note: where a reason for separation is based on an approved finding of guilty by a court-martial or on a civilian criminal conviction, such a finding of guilty or criminal conviction will be binding on the BOI. When the basis for separation includes loss or revocation of a security clearance, relevant decisions by the Department of Defense Central Adjudications Facility or the Personnel Security Appeals Board are also binding):

(1) That the respondent is recommended for separation from the naval service for the specific reason or reasons provided in paragraph 1 (Separation for Cause) or paragraph 2 (Parenthood) of enclosure (6) as supported by a preponderance of the evidence. Based on those reasons, the evidence presented, the overall record of service, and consistent with enclosure (8), the Board must recommend a characterization of service except in cases involving a retirement-eligible officer where CHNAVPERs or DC M&RA did not authorize a service characterization lower than Honorable;

(2) That none of the reasons specified are supported by a preponderance of the evidence presented to warrant separation for cause and the case is, therefore, closed; or

(3) That, despite a finding that one or more of the reasons for separation specified are supported by a preponderance of the evidence, the respondent should be retained in the naval service and the case is, therefore, closed.

b. In the case of a retirement-eligible officer, if separation is recommended, the Board must also recommend:

(1) The highest grade in which the officer served satisfactorily for a period of not less than six months in accordance with the guidance contained in enclosure (9); and

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(2) A service characterization, if authorized by CHNAVPERS or DC M&RA pursuant to paragraph 4c of enclosure (7) and paragraph 2 of this enclosure.

14. Record of Proceedings. The convening authority will make a separate record of proceedings for each respondent.

a. Each record of proceedings must include:

(1) A summary of the respondent's service and background;

(2) All exhibits considered by the BOI; and

(3) A report of the Board's findings and recommendations, which must include:

(a) A list of the specific acts, omissions, or traits on which an allegation of misconduct or substantiated performance is based;

(b) Whether the respondent admits or denies each act, omission, or trait;

(c) The BOI's findings regarding each alleged act, omission, or trait, and each reason for separation;

(d) If the BOI finds a reason for separation, the BOI's recommendation regarding whether the respondent should be separated and, if separated, a recommended characterization of service;

(e) If the respondent is retirement-eligible and the BOI finds a reason for separation, the BOI's recommendations concerning whether the respondent should be retired, the highest grade in which the officer served satisfactorily for not less than six months, and, if authorized by CHNAVPERS or DC M&RA, a service characterization; and

(4) Copies of all documents and correspondence relating to convening the BOI (for example, the appointing order, the notification, requests for delay, requests for production of witnesses, the CHNAVPERS or DC M&RA authorization to recommend

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service characterization in the case of a retirement-eligible officer).

b. In cases where the BOI recommends that the respondent be separated or retired, the record of proceedings must include a transcript of the BOI hearing. With the exception of the BOI's findings and recommendations, the transcript may be in summarized form unless the SCA directs that a verbatim transcript be produced.

c. In cases where the BOI does not find a basis for separation or retirement, or recommends that the respondent be retained, then no transcript is required.

d. If a transcript of the BOI is required, the senior member will, by signature, authenticate the BOI transcript. All board members and the counsel for the respondent (or the respondent if counsel was not elected) must sign the report of the findings and recommendations immediately upon adjournment of the BOI hearing.

e. A BOI member who does not concur in any of the findings or recommendations must sign the report and submit a separate minority report that includes the finding(s) or recommendation(s) with which the member does not concur and the reason(s) for such non-concurrence.

f. The counsel for respondent (or respondent if no counsel was elected) will be provided a copy of the record of proceedings and is entitled to submit written comments in rebuttal to the report to SECNAV, via the SCA, within 10 calendar days of service. The convening authority may grant an extension of up to ten calendar days for submission of comments upon written request and for good cause. Failure to submit comments within the prescribed time will be considered a waiver by the respondent of the opportunity to submit comments. The respondent's comments will be submitted via the respondent's chain of command. However, the respondent may also submit a copy of his or her comments directly to SECNAV. A certificate of service must be included with the record of proceedings verifying submission to the respondent's counsel or the respondent.

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g. Per section 1182(c) of reference (a), when a BOI recommends that a respondent not be retained on active duty, the respondent may be required to take leave, to begin at any time following the respondent's receipt of the BOI report and the expiration of any period allowed for the respondent's submission of comments in rebuttal to that report. The leave may be continued until the date on which SECNAV action on the officer's case is completed or may be terminated at any earlier time.

15. Action on the Record of Proceedings of the BOI. The record of proceedings must be submitted via the convening authority to the SCA for termination of processing or review and endorsement before forwarding to SECNAV for final determination. This submission must include any minority report and the respondent's comments in rebuttal or statement, if any. The record of proceedings of a BOI convened solely to recommend a retirement-eligible officer's retirement grade and, if authorized per paragraph 4c of enclosure (7), characterization of service must be forwarded directly to the SCA for a forwarding endorsement to SECNAV, who will make the final determination of the grade and, if authorized, characterization of service of the officer. However, the characterization of service for a retirement-eligible officer, if authorized, will be no less favorable than that recommended by the BOI. If a retirement-eligible officer who has not submitted a voluntary retirement request has failed to show cause for retention, the BOI must make a recommendation concerning retirement grade and, if authorized, characterization as set forth in subparagraph 13b.

16. Actions Concerning BOI Defects. At any time after receipt and review of a case by the SCA but before SECNAV's final determination, these actions may be taken:

a. If the Board has failed to make findings or recommendations required by applicable regulations, the case may be returned to the same Board for compliance with those regulations.

b. If there is an apparent procedural error or omission in the record of proceedings that may be corrected without reconsideration of the findings and recommendations of the Board, the case may be returned to the same Board for corrective action.

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c. If the Board committed an error (other than those addressed in paragraphs 16a and 16b above) that substantially prejudiced a substantial right of the respondent, the case may be returned for a rehearing by a new Board after the respondent is notified again in accordance with this enclosure. No person who previously considered the respondent may be appointed to serve as a member on the new Board. The new Board may be furnished any evidence properly considered by the previous Board, but cannot be advised of that Board's findings and recommendations. Any new allegations forming a basis for separation under this instruction may also be presented to the new Board, upon proper notification. The recommendations of the new Board cannot be less favorable than those of the previous Board unless the new Board finds proven any additional allegations.

17. Action on the Report of the BOI

a. The report of a BOI that recommends separation must be delivered to SECNAV, with any desired recommendations of CHNAVPERS or DC (M&RA), for final determination.

b. If the BOI closes the case, then separation processing will be terminated.

c. If the BOI recommends separation or retirement, then SECNAV may:

(1) Direct retention;

(2) Direct separation of the respondent for the specified reasons, and a characterization of service not less favorable than that recommended by the BOI; or

(3) In the case of a retirement-eligible officer, direct retirement of the respondent in the highest grade satisfactorily held as determined by SECNAV and, if authorized per paragraph 4c of enclosure (7), make a characterization of service determination no less favorable than that recommended by the BOI.

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**OTHER SEPARATION REVIEW REQUIREMENTS**

1. Dual Processing. Officers who have been referred into the DES while undergoing involuntary administrative separation processing may be separated before completion of the DES process if warranted. In this event, CHNAVPERs and DC M&RA will notify ASN (M&RA) that the officer is processing both through the DES and via involuntary administrative separation.

2. Prohibition on Involuntary Separation due to Finding of Unfitness by Physical Evaluation Board (PEB). In accordance with reference (a), section 1214a, involuntary separation based on a determination that an officer is unsuitable for deployment or worldwide assignment because of a medical condition is not authorized if the PEB determined that the officer was fit for duty for the same medical condition. The only exception is if the separation is approved by the SECDEF.

a. If ASN (M&RA) has reason to believe the medical condition considered by the PEB renders the officer unsuitable for continued military service, then the Secretary may direct the PEB to reevaluate the officer.

b. If, based on reevaluation by a PEB, an officer is determined to be unfit to perform the duties of his or her office, grade, or rank, then the officer may be retired or separated for physical disability consistent with reference (a), chapter 61.

3. Pre-Separation Health Assessments

a. Pursuant to the authority contained in reference (a), section 1177, an officer who has been deployed overseas in support of a contingency operation, or sexually assaulted, during the previous 24 months, and who is diagnosed by a physician, clinical psychologist, psychiatrist, licensed clinical social worker, or psychiatric advanced practice registered nurse at a Military Treatment Facility as experiencing PTSD or Traumatic Brain Injury (TBI) or who otherwise reasonably alleges, based on the service of the officer while deployed, or based on such sexual assault, the influence of such a condition, must receive a medical examination to evaluate a diagnosis of PTSD or TBI. The purpose

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of the medical examination is to assess whether the effects of PTSD or TBI constitute matters in extenuation that relate to the basis for administrative separation. In a case involving PTSD, the medical examination must be performed by a clinical psychologist, psychiatrist, licensed clinical social worker, or psychiatric advanced practice registered nurse. In cases involving TBI, the medical examination may be performed by a physician, clinical psychologist, psychiatrist, or other health care professional, as appropriate. These psychologists, psychiatrists, social workers, advanced practice registered nurses and other health care professionals will be referred to as medical reviewers.

b. Reviews pursuant to the above criteria will consist of medical records reviews, misconduct documentation, if any, (which may consist of command investigations, NCIS investigations or other investigations), and, if necessary, conversations with primary care providers, medical providers, and/or other mental health professionals. The material used to form the basis of the medical reviewer's opinion must be articulated in a memo to ASN (M&RA). Best efforts will be made to ensure that the medical reviewer that correlates any misconduct and PTSD or TBI is also the medical provider who made the initial diagnosis. The medical reviewer must determine whether, and to what extent (if any), PTSD or TBI contributed to the misconduct.

c. Officers covered by the paragraph above cannot be administratively separated including an administrative separation in lieu of court-martial, until the results of the medical examination have been reviewed by ASN(M&RA).

#### 4. Sexual Assault Review Requirements

a. In accordance with reference (b), an officer may request General or Flag Officer review of the circumstances of and grounds for his or her involuntary separation if:

(1) The officer made an unrestricted report of sexual assault; and

(2) The officer is recommended for involuntary separation within one year of final disposition of his or her sexual assault case.

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b. An officer who meets the requirements of paragraphs 4a(1) and 4a(2) of this enclosure must submit a written request to the first General or Flag Officer in the officer's chain of command before approval of final separation action. An officer who submits a timely request will not be separated until the General or Flag Officer completes his or her review and concurs with the circumstances and grounds for the officer's involuntary separation. A request submitted by an eligible officer after approval of the final separation action will not be considered, but the officer may apply to the Naval Discharge Review Board (NDRB) or the Board for Correction of Naval Records (BCNR), as appropriate, as explained in enclosure (13).

5. Provision of Information During Separation Processing. Pursuant to section 1155 of reference (a), the Show Cause Authority will ensure that an officer subject to separation processing receives a current assessment of all benefits to which the officer may be entitled under laws administered by the SECDEF and the Secretary of VA. This assessment of benefits must be provided to Regular officers not later than 30 days before separation and to Reserve officers upon release from active duty. The SCA will also ensure that an officer subject to separation processing receives enclosure (13), which explains the purpose and authority of the NDRB and the BCNR. It must include an explanation that a discharge under Other Than Honorable conditions, resulting from a period of continuous unauthorized absence of 180 days or more, is a conditional bar to benefits administered by the Veterans Administration notwithstanding any action by the NDRB. These requirements are the responsibility of the Show Cause Authority and not a procedural entitlement. Noncompliance with this paragraph does not bar separation or affect the characterization of service determination.



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**FACT SHEET**

**PURPOSE AND AUTHORITY OF THE NAVAL DISCHARGE REVIEW BOARD AND  
THE BOARD FOR CORRECTION OF NAVAL RECORDS**

Upon discharge, there are two resources a member may utilize for review of discharge and naval records in case of errors or injustices:

1. NDRB: The NDRB purpose and authority are set forth under section 1553 of reference (a), and reference (ar). The NDRB was established under SECNAV Council of Review Boards to review a Service Member's discharge and determine whether it was granted in a proper manner. The NRDB also ensures the discharge was fair and equitable considering the regulations in effect at the time of the discharge. Requests must be submitted within 15 years of discharge. The NDRB does not have the authority to upgrade a discharge to become eligible for VA benefits. Additionally, a discharge under Other Than Honorable conditions resulting from a period of continuous unauthorized absence of 180 days or more is a conditional bar to benefits administered by the VA notwithstanding any action by the NDRB.
2. Board for Correction of Naval Records: The BCNR purpose and authority are set forth under section 1552 of reference (a), and reference (as). The BCNR was established by the SECNAV to consider applications to determine the existence of error or injustice in the naval records of current or former members of the Navy or Marine Corps and make recommendation to the Secretary or take corrective action on the Secretary's behalf. Applications must be filed within three years of the discovery of the alleged error or injustice. BCNR is not an investigative body and it is the applicant's responsibility to procure supporting evidence not contained in official naval records.

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**INTERNAL CONTROLS, RECORDS MANAGEMENT, AND REPORTS**

1. Internal Controls. In accordance with reference (ap), the establishment and use of internal controls and accounting procedures are mandated to ensure: effectiveness and efficiency of operations; reliability of financial reporting; and compliance with applicable laws and regulations. Additionally, as part of the annual Manager's Internal Control Program report, the Navy and Marine Corps will provide ASN M&RA with copies of the sections of their reports that are relevant to this program.

2. Records Management

a. Records created as a result of this instruction, regardless of format or media, must be maintained and dispositioned according to the records disposition schedules found on the Directives and Records Management Division (DRMD) portal page:

<https://portal.secnav.navy.mil/orgs/DUSNM/DONAA/DRM/SitePages/Home.aspx/>.

b. For questions concerning the management of records related to this instruction or the records disposition schedules, please contact your local Record Manager or the DRMD program office.

3. Reports. The reporting requirements contained in this instruction are exempt from information collection control, per reference (u), Part IV, paragraphs 7k, 7n and 7p.

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**VOLUME 15****“OFFICER MISCONDUCT AND SUBSTANDARD PERFORMANCE OF DUTY”****SUMMARY OF VOLUME 15 CHANGES**

Hyperlinks are denoted by *[bold, italic, blue and underlined font](#)*.

The original publication date of this Marine Corps Order (right header) will not change unless/until a full revision of the MCO has been conducted.

The date denoted by *blue font* (left header) will reflect the date this Volume was last updated.

All Volume changes denoted in *blue font* will reset to black font upon a full revision of this Volume.

<b>VOLUME VERSION</b>	<b>SUMMARY OF CHANGE</b>	<b>ORIGINATION DATE</b>	<b>DATE OF CHANGES</b>
ORIGINAL VOLUME	N/A	DD MMM YYYY	N/A

Submit recommended changes to this Volume, via the proper channels, to:

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**REFERENCES**

- (a) SECNAVINST 5430.7R CH-1
- (b) SECNAVINST 5430.27D
- (c) SECNAVINST 5430.25E
- (d) 10 U.S.C. §§ 806, 1044, 1044e, 1059, 1072, 1565b, 1588, and 5046
- (e) MCO 5430.2
- (f) JAGINST 5803.1E
- (g) Manual for Courts-Martial, (2016 ed.)
- (h) U.S. Navy Regulations, (1990)
- (i) MCO 5800.14
- (j) MCO 1001.62B
- (k) MCO 1200.18
- (l) JAGINST 5803.2B
- (m) SECNAVINST 1920.6C
- (n) Uniform Code of Military Justice, (2016)
- (o) MCO 1610.7A
- (p) MCO 1300.8
- (q) MCO 1000.6
- (r) JAGINST 5800.7F
- (s) SECNAVINST 5211.5E
- (t) 5 U.S.C. §§ 101, 552a, and 3111
- (u) JAGINST 5801.2
- (v) 37 U.S.C. §§ 601-604
- (w) 38 U.S.C. §§ 4301-4334
- (x) DoD Instruction 1205.12
- (y) 31 U.S.C. § 1342
- (z) DoD Instruction 1100.21
- (aa) 8 U.S.C. § 1400
- (bb) Executive Order 13269, (July 3, 2002)
- (cc) DoD Directive 2311.01E
- (dd) MCO 3300.4A
- (ee) DoD Directive 2310.01E
- (ff) DoD Directive 5146.13
- (gg) Executive Order 12333, (December 4, 1981)
- (hh) DoD Directive 5240.01
- (ii) DoD 5240.1-R
- (jj) DoD Instruction 3025.21
- (kk) DoD Instruction 5525.03
- (ll) SECNAVINST 5710.25B
- (mm) 1 U.S.C. § 112b
- (nn) 22 CFR Part 181
- (oo) DoD Directive 5530.3
- (pp) DoD 5500.07-R
- (qq) 18 U.S.C. § 202
- (rr) 5 C.F.R. § 2634



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(ss) SECNAV M-5214.1

**“REFERENCES”**

As changes are made within this MCO Volume, the References list will also update.

Annotation of each update/change/addition to the References list is required.

The original publication date this MCO (right header) will not change unless/until a full revision of the MCO has been conducted.

The date denoted by **blue font** (left header) will reflect the date these References were last updated as changes/revisions are made within this MCO.

Report Required: Officer Misconduct Report (Report Control Symbol EXEMPT) par. 010404.A

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**VOLUME 15****“OFFICER MISCONDUCT AND SUBSTANDARD PERFORMANCE OF DUTY”****SUMMARY OF SUBSTANTIVE CHANGES**

Hyperlinks are denoted by *bold, italic, blue and underlined font*.

The original publication date of this Marine Corps Order (MCO) Volume (right header) will not change unless/until a full revision of the MCO has been conducted.

All Volume changes denoted in *blue font* will reset to black font upon a full revision of this Volume.

<b>CHAPTER VERSION</b>	<b>PAGE PARAGRAPH</b>	<b>SUMMARY OF SUBSTANTIVE CHANGES</b>	<b>DATE OF CHANGE</b>

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**OFFICER MISCONDUCT AND SUBSTANDARD PERFORMANCE OF DUTY**

## 0101. PURPOSE

This Volume promulgates policies, standards, and procedures for the reporting and disposition of instances of alleged officer misconduct or substandard performance of duty, and administrative processing of officers for possible separation as a consequence of such alleged misconduct or substandard performance. This Volume also provides policies, standards, and procedures for related personnel actions, including personnel/administrative hold, and promotion delay, withhold, and removal.

## 0102. GENERAL

010201. References

A. The authoritative sources for the policies, standards, and procedures governing the administrative separation of officers in the Naval Service are Title 10, United States Code (U.S.C.); Department of Defense Instruction (DoD Instruction) 1332.30, Separation of Regular and Reserve Commissioned Officers; and Secretary of the Navy Instruction (SECNAVINST) 1920.6, Administrative Separation of Officers. Marine Corps Order (MCO) 1900.16, Marine Corps Separation and Retirement Manual (MARCORSEPMAN), supplements the policies, standards, and procedures set forth in SECNAVINST 1920.6 and this Volume. Any inconsistencies are resolved in favor of SECNAVINST 1920.6.

B. The authoritative sources for the policies, standards, and procedures governing officer promotion delay, withhold, and removal in the Naval Service are Title 10, U.S.C.; DoD Instruction 1320.04, Military Officer Actions Requiring Presidential, Secretary of Defense, or Under Secretary of Defense for Personnel and Readiness Approval or Senate Confirmation; DoD Instruction 1320.14, Commissioned Officer Promotion Program Procedures; SECNAVINST 1412.6, promotion of Officers to the Grade of Lieutenant (Junior Grade) and to the Grade of First Lieutenant in the Marine Corps; SECNAVINST 1412.9, Marine Corps Limited Duty Officer and Warrant Officer Programs, Promotions, and Continuation Procedures; SECNAVINST 1420.1, Promotion, Special Selection, Selective Early Retirement, and Selective Early Removal Boards for Commissioned Officers of the Navy and Marine Corps. MCO P1400.31C, Marine Corps Promotion Manual, Volume 1, Officer Promotions (MARCORPROMAN, VOL 1, OFFPROM), supplements the policies, standards, and procedures set forth in these sources and this Volume. Any inconsistencies shall be resolved in favor of these sources.

010202. Show Cause Authority

Paragraph 13d of SECNAVINST 1920.6 designates the Deputy Commandant for Manpower and Reserve Affairs (DC, M&RA) as the Show Cause Authority for the Marine Corps. Generals and lieutenant generals in command have been delegated Show Cause Authority and are hereinafter referred to as Alternate Show Cause Authorities.

010203. Expeditious Processing

A. SECNAVINST 1920.6 and this Volume establish time processing goals for officer misconduct and substandard performance cases. These time processing goals do not provide a basis of appeal or redress for officers.



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B. The Commandant of the Marine Corps (CMC) expects all matters involving officer discipline to be handled promptly. However, it is also important that commanders dispose of cases consistently, equitably, and in a manner that best promotes good order and discipline. The disposition decisions of commanders relative to officer misconduct cases are fundamentally important to good order and discipline and shall take into consideration those factors and guidance articulated in the discussion of Rule for Courts-Martial (R.C.M.) 306(b), Manual for Courts-Martial (MCM). Within the limits established by the MCM and SECNAVINST 1920.6\_, commanders retain the authority to determine the most appropriate forum for resolution of a particular case. What is desired is not a “rush to judgment” but, rather, deliberate speed in handling officer discipline cases in the most appropriate manner.

C. To ensure the timely, efficient, and accurate processing of officer misconduct and substandard performance cases, general court-martial convening authorities (GCMCAs) are responsible for the following tasks: (1) through the command SJA, use the Officer Disciplinary Notebook Management System (ODNMS) to report and track all officer misconduct and substandard performance cases; (2) through the command SJA, as reportable events occur, and at least monthly, update the status of all cases reported on the ODNMS; (3) regularly meet with the SJA to discuss all pending officer misconduct and substandard performance cases; (4) ensure that officer cases are not postponed because of operations, exercises, or training commitments (commands shall coordinate with CMC (JPL) before deploying an officer with an active misconduct or substandard performance case); and (5) ensure that expedited mail, courier service, or electronic submission is used to transmit officer misconduct and substandard performance cases during all phases of processing and to each level of command.

**0103. SPECIAL CONSIDERATIONS**

Certain types of cases involve additional processing requirements. Failure to adhere to such requirements may result in significant delay.

**010301. Substance-Related Offenses****A. General**

1. The policies and procedures in this section supplement the policies and procedures set forth in SECNAVINST 5300.28\_, Military Substance Abuse Prevention and Control, and MCO 5300.17, Marine Corps Substance Abuse Program. Commanders must ensure that the policies and procedures set forth in SECNAVINST 5300.28\_ and MCO 5300.17 are followed for all officers alleged to have committed a substance-related offense. Additionally, commanders must consult MCO 1610.7A, Performance Evaluation System (PES), for substance-abuse fitness reporting requirements.

2. Substance (alcohol and drug) abuse by members of the Armed Forces is incompatible with the maintenance of high standards of performance, military discipline, readiness, and reliable mission accomplishment.

3. In all substance-abuse incidents, the officer involved shall be assessed, counseled by the unit commander, disciplined (if warranted, as determined by the commander, in the commander’s sole discretion), and referred in a timely manner to the nearest substance-abuse counseling center (SACC)—or other Service equivalent—for screening.

4. Regardless of the type of discharge, all commanders will ensure that no officer requiring treatment is separated until the treatment process is completed. This requirement,



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however, does not include aftercare or treatment failures. (For example, a commander will not delay the discharge of a drug-dependent officer for medical or rehabilitation treatment for drug dependency after the officer completes the initial treatment program recommended by the SACC.) In all cases, upon completion of treatment, the treatment facility will advise the Marine of his or her Veterans Affairs (VA) substance-abuse treatment eligibility.

5. Retained officers will be ordered into a treatment program recommended by the SACC and will comply with aftercare program requirements.

**B. Alcohol-Related Incidents**

1. Definition. Pursuant to SECNAVINST 5300.28\_, an alcohol-related incident occurs when an officer commits an offense punishable under the UCMJ or by civilian authorities for which, in the judgment of the officer's commanding officer (CO), the consumption of alcohol was a contributing factor. Although the determination that an incident is alcohol-related is generally a matter within a CO's discretion, enclosure (3) to SECNAVINST 5300.28\_ defines what constitutes a substantiated incident of impaired driving and requires that such incidents be properly documented in officer fitness reports, appropriate administrative record entries, and other reports required by instruction.

2. Formal Counseling. In accordance with MCO 5300.17, an officer involved in an alcohol-related incident will receive formal written counseling per paragraph 3005 of MCO P1070.12K (IRAM). The officer's blood alcohol concentration, if known, will be included in the counseling entry. Because such counseling will be included in the officer's Official Military Personnel File (OMPF) in accordance with MCO P1070.12K, Individual Records Administration Manual (IRAM), the officer must be given the opportunity to make a statement in rebuttal. Formal counseling is in addition to any directed comments required by MCO 1610.7.

3. Counseling and Treatment Referral. Timely alcohol screening is vital to determine appropriate administrative actions and is required for later promotion determinations. Accordingly, in any case involving an alcohol-related incident, commanders shall ensure the immediate completion of alcohol screening by appropriate military or civilian medical agencies in accordance with paragraph 010301.C.3, below, to determine the existence of alcohol dependence or abuse.

4. Subsequent Alcohol-Related Incident. An officer who incurs a second driving-under-the-influence (DUI) or driving-while-impaired (DWI) conviction during their naval career (whether or not the member has entered a prescribed treatment program) or a subsequent alcohol-related incident after entering a prescribed treatment program (successful completion notwithstanding) precipitated by a prior alcohol-related incident shall be disciplined as appropriate and processed for administrative separation.

5. Subsequent Abuse of Alcohol. An officer who again abuses alcohol, or whose standards of conduct and performance decline following the successful completion of a treatment or aftercare program, shall be processed for separation if determined by a physician or clinical psychologist credentialed and privileged through the Naval Hospital not to be amenable to or qualified for additional treatment.

**C. Drug-Related Incidents**



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1. Definition. Pursuant to SECNAVINST 5300.28\_, a drug-related incident is any incident where the use of a controlled substance or illegal drug, or the misuse of a legal drug or intoxicating substance (other than alcohol), is a contributing factor. Mere possession or trafficking in a controlled substance, illegal drug, legal drug intended for improper use, or drug paraphernalia may be classified as a drug-related incident. Additionally, testing positive for a controlled substance, illegal drug, or a legal drug not prescribed, may be considered a drug-related incident.

2. Mandatory Processing. Drug-related incidents require mandatory processing for separation per SECNAVINST 5300.28\_ and the MARCORSEPMAN.

3. Counseling and Treatment Referral. In accordance with MCO 5300.17, commanders shall refer to the nearest SACC—or other Service equivalent—officers who test positive for or who admit to using illegal drugs for screening in a timely manner.

D. In accordance with MCO 5300.17, the Marine Corps is required to identify, counsel, and treat Marines identified as having a substance-use disorder. Accordingly, all substance-related incidents must be properly documented in accordance with paragraph 010301.E, below.

E. Any report, recommendation for administrative separation, or endorsement on a resignation/retirement request in a case involving a substance-related incident that is submitted to CMC (JPL) pursuant to paragraphs 010603., 011003, or 011006 of this Volume must include the following information to document that the officer was screened in accordance with MCO 5300.17:

1. Who conducted the screening (counselor, credentialed provider, etc.) and the name of the appropriate military or civilian medical agency.

2. What diagnosis/finding was made by the qualified counselor/credentialed provider, and what treatment was recommended or mandated, if any.

3. When the screening was completed.

4. When the officer completed the recommended or mandated initial treatment, or refused or failed treatment.

5. Proof of completion of any recommended or mandated initial treatment.

F. Failure to properly document the substance-related incident, to complete the SACC screening, or to include proof of completion or refusal or failure of any recommended or mandated initial treatment, will result in CMC (JPL) being unable to process the case.

G. Promotion Implications of Alcohol-Related Incidents

1. Any officer involved in an alcohol-related incident risks removal from a promotion list by the Secretary of the Navy (SECNAV) in the absence of evidence that qualified personnel screened the officer and the officer completed the recommended treatment in accordance with the procedures set forth in this Volume.

2. Pursuant to SECNAVINST 5300.40, the Department of the Navy has zero tolerance for driving under the influence. All alcohol-related vehicle incidents will be properly



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reviewed before an officer's promotion to determine whether that officer is suitable for advancement to the next higher pay grade. Accordingly, all alcohol-screening and treatment documentation must be in the officer's OMPF before the convening of the promotion selection board, or the officer's promotion may be withheld.

H. Treatment Failure

Any officer who refuses, fails to participate in, or does not successfully complete a prescribed alcohol-abuse or dependency treatment/aftercare program and is deemed a treatment failure by a certified Substance Abuse Counselor, physician, or psychologist credentialed and privileged through the Naval Hospital shall be processed for administrative separation.

010302. Medical Qualification for Separation and Medical Evaluations

A. Paragraph 1011 of the MARCORSEPMAN sets forth the requirements for a medical evaluation before separation and retirement.

B. Medical Evaluation Requirements

With certain exceptions, a Marine officer being separated from active duty must receive a separation health physical evaluation (SHPE).

1. These medical evaluations are standard separation evaluations per Article 15 of NAVMED P-117, Manual of the Medical Department (MANMED). At a minimum, a SHPE will include: (1) the officer's completion of DD Form 2807-1 (Report of Medical History), (2) an interview and completion of DD Form 2808 by an appropriately privileged medical provider, and (3) the medical provider's completion and signature on these and any other required documents.

2. Medical providers, COs and GCMCAs in the chain of command, the Alternate Show Cause Authority, or the Show Cause Authority may direct further medical evaluation as warranted by the circumstances of each case.

C. Exceptions to Medical Evaluation Requirements

While every reasonable attempt will be made to provide a separating Marine officer with a SHPE, there will be rare situations when that will be difficult or impossible to provide. Such situations include, but are not limited to:

1. Officers in the hands of civilian authorities (IHCA). Officers IHCA may be evaluated and reported by any of the following: a medical officer of the Armed Forces or other Federal Government agency; credentialed civilian contract physicians; penal institution physician; or, in the absence of the foregoing, a certificate signed by the official in charge of the penitentiary reflecting an opinion about the present state of health of the Marine to be discharged.

2. Officers in a status otherwise beyond the control of the Marine Corps. When a Marine officer is otherwise beyond the control of the Marine Corps (e.g., in the hands of foreign authorities), the command recommending separation will contact the holding authority and request an evaluation be conducted.



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3. Marine officers who fail to respond to notification. A medical evaluation is not required for the purposes of this section for Marine officers who are undergoing administrative separation proceedings and do not respond to notification or other requirements for administrative separation. Medical evaluations must be directed in writing and hand-delivered or, in the case of a Reserve officer or other officer not available for personal service, sent to the officer via certified mail. If, after a reasonable amount of time—approximately 45 calendar days—from the date of the request for the medical evaluation, there is no response, or a negative answer is received, the command recommending separation will document the command's efforts to obtain a medical evaluation in the requisite report/endorsement and include an explanation as to why it was the evaluation was not possible.

4. Reserve Marine officers not on active duty with no history of combat experience or deployment. A medical evaluation is not required for the purposes of this section for Reserve Marine officers not on active duty with no history of combat service or deployment; however, the first GCMCA in the chain of command is required to certify that the officer had no combat service or deployment and was not diagnosed with PTSD or TBI.

D. Post-Traumatic Stress Disorder (PTSD)/Traumatic Brain Injury (TBI) Evaluation

1. When Required. In addition to the normal SHPE, an officer shall receive a medical evaluation to assess whether the effects of PTSD or TBI constitute matters in extenuation that relate to the basis for administrative separation if the officer (a) has been previously diagnosed with PTSD or TBI by an appropriately privileged medical provider as described below, or reasonably alleges that PTSD or TBI played a role in the officer's misconduct or substandard performance; (b) was deployed overseas to a contingency operation or was sexually assaulted during the 24 months before the initiation of separation processing, or (c) is being recommended for separation with an Other Than Honorable characterization of service. (The officer's CO, after considering the advice of an appropriately privileged medical provider, shall determine if PTSD or TBI is reasonably alleged and should be further evaluated by a more appropriate medical provider.)

2. Evaluation Requirements. The medical provider who conducts a PTSD or TBI evaluation must specifically comment on the presence or absence of these conditions and, if present, the extent to which they affected the officer's judgment and may have been a contributing factor in the basis for separation. In cases involving PTSD, the evaluations must be performed by a clinical psychologist, psychiatrist, licensed clinical social worker, or psychiatric advanced practice registered nurse as experiencing PTSD. In cases involving TBI, the evaluations must be performed by a neurologist, clinical psychologist, psychiatrist, or other healthcare professional with expertise in diagnosing or treating brain injuries.

3. An officer's separation package will not be processed by CMC (JPL) without the required medical evaluation and appropriate report/endorsement.

4. GCMCA Report/Endorsement Requirements. For those cases in which an appropriately privileged medical provider determined that PTSD or TBI may have been a contributing factor to one or more of the bases for separation, the GCMCA's report/endorsement shall, in light of that identified possible PTSD or TBI contributing factor, explain the reasons for the recommended separation and characterization of service. In contrast, in cases in which the criteria set forth in paragraph 010302.D.1, above, are inapplicable, the GCMCA's report/endorsement must note specifically the reason(s) that a PTSD/TBI evaluation is not required.



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E. If the medical evaluation results in a diagnosis of PTSD or TBI and the Separation Authority determines it is service-related, sufficiently mitigating, and possibly a disability, the Separation Authority should consider processing for separation for physical disability under chapter 8 of the MARCORSEPMAN.

F. A PTSD or TBI evaluation is not required if the officer is being separated pursuant to a dismissal adjudged by a general court-martial. However, a PTSD or TBI evaluation and compliance with this section is required for administrative separation in lieu of court-martial.

G. Officers separated under these provisions shall be directed to consult with a representative from the Department of Veteran Affairs regarding veteran benefits and services prior to separation with that counseling dated and signed in DD Form 2648, pre-separation counseling checklist.

H. This section does not provide a basis of appeal or redress for officers.

010303. Security Clearances

Any officer misconduct or substandard performance reportable under this regulation should be analyzed under SECNAVINST 5510.30, Department of the Navy Personnel Security Program Instruction, for possible security clearance issues and any related reporting requirements, to include coordination with unit security managers. SECNAVINST 1920.6\_ permits separation processing of an officer who is disqualified for a security clearance. Typically, however, the revocation of the security clearance itself is not the primary basis for separation, but rather it is the substandard performance of duty or misconduct that led to the loss of status that serves as the basis. SECNAV M-5510.30, the Department of the Navy Personnel Security Program Manual, provides that all officers must submit to and must maintain secret eligibility and that those officers determined to be not eligible will be subject to discharge. Officers shall not be separated for failure to meet the requirements of that Manual if separation can be effected under administrative (non-security) military regulations. Moreover, no separation under Other Than Honorable conditions will be taken with respect to an officer in any case where the officer has held access to SCI within 18 months prior to the proposed action, unless approval is first received from the program manager (i.e., the DNI for SCI access).

010304. Domestic Abuse

A. Lautenberg Amendment

The applicability of the “Lautenberg Amendment” should be considered and addressed in any instance of a domestic abuse conviction. The Lautenberg Amendment makes it a felony for anyone convicted of a crime of domestic abuse to ship, transport, possess, or receive firearms or ammunition. A “qualifying conviction” includes a conviction for a “crime of domestic violence” tried by a general or special court-martial, or in a civilian court where the defendant was represented by counsel. Commanders are directed to ensure draw case code “FF” is reported in the Marine Corps Total Force System (MCTFS) for all such convictions. See MARADMIN 186/03, Policy for Implementation of the Lautenberg Amendment, for additional guidance.

B. Marine Corps Family Advocacy Program

Child abuse and domestic abuse in Marine Corps families detracts from military performance, negatively impacts the efficient functioning and morale of military units, and diminishes the



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reputation and prestige of the Marine Corps. Commanders must ensure that the policies and procedures set forth in MCO 1754.11, Marine Corps Family Advocacy and General Counseling Program, are followed upon the receipt of allegations of child or domestic abuse. Failure to follow the requirements of MCO 1754.11 may result in delayed processing of a related officer misconduct case.

C. Domestic Abuse Repeat Offenders

1. Domestic abuse is (1) domestic violence or (2) a pattern of behavior resulting in emotional/psychological abuse, economic control, and/or interference with personal liberty when such violence or abuse is directed toward a person who is: (a) a current or former spouse; (b) a person with whom the abuser shares a child in common; or (c) a current or former intimate partner with whom the abuser shares or has shared a common domicile.

2. Repetition of a domestic abuse offense for which rehabilitation/behavior education and counseling services had previously been afforded, or failure to meet the conditions of court orders or terms of probation, should normally result in processing for administrative separation. Additionally, military members who have admitted guilt or have been found guilty at NJP, court-martial, or a civilian criminal trial of child or domestic abuse and thereafter refuse rehabilitation, refuse to cooperate with or complete behavior modification programs, or who are not able to cease their abusive behavior during or after an education or counseling program, should be processed for separation.

3. COs who convene administrative discharge proceedings in child sexual abuse cases shall, in all cases, assign a judge advocate as the recorder unless there is a compelling reason not to do so. In cases of domestic abuse and other types of child abuse, COs shall, where available, assign judge advocates as recorders. Nothing in this paragraph, however, limits the right of the CO to take appropriate measures under the UCMJ and/or to initiate separation proceedings for a first offense involving domestic abuse.

4. When initiating an administrative separation as a result of domestic abuse involvement, the domestic abuse must be included as the reason for separation so the spouse and eligible children may initiate the application process for financial compensation and retention of ID card benefits and privileges through the Transitional Compensation for Abused Family Members program.

010305. Marine Officers Who Fail To Respond To Notification.

Notifications and other requirements (e.g., acknowledgments, medical evaluations, substance-abuse screenings) for administrative separation may be difficult or impossible to obtain from Marine officers who do not respond. The relevant requirement must be directed in writing and hand-delivered or, in the case of a Reserve officer or other officer not available for personal service, sent to the officer via certified mail. If, after a reasonable amount of time—approximately 45 calendar days—from the date of the request, there is no response or a negative answer is received, the command recommending separation will document the command's efforts to obtain the requirement in the requisite report/endorsement and include an explanation as to why it was impossible to obtain.

0104. REPORTING OFFICER MISCONDUCT IN THE OFFICER DISCIPLINARY NOTEBOOK (ODN)

010401. General



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The CMC's ODN is a database used to track officer misconduct and substandard performance in the Marine Corps. All information submitted to CMC (JPL) pursuant to the following paragraphs will be placed in the CMC's ODN and will only be provided to those with a need to know. ODN entries are not included in an officer's OMPF.

010402. Responsibility to Report Officer Misconduct to CMC (JPL)

Each GCMCA—and each CO/officer-in-charge (OIC) of a Marine unit where the officer is not under the command of a Marine GCMCA—shall report officer misconduct to CMC (JPL) in a timely manner. For officers assigned to joint commands that lack a Marine GCMCA, CO, or OIC, the Marine GCMCA geographically closest to the officer's joint command shall make the required reports.

A. Misconduct Committed by Marine Officers

Upon receipt of credible information described in paragraph 010403, below, regarding alleged, suspected, or reported misconduct committed by a Marine officer, the cognizant SJA, on behalf of the GCMCA/CO/OIC, shall report the alleged misconduct to CMC (JPL).

B. Misconduct Committed by Officers of Other Services

Upon receipt of credible information described in paragraph 010403, below, regarding alleged, suspected, or reported misconduct committed by a non-Marine officer under the administrative control of a Marine command, the cognizant SJA, on behalf of the GCMCA/CO/OIC, shall report the alleged misconduct to CMC (JPL). In the case of officers of the Navy, the SJA must also coordinate with Navy Personnel Command (PERS 834).

010403. Circumstances that Trigger an Initial Report

A. Officer misconduct must be reported to CMC (JPL) if a Marine officer (or an officer of any other branch of military service serving under the administrative control of a Marine command) is:

1. Alleged, suspected, or reported to have committed misconduct for which NJP, court-martial, civilian prosecution, or a recommendation to CMC (JPL) for administrative discharge proceedings is possible under existing statutes and regulations. While minor traffic offenses need not be reported, all DUI or DWI allegations must be reported. [Note: This is intended to be a low threshold.]

2. Incarcerated in a civilian, foreign, or military detention facility. An incident of this nature must be reported to CMC (JPL) within 24 hours of the command becoming aware of the incarceration.

B. When doubt exists as to whether an initial report is required, contact CMC (JPL) for guidance.

010404. When an Initial Report Must be Made

A. Upon receipt of credible information described in paragraph 010403, above, the cognizant SJA, following consultation with the GCMCA, must immediately report the allegation to CMC (JPL) unless otherwise coordinated with CMC (JPL). However, consultation with the GCMCA shall not



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unreasonably delay the notification to CMC (JPL). This report is exempt from reports control according to reference (ss), Part IV, paragraph 7n.

B. In determining the timeliness of the report to CMC (JPL), consideration should be given to the gravity of the alleged, suspected, or reported misconduct, the anticipated media interest, and any pending personnel actions involving the officer (e.g., promotion, PCS move, retirement, and command slating).

010405. How Misconduct is Reported

All officer misconduct is reported to CMC (JPL) using the Officer Disciplinary Notebook Management System (ODNMS). The ODNMS is an internet-based database for reporting and tracking open officer misconduct and substandard performance cases. An ODNMS user's guide is available on JAD's public website (<http://www.hqmc.marines.mil/sja/JADForms.aspx>).

A. Initial Reporting Requirements

Upon receipt of credible information described above, the cognizant SJA will (1) enter the initial report in the ODNMS, and (2) inform the cognizant Marine Force Commander and Alternate Show Cause Authority. This notification shall not delay the immediate notification to CMC (JPL).

1. The initial report shall contain all of the information specified in the ODNMS user's guide (e.g., case status, type of offense, offense, additional offense, companion case, officer's personal data).

2. The initial report shall also contain a detailed statement of the allegation, to include the time, date, and location of the alleged offense.

3. If the incident included involvement by law enforcement, the initial report must include the name of the city/county/state/federal law enforcement agency.

4. In the event of a DUI/DWI arrest, the detailed statement must include the officer's BAC level, if available, and whether or not there were injuries to any person or damage to property.

5. Although all of the facts may not be immediately available to the command, every effort must be made to provide a robust, detailed account of the allegation.

6. Initial allegations may change following more detailed investigation. Any additional facts or allegations, or facts or allegations that have been adequately refuted, must be reflected in a separate paragraph, rather than altering the initial account.

B. Ongoing Reporting Requirements

To ensure that the CMC is apprised of the most current status of open officer misconduct cases, the cognizant SJA must:

1. Immediately enter updates reflecting significant events in the chronology section of the ODNMS for each case pending their review. A significant event is one that may affect the



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disposition of a case or increase the public attention drawn to it. Significant events include, but are not limited to: the signing of recommendations, reports, or endorsements; new allegations of misconduct; pre-trial confinement; the prefferal, referral, withdrawal, or dismissal of charges; acceptance of NJP; acceptance of a pre-trial agreement; the delay or conclusion of a court-martial, BOI, or civilian court proceeding; and a finding that misconduct did not occur.

2. Update and certify each case from their command pending their review in the ODNMS by the 20th of each month. (This requirement is in addition to the real-time update discussed in the preceding paragraph.) Certification ensures that all cases are reviewed every month, even in the absence of developments in a case. When an SJA “certifies” an entry, he or she is endorsing the current case status on behalf of his or her commander and approving the release of the updated information to CMC.

3. Monitor each of their cases in the ODNMS until the case is closed. Although SJAs are only responsible for entering immediate and monthly updates into the ODNMS when a case is pending action at their commander’s level of review, they must monitor all cases under their cognizance to facilitate the timely, efficient, and accurate processing of officer misconduct cases through the chain of command.

**0105. DISPOSITION OF ALLEGATIONS OF MISCONDUCT****010501. General**

Ultimately, as to each allegation of misconduct reported, the GCMCA must determine that the officer either did or did not commit the misconduct alleged. When the GCMCA determines that the officer did commit misconduct, the GCMCA must take appropriate action to dispose of the case under R.C.M. 306. If not an Alternate Show Cause Authority (ASCA), the GCMCA must also forward the case to an ASCA with a show cause recommendation. If the GCMCA determines that the officer did not commit misconduct, the GCMCA must notify CMC (JPL) of that conclusion and forward a Report of No Misconduct directly to CMC (JPL) per paragraph 010602, below. This section details options available to the GCMCA. In each case, a Report must be submitted to CMC (JPL) in accordance with paragraph 0106, below.

**010502. Disposition Options**

If the GCMCA determines that the officer did commit misconduct, the GCMCA must choose one of the following options per R.C.M. 306:

**A. Non-Punitive or Administrative Measures**

The GCMCA may decline to take disciplinary action against the officer. Instead, the GCMCA may document the incident in a Report of Misconduct. The GCMCA may also counsel (formally or informally) the officer or issue the officer a non-punitive letter of caution (NPLOC). [Note: In some instances, the GCMCA may determine that a Report of Misconduct with a recommendation that the officer be administratively separated or required to show cause is, by itself, the appropriate administrative disposition action under R.C.M. 306.]

1. Formal Administrative Counseling. Pursuant to paragraph 3005 of the IRAM, officers may receive a Page 11 entry for misconduct or substandard performance of duty. The



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entry shall note that the counseling is pursuant to paragraph 3005 of the IRAM, not paragraph 6105 of the MARCORSEPMAN, which applies only to enlisted Marines. (MARCORSEPMAN 6105 counseling entries will not be used in officer cases.) The officer will acknowledge the adverse counseling and be provided with an opportunity to submit a rebuttal. The entry shall be included as an enclosure to a Report of Misconduct. CMC (JPL) will forward the adverse matters for inclusion in the officer's OMPF.

2. Informal Counseling or Non-Punitive Letter of Caution. Although an informal counseling or NPLOC is not entered in an officer's OMPF, it shall be documented in a Report of Misconduct with the following language: "SNO's misconduct was addressed via administrative measures."

**B. Nonjudicial Punishment (NJP)**

1. The Unit Punishment Book (UPB) will not be used in officer NJP cases. Instead, the officer should be advised of those matters using the documentation provided in Figures 15-1 or 15-2, as appropriate.

2. The procedures for imposing NJP upon an officer are contained in the pertinent sections of chapter 1 of the Manual of the Judge Advocate General, JAGINST 5800.7F (JAGMAN) and in paragraph 4, Part V, MCM.

3. If NJP is imposed, the officer must be advised of the right to appeal as specified in JAGMAN section 0116 (must use Figure 15-3).

4. If a punitive letter of reprimand is awarded, the officer must be advised of the right to appeal and to submit a statement in rebuttal as specified in JAGMAN section 0114 (must use Figure 15-4).

5. Because UPBs are not used in officer NJPs, if forfeitures are awarded at an officer NJP, a copy of the Report of NJP (see paragraph 010605, below) must be provided to the local administrative center to serve as the source document to run the appropriate Unit Diary entry for the forfeitures (must use Figure 15-5).

6. Pursuant to JAGMAN section 0124, NJP may be imposed at any time before adjudication by a civilian court. After civilian adjudication, NJP may be imposed for an offense only in certain limited circumstances after receiving the permission of the GCMCA, and grants of such permission shall be reported by the GCMCA via letter to CMC (JCA), describing the offense alleged, the action taken by civil authorities, and the circumstances bringing the case within one or more of the exceptions to the general policy. However, officers who have been tried by courts that derive their authority from the United States Federal Government, such as U.S. District Courts, shall not be subjected to NJP for the same act or acts.

7. An appeal shall be submitted within five working days of imposition of punishment, excluding weekends and holidays; thereafter, the right to appeal shall be waived in the absence of good cause shown. The fact that the officer signed a statement indicating no intent to appeal immediately after imposition of NJP does not prevent the officer from later submitting an appeal within the five-day period (see paragraph 7, Part V, MCM, and JAGMAN sections 0110 and 0116).



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8. No report of officer NJP shall be made to CMC (JPL) until the appropriate authority has taken final action upon an appeal of NJP or the five-day period has elapsed after the imposition of NJP without an appeal having been submitted.

C. Court-Martial of Officers

1. CMC (JPL) must be notified via the ODNMS when charges are preferred, referred, withdrawn, or dismissed against an officer, and when a court-martial is delayed or concluded.

2. Pursuant to JAGMAN section 0124, charges may be referred to a court-martial at any time before adjudication by a civilian court. After a civilian adjudication, charges may be referred to a court-martial only in certain limited circumstances after receiving the permission of the GCMCA, and grants of such permission shall be reported by the GCMCA via letter to CMC (JCA), describing the offense alleged, the action taken by civil authorities, and the circumstances bringing the case within one or more of the exceptions to the general policy. However, officers who have been tried by courts that derive their authority from the United States Federal Government, such as U.S. District Courts, shall not be tried by court-martial for the same act or acts.

3. If the officer was acquitted, or the findings and sentence were disapproved or set aside, the GCMCA must forward a report to the Show Cause Authority in accordance with paragraph 0106, below. The GCMCA must determine that the officer did not commit the alleged misconduct and forward a Report of No Misconduct in accordance with paragraph 010602, below, or determine that the officer committed the alleged misconduct and forward a Report of Misconduct in accordance with paragraph 010603, below. This provision recognizes that the burden of proof at a court-martial (beyond a reasonable doubt) is substantially higher than the burden of proof at a BOI (preponderance of the evidence)(see SECNAVINST 1920.6 ).

4. If the officer was convicted and no dismissal was adjudged, or a dismissal was disapproved in the convening authority's action, a Report of Court-Martial Conviction will be forwarded in accordance with paragraph 010607, below.

5. If the officer was convicted and a dismissal was adjudged and approved in the convening authority's action, the convening authority's action will be forwarded to CMC (JPL) and the case will be closed in the ODNMS.

D. Commanders shall not discharge a dismissed officer outside CONUS, except under special circumstances and upon SECNAV's approval.

0106. REPORTING DISPOSITIONS OF MISCONDUCT

010601. General

After the disposition is complete, the GCMCA must report the disposition in accordance with this paragraph and make a recommendation as to whether the officer should be required to show cause for retention at a BOI or, for probationary officers, administratively separated via notification procedures. All allegations of misconduct must be formally closed with a report of disposition.

010602. Reporting Unsubstantiated Allegations of Misconduct



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In all cases where the GCMCA determines that misconduct did not occur, the GCMCA will generate a Report of No Misconduct (must use Figure 15-6). The Report of No Misconduct will mirror the Report of Misconduct; however, instead of disposition action, the report will detail the investigative efforts by the command and include an explanation from the command detailing how it reached the conclusion that no misconduct occurred. Once signed, the GCMCA will forward the Report directly to CMC (JPL). The GCMCA must provide a courtesy copy of the Report to each intermediate endorser in the chain of command and the Alternate Show Cause Authority. Upon receipt of the Report and review for compliance with this order, CMC (JPL) will normally close the case in the ODNMS. This Report will not be placed in the officer's OMPF.

010603. Reporting Dispositions of Substantiated Misconduct

A report must be generated in all cases where the GCMCA determines that the officer committed misconduct. This report serves two purposes. First, it provides the Alternate Show Cause Authority and the Show Cause Authority with sufficient information to make a decision on whether to process the officer for administrative separation. Second, it provides a complete record of the misconduct and its disposition for inclusion in the officer's OMPF.

A. Routing

The report is forwarded to the Show Cause Authority via the chain of command and the Alternate Show Cause Authority in the officer's chain of command (or the Alternate Show Cause Authority geographically located nearest to the command if there is no Alternate Show Cause Authority in the chain of command) in order to make a show cause determination. Only the SECNAV; ASN, M&RA, or DC, M&RA, may close the case if an officer is determined to have committed misconduct. If an officer either appropriately requests or is recommended for separation (and has been notified of the recommendation), the report must be forwarded to the ASN, M&RA, via the DC, M&RA, for final disposition. The ASN, M&RA, remains the sole separation authority for officer separations resulting from adverse administrative processing. Nothing in this Volume should be interpreted to preclude an Alternate Show Cause Authority from directing an officer to show cause.

B. Factual Basis

All reports shall include a brief factual statement of the misconduct/offense(s) and the punishment imposed (if NJP conducted) or method of disposition of the misconduct.

C. Matters in Aggravation, Extenuation, and Mitigation

All reports shall include a concise explanation of the circumstances surrounding the offense(s), including significant matters in aggravation, extenuation, and mitigation.

D. Recommendation

All reports shall include a recommendation as to whether the officer should show cause or be administratively separated via notification procedures (for probationary officers) under SECNAVINST 1920.6\_, including the basis for such recommendation.

E. Investigation



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All reports must include a copy of the investigation (unless classified) upon which the substantiation of the misconduct was based, including, but not limited to, preliminary inquiries, command investigations, Inspector General investigations, CID investigations, NCIS investigations, PMO incident reports, civilian traffic citations, and civilian police reports.

F. Evidence

All reports must include a legible copy of all of the evidence considered, or photographic representations of such evidence, or descriptions through affidavit of any evidence that is not easily includable.

G. Substance-Abuse Counseling Center Screen

If the misconduct involved a substance-related incident, the report must include the substance-abuse screening results and proof of completion of any recommended or mandated initial treatment. The report will not be forwarded to the DC M&RA until this information/documentation is provided to CMC (JPL) (see paragraph 010301.E, above).

H. Medical Evaluation

If separation is recommended, the report must include documentation showing that the officer is qualified for separation as set forth in paragraph 010302, above. The report must also include documentation of the completion of a PTSD/TBI screen, if required, with comments on the presence or absence of such conditions and, if present, the extent to which they affected the officer's judgment and may have been a contributing factor in the basis for separation. If PTSD or TBI is identified as a possible contributing factor, the GCMCA's report/endorsement shall explain the reasons for the recommended separation and characterization of service.

I. Advanced Education Assistance

1. All reports must contain an acknowledgment from the officer that, if separated before fulfilling a service obligation resulting from the receipt of advanced education assistance, the officer may be required to reimburse the Government for the unserved portion of the service obligation on a pro-rata basis (must use Figure 15-7).

2. If the officer received advanced education assistance, all reports must set forth the amount and type of advanced education assistance received.

3. If the officer received advanced education assistance, all reports and endorsements must include a recommendation as to whether the officer should be required to reimburse the Government, on a pro-rata basis, for the unserved portion of the officer's service obligation (see 10 U.S.C. § 2005 for guidance).

J. Official Military Personnel File Acknowledgement

All reports must contain the officer's acknowledgement that adverse material concerning the misconduct will be included in the officer's OMPF. After the report is signed, it shall be provided to the officer, and the officer shall be given 10 calendar days in which to prepare a rebuttal. The officer may



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waive the right to submit a rebuttal (must use Figure 15-8).

K. Rebuttal Matters

If the officer submits a rebuttal, the GCMCA who prepared the report must prepare an endorsement to the report and include the matters as an enclosure to the endorsement. If the officer's submission alleges legal errors, the GCMCA, in the endorsement, must address each allegation of legal error.

010604. Report of Misconduct

A Report of Misconduct is required in all cases of misconduct described in paragraph 010403, above, in which a Report of NJP, Report of Court-Martial Conviction, or Report of Civilian Conviction is not applicable, where the first GCMCA in the chain of command determines that the officer committed the misconduct. A sample Report of Misconduct is contained in Figure 15-9. In all cases in which the command addresses the officer's misconduct administratively, a copy of the officer's formal counseling or adverse fitness report, if any, will be included as an enclosure to the Report of Misconduct. Per paragraph 010502.A.2, above, however, if the officer receives an informal counseling or a NPLOC, the Report shall state that "SNO's misconduct was addressed via administrative measures" (see JAGMAN section 0105).

010605. Report of Nonjudicial Punishment

A Report of NJP is required in all cases in which NJP is imposed. A sample Report of NJP is contained in Figure 15-5. In addition to the general requirements set forth above, the Report of NJP will include:

- A. All correspondence incident to the imposition of NJP—i.e., the notification of NJP, the officer's acknowledgement of rights and acceptance of NJP, any matters submitted by the officer, etc.
- B. All matters relating to an appeal.
- C. A verbatim transcript of the NJP hearing.

010606. Report of Civilian Conviction

A Report of Civilian Conviction is required in all cases in which the officer is convicted in civilian court. A sample Report of Civilian Conviction is contained in Figure 15-10. A Report of Civilian Conviction is also required even in cases where the officer pleads to a lesser offense, receives a deferred prosecution, receives a probation in judgment, participates in a court-sanctioned diversionary program that permits the subsequent dismissal of the charge, or similar cases. (Depending on the circumstances of the case, however, the Report may be more appropriately characterized as a Report of Misconduct vice a Report of Civilian Conviction.) In addition to the general requirements set forth above, the Report of Civilian Conviction will include:

- A. Copies of the civilian court documents reflecting the findings of the court with respect to all charges and the sentence imposed.



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- B. Documents reflecting the satisfaction of any sentence imposed.

010607. Report of Court-Martial Conviction

A Report of Court-Martial Conviction is required in all cases in which the officer is convicted at a court-martial but a dismissal is not adjudged. A sample Report of Court-Martial Conviction is contained in Figure 15-11. In addition to the general requirements set forth above, the Report of Court-Martial Conviction will include the record of trial, which includes, but is not limited to, the preferred and referred charges, pre-trial agreement, results of trial, and convening authority's action.

010608. Coordination When an Officer is Pending Civilian Adjudication

Certain types of cases arising from misconduct in the civilian community have historically taken inordinate amounts of time to resolve. In particular, drunk driving or "DUI/DWT" cases often are extended by numerous continuances. Additionally, following a conviction, sentencing is often delayed. In general, CMC (JPL) will not take action on a case while civilian adjudication remains pending. However, in certain cases, proceeding with a Report of Misconduct before civilian adjudication may be appropriate. Commanders may request—in writing and with appropriate justification—that a case be forwarded before the conclusion of civilian adjudication. Such requests shall be forwarded via the chain of command to CMC (JPL) for action. For example, if a command recommends that an officer be required to show cause, a Report of NJP or Misconduct may be routed to the Alternate Show Cause Authority or Show Cause Authority before the adjudication of the civilian charges if the command believes that there is a sufficient basis to direct the officer to show cause for retention at a BOI. Likewise, if a command recommends that a probationary officer be separated via notification procedures before the adjudication of civilian charges, a Recommendation for Administrative Separation may be routed to the ASN, M&RA, via the Alternate Show Cause Authority and Show Cause Authority if the command believes that there is a sufficient basis to separate the officer for cause.

010609. Nonjudicial Punishment /Administrative Action Concurrent with Civilian Adjudication

If NJP is imposed or other administrative action is taken shortly before a civilian conviction is adjudged, the misconduct for which NJP was imposed and the civilian conviction may be documented in one report, e.g., a "Report of NJP and Civilian Conviction."

010610. Timing

GCMCAs shall forward reports to CMC (JPL) as follows: (1) thirty calendar days from the imposition of NJP, if no appeal is submitted; (2) thirty calendar days from final action on the NJP appeal; (3) thirty calendar days from the signing of the convening authority's action following court-martial; and (4) thirty calendar days from the date of civilian conviction.

A. Each intermediate endorser before the Alternate Show Cause Authority shall have 20 calendar days to forward a report.

B. The first GCMCA in the chain of command and all intermediate endorsers shall explain all delays that exceed the specified processing times. If delay is anticipated due to difficulties scheduling or completing the SACC screen, recommended or mandated initial treatment, or medical evaluation, notify CMC (JPL) of the reason for the delay and the anticipated completion date.



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**010611. Service of Report on Officer**

As discussed in the general requirements, a copy of the report with the commander's recommendation as to administrative processing shall be provided to the officer. The officer shall have 10 calendar days to submit a rebuttal. The first GCMCA in the chain of command may grant, in writing, an extension setting forth a specific period of delay, upon the officer's written request, with explanation of the supporting reasons for the requested delay. If the commander recommends that the officer be required to show cause at a BOI, the officer shall be allowed an opportunity to submit a resignation/retirement request (see paragraphs 011006 through 011008, below).

**010612. Officer Disciplinary Notebook Management System Actions**

The SJA, Deputy SJA, or authorized support staff shall upload all reports and endorsements to the ODNMS and make appropriate entries to the chronology section. CMC (JPL) will update and certify all cases pending review and/or endorsement by CMC (JPL), or the SJA to CMC, DC, M&RA, or ASN, M&RA.

**0107. ACTION BY SHOW CAUSE AUTHORITIES****010701. Alternate Show Cause Authority.**

Upon receipt of one of the reports identified above, the Alternate Show Cause Authority may direct an officer to show cause at a BOI in accordance with SECNAVINST 1920.6\_ and this Volume, initiate separation via notification procedures (if applicable), or forward the report with a recommendation to the Show Cause Authority that an officer not be required to show cause and that the case be closed. If the Alternate Show Cause Authority does not direct an officer to show cause or initiate separation via notification procedures, the package shall be forwarded immediately to the DC, M&RA, via CMC (JPL) for processing. Only the DC M&RA, ASN, M&RA, or SECNAV may close the case of an officer who has been found to have committed misconduct. The Alternate Show Cause Authority shall direct show cause, initiate separation via notification procedures (if applicable), or forward a recommendation of no show cause within 20 calendar days of receipt of the report. The Alternate Show Cause Authority shall explain any delay that exceeds the specified processing time.

**0108. REPORTING AND PROCESSING ALLEGATIONS OF SUBSTANDARD PERFORMANCE OF DUTY****010801. General**

Officers who do not maintain required standards of performance—or professional or personal conduct—may be processed for administrative separation. Cases of substandard performance of duty are handled in accordance with SECNAVINST 1920.6\_ and this Volume. In cases in which the sole basis for separation is substandard performance of duty, the only characterization of service an officer may receive is Honorable.

**010802. Reporting Substandard Performance of Duty in the Officer Disciplinary Notebook**

Like cases involving officer misconduct, cases involving an officer's substandard performance of



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duty are reported via the ODNMS.

010803. Responsibility to Report Officer Substandard Performance of Duty

The same persons specified in paragraph 010402, above, are responsible for reporting officer substandard performance of duty to CMC (JPL).

010804. Circumstances that Trigger an Initial Report

Officer substandard performance of duty must be reported to CMC (JPL) if the performance or conduct of a Marine officer (or an officer of any other branch of military Service serving under the administrative control of a Marine command) is such that processing for separation may be appropriate, as indicated by:

A. A commander's recommendation for administrative separation based on performance or conduct that constitutes substandard performance of duty in accordance with SECNAVINST 1920.6\_.

B. An adverse fitness report for performance or conduct that forms a basis of separation established in SECNAVINST 1920.6\_.

C. A recommendation for promotion is delayed or withheld due to performance or conduct that constitutes substandard performance of duty.

010805. When an Initial Report Must be Made

The same procedures specified in paragraph 010405, above, are applicable to reporting officer substandard performance of duty to CMC (JPL).

010806. How Substandard Performance of Duty is Reported

All substandard performance of duty is reported to CMC (JPL) using the ODNMS. An ODNMS user's guide is available on JAD's public website (<http://www.hqmc.marines.mil/sja/JADForms.aspx>). The same procedures detailed in paragraph 010405, above are applicable to reporting and tracking substandard performance of duty cases.

010807. Disposition of Allegations of Substandard Performance of Duty

A. General

Allegations of substandard performance of duty will result in the GCMCA either finding that the officer's performance or conduct was substandard or that the officer's performance or conduct was not substandard. When the GCMCA finds that the officer's performance or conduct was substandard, the GCMCA must take appropriate disposition action. If not an ASCA, the GCMCA must also forward the case to an ASCA with a show cause recommendation. If the GCMCA determines that the officer's performance was not substandard, the GCMCA must notify CMC (JPL) of that conclusion and forward a Report of No Substandard Performance directly to CMC (JPL) per paragraph 010807.C, below. In any case, a Report must be submitted to CMC (JPL) in accordance with paragraphs 010807.C and 010807.D, below. Figures 15-12 and 15-13 must be used.



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**B. Disposition Options**

If the GCMCA finds that the officer's performance or conduct was substandard, the GCMCA may take any action detailed in paragraph 010502.A, above, regarding non-punitive or administrative measures.

**C. Reporting Dispositions of Substandard Performance of Duty**

After the disposition is complete, the GCMCA must report the disposition and recommend whether the officer should be required to show cause for retention at a BOI, administratively separated via notification procedures (for probationary officers), or that the Show Cause Authority close the case. All allegations of substandard performance of duty must be formally closed with a report of disposition.

**D. Report of Unsubstantiated Allegations of Substandard Performance of Duty**

In all cases where the GCMCA finds that the officer's performance or conduct was not substandard, the GCMCA will generate a Report of No Substandard Performance of Duty (must use Figure 15-12). The Report of No Substandard Performance of Duty will mirror the Report of Substandard Performance of Duty; however, instead of disposition action, the report will detail the investigative efforts by the command and include an explanation from the command detailing how it reached the conclusion that the officer's performance or conduct was not substandard. Once signed, the GCMCA will forward the Report directly to CMC (JPL). The GCMCA must provide a courtesy copy of the Report to each intermediate endorser in the chain of command and the Alternate Show Cause Authority. Upon receipt of the Report, CMC (JPL) will close the case in the ODNMS. This Report will not be placed in the officer's OMPF.

**E. Report of Substandard Performance of Duty**

In all cases where the GCMCA finds that the officer's performance or conduct was substandard, the GCMCA will generate a Report of Substandard Performance of Duty. (See Figure 15-13 for an example of such a report.) The routing, format, and content requirements set forth in paragraph 010603, above, apply to Reports of Substandard Performance of Duty. Additionally, the service requirements and ODNMS actions detailed in that paragraph apply to Reports of Substandard Performance of Duty.

**F. Action by Show Cause Authorities**

The same procedures specified in paragraph 0107, above, are applicable to Show Cause Authority and Alternate Show Cause Authority action on a Report of Substandard Performance of Duty.

**0109. ADMINISTRATIVE SEPARATION OF OFFICERS WITH BOARD ACTION****010901. General**

The purpose of a BOI—and the policies, standards, and procedures for the conduct of a BOI—are set forth in DoD Instruction 1332.30 and SECNAVINST 1920.6\_. The information in this section supplements the provisions of those references.



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010902. Convening a Board of InquiryA. Direction

The Show Cause Authority or Alternate Show Cause Authority will convene or direct the GCMCA of an officer [hereinafter referred to in this section as “respondent”] to convene a BOI in appropriate cases as provided in SECNAVINST 1920.6 and this Volume. The SJA for the Alternate Show Cause Authority—or CMC (JPL) for the DC, M&RA—will forward the order directing the BOI to the respondent’s GCMCA. The BOI direction letter may be forwarded electronically. The BOI direction letter will be uploaded to the ODNMS. (Sample BOI direction letters are contained in Figures 15-14 and 10-15, and a sample BOI convening order is contained in Figure 15-18.)

B. Notification

A Notification of BOI is prepared by a GCMCA or Alternate Show Cause Authority following the decision by the Alternate Show Cause Authority or Show Cause Authority that the respondent be directed to show cause at a BOI. A Notification of BOI informs the respondent of his/her rights, which may be exercised or waived. The Notification of BOI will also be uploaded to the ODNMS. Sample Notifications of BOI are contained in Figures 15-16 and 15-17.

1. The respondent shall be formally served with a copy of the Notification of BOI. Service of the Notification of BOI constitutes the respondent's official notification of show cause proceedings.

2. The GCMCA should ensure that the respondent is served with a copy of the Notification within two working days of the command’s receipt of the show cause order.

3. If the respondent refuses service of a copy of the Notification of BOI, then the GCMCA shall document its efforts to serve the Notification on the respondent in lieu of the respondent’s formal acknowledgement of receipt.

C. Timing

The GCMCA should ensure that each BOI is scheduled to commence, absent an approved continuance, not earlier than 30 but no more than 60 calendar days from the date the respondent is served with the Notification of BOI. The respondent may request a continuance in accordance with the procedures set forth in SECNAVINST 1920.6. Any delay in the commencement of the BOI beyond the specified time limits shall be explained in the GCMCA’s endorsement to the Report of the BOI.

D. Members

The GCMCA shall detail members consistent with the procedures and membership eligibility requirements set forth in 10 U.S.C. §§ 1187 or 14906, and DoD Instruction 1332.30 and SECNAVINST 1920.6. BOIs shall consist of not less than three officers.

E. Respondent a Regular commissioned officer commissioned warrant officer



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Each member shall be a lieutenant colonel or above. The senior member shall be a colonel or above. Every member must be senior in grade to the respondent (no member may be in the same grade as the respondent). For purposes of BOI membership, a frocked officer is deemed to hold the grade from which frocked, not the higher grade to which frocked. All members must be Regular officers on the active-duty list.

F. Respondent a Reserve Commissioned Officer Commissioned Warrant Officer

In addition to the requirements set forth above—except for the requirement that all members be Regular officers on the active-duty list—at least one member must be a Reserve officer.

G. Respondent a Warrant Officer

The members shall be senior to the respondent unless otherwise directed by SECNAV. Unlike cases involving commissioned officer respondents, members in cases involving warrant officers need only be senior in rank to the respondent; they need not be lieutenant colonels or colonels.

H. When a sufficient number of highly qualified and experienced active-duty officers are not available, the convening authority shall complete Board membership with available retired officers who meet the criteria set forth above other than the active-duty or active-status-list requirement, and who have been retired for fewer than 2 years.

010903. Minimum Qualifications for Recorder and Legal Advisor

A. Recorder

The convening authority must appoint a nonvoting recorder. The recorder for a BOI must be a judge advocate in the pay grade of O-3 or above who has had at least one year of experience as a trial or defense counsel. A frocked O-3 meets the pay grade requirement to serve as a recorder. An assistant recorder need not meet these qualifications. This paragraph is intended to ensure that adequately qualified personnel are detailed as BOI recorders and is not intended to, and does not, create any rights, entitlements, or defenses arising out of the failure to comply with its provisions.

B. Legal Advisor

The convening authority must appoint a legal advisor for a BOI. The legal advisor shall be a judge advocate in the pay grade of O-4 or above who has previously been a BOI recorder, a BOI counsel for the respondent, or who is or has been a military judge or a staff judge advocate to a GCMCA. A frocked O-4 meets the pay grade requirement to serve as a legal advisor. The legal advisor cannot be the SJA or Deputy SJA to any GCMCA in the respondent's chain of command. The legal advisor does not need to be physically present at the proceeding but must be available via telephone for consultation by the BOI members. The legal advisor shall not participate in closed sessions of the Board or engage in non-administrative ex parte communications with members as to the proceedings. If judge advocates meeting the minimum qualifications for the BOI recorder or legal advisor are not available, the SJA for the GCMCA may request a waiver of the minimum requirements from CMC (JPL) (see Figure 15-19). This paragraph is intended to ensure that adequately qualified personnel are detailed as BOI legal advisors and is not intended to, and does not, create any rights, entitlements, or defenses arising out of the failure to comply with its provisions.



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010904. Conduct of the Board of Inquiry

The Board shall follow the script contained in Figure 15-20. The Findings Worksheet (see Figure 15-21) shall be completed and signed by all voting members of the Board and counsel for the respondent directly upon conclusion of the Board.

A. Transcript of Hearing

The BOI proceedings shall be recorded using audio tapes, a digital audio recording device, or a court reporter if available. In all cases, a summarized transcript shall be completed within 30 calendar days and delivered to the Recorder for review and any corrections before inclusion in the Report of the BOI, unless a verbatim transcript is directed by the authority directing show cause—either the Show Cause Authority or Alternate Show Cause Authority. Any delay in the preparation of the transcript shall be explained in the GCMCA's endorsement to the Report of the BOI. In all cases, the cognizant LSSS shall retain all materials necessary to prepare a verbatim transcript.

B. Report of the Board of Inquiry

The Report of the BOI is prepared in accordance with SECNAVINST 1920.6\_. Additionally, the following provisions apply:

1. Within 30 calendar days of completion of the verbatim or summarized transcript, the transcript and the Report of the BOI (see Figures 15-22 and 15-23) shall be provided by the Government to the Senior Member of the Board for review. Within 10 calendar days of receipt, the Senior Member will sign the Report of the BOI and authenticate the BOI transcript.

2. Upon receipt of the Report of the BOI from the Senior Member, the Report of the BOI shall be forwarded to any non-concurring member. Within 10 calendar days of receipt, the non-concurring member will sign the Report of the BOI. The non-concurring member must also concurrently submit a minority report that includes the extent of non-concurrence as to each finding and recommendation and the reasons therefore (see Figure 15-24).

3. The final Report of the BOI shall then be served on respondent's counsel (or respondent, if no counsel was elected). A certificate of service shall be included with the Report of the BOI verifying service of the Report on respondent's counsel (or respondent, if no counsel was elected) (see Figure 15-25).

4. Respondent's counsel (or respondent, if no counsel was elected) shall have 10 calendar days after receipt of the Report of the BOI to submit the respondent's comments, rebuttal, or a waiver of rebuttal. The respondent's counsel (or respondent, if no counsel was elected) may request an extension from the Alternate Show Cause Authority or Show Cause Authority who directed the BOI. Such extensions shall not exceed 20 calendar days.

5. If the BOI finds substandard performance of duty, misconduct, or moral or professional dereliction, the respondent must acknowledge receipt of the Report of the BOI and acknowledge that adverse material concerning the incident will be included in the officer's OMPF, even if the respondent's counsel receives a copy of the Report of the BOI. The officer shall be given 10 calendar days in which to prepare a rebuttal. The officer may waive, in writing, the right to submit a rebuttal (must use Figure 15-8). Failure to submit matters within the 10-day period (and any extensions) will also



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constitute waiver, absent good cause.

6. After the respondent and the respondent's counsel have been afforded the opportunity to review the Report of BOI and submit matters in accordance with the deadline prescribed above, the Report and all exhibits and enclosures shall be provided to the GCMCA for endorsement. If the respondent or respondent's counsel alleges legal errors, the GCMCA must address each alleged error in the endorsement. The GCMCA must also explain any delay in the preparation of the transcript or the processing of the Report of the BOI.

C. Endorsements and Recommendations

The first GCMCA in the chain of command must forward the Report of the BOI to the SECNAV or the ASN, M&RA, via the chain of command, the Alternate Show Cause Authority, and Show Cause Authority (must use Figure 15-26). The first GCMCA in the chain of command and each intermediate endorser, including the Alternate Show Cause Authority, shall have 20 calendar days to forward the Report of the BOI. In addition to the requirements set forth in SECNAVINST 1920.6\_, the endorsements to the Report of the BOI must include/address the following:

1. If the BOI finds substandard performance of duty, misconduct, or moral or professional dereliction, and recommends separation, a recommendation as to whether the findings and recommendations of the BOI should be approved or disapproved. If the BOI does not find substandard performance of duty, misconduct, or moral or professional dereliction, or finds substandard performance of duty, misconduct, or moral or professional dereliction but recommends that the respondent be retained, the endorsements need not include a recommendation as to whether the findings and recommendations of the BOI should be approved or denied but may include a recommendation as to whether matters should be included in the officer's OMPF.

2. If separation is recommended and the officer is not retirement eligible, a recommendation as to characterization of service, or, in the case of a respondent who is retirement eligible, a recommendation for retirement grade. (Retirement-eligible LDOs may not be reduced below the last CWO grade satisfactorily held).

3. If separation is recommended, a medical evaluation in accordance with paragraph 010302 of this Volume, if not already included in the package. The medical evaluation shall include the PTSD/TBI screen, if required, including comments on the presence or absence of these conditions and, if present, the extent to which they affected the respondent's judgment and may have been a contributing factor in the basis for separation. If PTSD or TBI was determined to be a possible contributing factor to one or more of the bases for separation, the GCMCA's report/endorsement shall, in light of that identified possible PTSD or TBI contributing factor, explain the reasons for the recommended separation and characterization of service.

4. If the officer was involved in a substance-related incident, the substance-abuse screening results and proof of completion of any recommended or mandated initial treatment, as set forth in paragraph 010301.E of this Volume, if not already included in the package.

5. If separation is recommended and the officer has yet to complete his/her advanced education assistance service obligation, the amount and type of advanced education assistance received and a recommendation as to whether the Government should recoup the advanced education assistance on a pro-rata basis for the unserved portion of the officer's service obligation.



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**D. Involuntary Leave**

Under 10 U.S.C. § 1182 and SECNAVINST 1920.6\_, if a BOI recommends that an officer should be separated, that officer may be required to take involuntary leave, beginning at any time following the expiration of the period allotted for the officer to submit a rebuttal to the Report of the BOI (which is after the officer's receipt of the Report of the BOI). (MCO P1050.3J, Regulations for Leave, Liberty, and Administrative Absence, enclosure (1), paragraph 26 implements the Marine Corps policy on leave awaiting administrative separation and excess leave.)

**0110. ADMINISTRATIVE SEPARATION OF OFFICERS WITHOUT BOARD ACTION****011001. General**

In accordance with SECNAVINST 1920.6\_, a commander, an Alternate Show Cause Authority, or the Show Cause Authority may recommend to the ASN, M&RA, that a probationary officer be administratively separated via notification procedures for misconduct or substandard performance of duty. This procedure does not afford an officer a hearing and serves as an expeditious means to separate an officer at the discretion of the ASN, M&RA. When separated in accordance with the notification procedure for misconduct, the least favorable characterization of service that an officer may receive is General (Under Honorable Conditions). When separated in accordance with the notification procedure for substandard performance of duty, the only characterization of service that an officer may receive is Honorable. Therefore, if an Alternate Show Cause Authority or the Show Cause Authority determines that an Other Than Honorable characterization of service would be more appropriate for a probationary officer, he must direct a BOI.

**011002. Who May Be Separated Via Notification Procedures**

Only probationary officers may be separated via notification procedures. Commissioned officers on the active-duty list with fewer than six years of active commissioned service and Reserve commissioned officers with fewer than six years of commissioned service are in a probationary status. Active-duty warrant officers (WO) are in a probationary status for three years from the date upon which they receive their warrant appointing them to the grade of WO. Reserve WOs are in a probationary status for six years from the date upon which they receive their warrant appointing them to the grade of WO. Officers who have exceeded the applicable probationary threshold are non-probationary and thus cannot be processed for separation without being afforded the opportunity to show cause for retention at a BOI.

**011003. Procedures for Processing an Officer for Separation via Notification Procedures****A. Notification**

The officer shall be notified of the rights contained in SECNAVINST 1920.6\_.

**B. Notification by the Show Cause Authority**

In cases in which the recommendation for separation via notification procedures originates with the Show Cause Authority, the notification of the separation recommendation will be prepared by CMC (JPL).



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**C. Notification by the Alternate Show Cause Authority or Command**

In cases in which the recommendation for separation via notification procedures originates with the Alternate Show Cause Authority or the officer's command, the notification of the separation recommendation will be prepared by the command (see Figure 15-27).

**D. Service on the Respondent**

The notification (with all enclosures) will be forwarded to the respondent via the chain of command within five working days of its signing by the commander, the Alternate Show Cause Authority, or the Show Cause Authority, as appropriate. Service of the notification constitutes the respondent's official notification that the officer is being processed for administrative separation.

**E. Respondent's Right to Submit Matters**

The respondent shall be afforded the opportunity to submit matters in response to the separation recommendation (see Figure 15-28). The respondent's response to the recommendation for separation (or a written waiver of the right to respond) shall be submitted within 10 calendar days of the respondent's receipt of the notification. The GCMCA may, in writing, grant an extension for a specified period upon written request with justification. Failure to submit matters within the 10-day period (and any extensions) will also constitute waiver, absent good cause.

**011004. Submission to the Secretary of the Navy****A. Recommendation**

The command recommending separation—or the first GCMCA in the chain of command—must prepare the Recommendation for Administrative Separation. A sample is contained in Figure 15-29. The Recommendation shall contain the following:

1. Notification and Rebuttal Matters.
2. Report of Misconduct/NJP/Civilian Conviction/Court-Martial Conviction (if applicable).
3. Recommended characterization of service.
4. Medical evaluation in accordance with paragraph 010302 of this Volume, if not already included in the package.
5. If the officer was involved in a substance-related incident, the substance-abuse screening results and proof of completion of any recommended or mandated initial treatment as set forth in paragraph 010301.E of this Volume, if not already included in the package.
6. If the officer has yet to complete his/her advanced education assistance service obligation, the amount and type of advanced education assistance received, if not already included in the package, and a recommendation as to whether the Government should recoup the advanced education assistance on a pro-rata basis for the unserved portion of the officer's service obligation.

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**B. Endorsements and Routing**

The Recommendation for Administrative Separation is forwarded to the ASN, M&RA, via the chain of command, the Alternate Show Cause Authority, and the Show Cause Authority. Each intermediate endorser and the Alternate Show Cause Authority shall have 20 calendar days to forward the recommendation. Each endorsement shall contain:

1. A recommendation as to whether the Recommendation for Administrative Separation should be approved or disapproved.
2. If approval is recommended, the recommended characterization of service.
3. If approval is recommended, a recommendation as to whether the Government should recoup the advanced education assistance on a pro-rata basis for the unserved portion of the officer's service obligation.

011005. Administrative Separation of Non-Probationary Officers. Officers who have exceeded the applicable probationary threshold are non-probationary and thus cannot be processed for separation without being afforded the opportunity to show cause for retention at a BOI. BOI procedures are provided in paragraph 0109, above.

011006. Resignation/Retirement Request in Lieu of Further Administrative Processing. An officer may tender a resignation/retirement request in lieu of further administrative processing at any time during, or in anticipation of, show cause processing. The type of resignation, the characterization of service available, and the requested retirement grade are all important factors in this decision, and are therefore critical in each submission and any subsequent endorsement(s). Samples of requests for retirement, resignation in lieu of further administrative processing, and resignation in lieu of trial are contained in Figures 15-30, 15-31, and 15-32, respectively.

011007. Requirements for Request for Retirement in Lieu of Further Administrative Processing

A. A request for retirement in lieu of further administrative processing shall contain the information contained in paragraph 2 to enclosure (6) of SECNAVINST 1920.6\_.

B. Pursuant to 10 U.S.C. § 6329, no officer may be retired because of misconduct for which trial by court-martial would be appropriate.

011008. Requirements for Request for Resignation in Lieu of Further Administrative Processing

A. A request for resignation in lieu of further administrative processing shall include:

1. A statement that the officer understands that a BOI will not be convened to make a separation recommendation to SECNAV if the request is approved.
2. A statement that the officer understands that the request is voluntary and



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may only be withdrawn with the permission of SECNAV.

3. As applicable, a statement that the request is *unqualified* (least favorable characterization is Honorable), *qualified* (least favorable characterization is General (Under Honorable Conditions)), or *for the good of the service* (least favorable characterization is Other Than Honorable) under the definitions provided in enclosure (1) to SECNAVINST 1920.6\_.

4. A statement that the officer understands the least favorable characterization of service specifically available for the type of resignation requested and a statement that the officer understands the consequences of that characterization as set forth in paragraph 4104 of the MARCORSEPMAN.

5. The officer's requested characterization of service.

6. A statement that the officer has consulted with counsel, including counsel's name, grade, and branch of Service for military counsel, or counsel's name and address if civilian counsel is retained.

7. A statement that the officer admits that his or her performance of duty was substandard, or, if the officer is being required to show cause for misconduct or is being recommended for separation for misconduct, that he or she admits to committing the misconduct.

8. The investigation and any other documentation (e.g., NJP, civilian conviction, court-martial, etc.) evidencing the substandard performance or misconduct, and a summary of the relevant evidence.

9. A statement that the officer understands that sworn or unsworn testimony or other materials may be submitted on his or her behalf, and that such submissions, including admissions of guilt, are not admissible in a court-martial except as provided by Military Rule of Evidence 410 but may be admissible at other proceedings.

10. A statement that the officer understands that he or she is not entitled to receive a Reserve commission.

11. A statement that the officer understands that he or she may be required to reimburse the Government for advance education assistance that included an active-duty service requirement that has not been completed.

011009. Resignation in Lieu of Trial (RILT)

A RILT shall contain the information required by enclosure (3) of SECNAVINST 1920.6\_ and paragraph 4104.4 of the MARCORSEPMAN.

011010. Separation/Retirement Date

Separation and retirement dates are effective upon approval by the ASN, M&RA, or SECNAV, as applicable, and subsequent issuance of the discharge electronic mail and unit diary transaction from CMC (MMSR). Consequently, an officer need not, and normally should not, request a specific separation date.



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**011011. Endorsements and Routing**

Requests for resignation or retirement shall be addressed to the ASN, M&RA, or SECNAV, respectively, via the chain of command, the Alternate Show Cause Authority, and the DC, M&RA. The DC, M&RA, is the denial authority for all resignation and retirement requests. The endorsements shall contain:

- A. A recommendation as to whether the request should be approved or disapproved.
- B. If approval is recommended, for resignation requests, the recommended characterization of service, or, for retirement requests, a recommended retirement grade. (Retirement-eligible LDOs may not be reduced below the last CWO grade satisfactorily held.)
- C. If approval is recommended, a medical evaluation in accordance with paragraph 030102 of this Volume, if not already included in the package. The medical evaluation shall include the PTSD/TBI screen, if required, including comments on the presence or absence of these conditions and, if present, the extent to which they affected the respondent's judgment and may have been a contributing factor in the basis for separation. If PTSD or TBI was determined to be a possible contributing factor to one or more of the bases for separation, the GCMCA's report/endorsement shall, in light of that identified possible PTSD or TBI contributing factor, explain the reasons for the recommended separation and characterization of service.
- D. If the officer was involved in a substance-related incident, the substance-abuse screening results and proof of completion of any recommended or mandated treatment as set forth in paragraph 010301.E of this Volume, if not already included in the package.

**011012. Advanced Education Assistance Recoupment**

If approval is recommended and the officer has yet to complete his or her advanced education assistance service obligation, the amount and type of advanced education assistance received, if not already included in the package, and a recommendation as to whether the Government should recoup the advanced education assistance on a pro-rata basis for the unserved portion of the officer's service obligation.

**011013. Voluntary Board of Inquiry Waiver**

An officer may waive a BOI at any time during, or in anticipation of, show cause processing. A waiver of a BOI may not be conditional.

- A. The waiver shall include the following (use Figure 15-33 for non-retirement-eligible officers and Figure 15-34 for retirement-eligible officers):
  - B. A statement that the officer understands that a BOI will not be convened to make a separation recommendation to SECNAV if the request is approved.
  - C. A statement that the officer understands that the request is voluntary and may only be withdrawn with the permission of SECNAV.



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D. If the officer is not retirement eligible, a statement that the officer understands that he or she may be separated with an Other Than Honorable characterization of service and that the officer understands the consequences of an Other Than Honorable characterization, as set forth in paragraph 4104 of the MARCORSEPMAN. If the officer is retirement eligible, a statement that the officer understands that SECNAV may retire him or her in a lesser pay grade than currently held and the retirement grade will be the highest grade in which the officer served satisfactorily, as determined by SECNAV. (Retirement-eligible LDOs may not be reduced below the last CWO grade satisfactorily held.)

E. If the officer is not retirement eligible, the officer's requested characterization of service, or, if retirement eligible, the officer's requested retirement grade.

F. A statement that the officer has consulted with counsel, including counsel's name, grade, and branch of service for military counsel, or counsel's name and address if civilian counsel is retained.

G. A statement that the officer admits that his or her performance of duty was substandard, and if the officer is being required to show cause for misconduct or is being recommended for separation for misconduct, that he or she admits to committing the misconduct.

H. The investigation and any other documentation (e.g., NJP, civilian conviction, court-martial, etc.) evidencing the substandard performance or misconduct, as well as a summary of the relevant evidence.

I. A statement that the officer understands that sworn or unsworn testimony or other materials may be submitted on his or her behalf, and that such submissions, including admissions of guilt, are not admissible in a court-martial except as provided by Military Rule of Evidence 410 but may be admissible at other proceedings.

J. If the officer is not retirement eligible, a statement that the officer understands that he or she is not entitled to receive a Reserve commission.

K. A statement that the officer understands that he or she may be required to reimburse the Government for advance education assistance that included an active-duty service requirement that has not been completed.

L. BOI waivers shall be addressed to the SECNAV (retirement-eligible officers) or the ASN, M&RA (non-retirement-eligible officers) via the chain of command, the Alternate Show Cause Authority, and the DC, M&RA. The endorsements shall contain:

1. A recommendation as to whether the BOI waiver should be approved or denied.

2. If approval is recommended, the recommended characterization of service for non-retirement eligible officers, or the recommended retirement grade for retirement-eligible officers. (Retirement-eligible LDOs may not be reduced below the last CWO grade satisfactorily held.)

3. If approval is recommended, a medical evaluation in accordance with paragraph 010302 of this Volume, if not already included in the package. The medical evaluation shall include the PTSD/TBI screen, if required, including comments on the presence or absence of these



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conditions and, if present, the extent to which they affected the respondent's judgment and may have been a contributing factor in the basis for separation. If PTSD or TBI was determined to be a possible contributing factor to one or more of the bases for separation, the GCMCA's report/endorsement shall, in light of that identified possible PTSD or TBI contributing factor, explain the reasons for the recommended separation and characterization of service.

4. If the officer was involved in a substance-related incident, the substance-abuse screening results and proof of completion of any recommended or mandated initial treatment, as required by paragraph 010301.E of this Volume, if not already included in the package.

5. If approval is recommended and the officer has yet to complete their advanced education assistance service obligation, the amount and type of advanced education assistance received, if not already included in the package, and a recommendation as to whether the Government should recoup the advanced education assistance on a pro-rata basis for the unserved portion of the officer's service obligation.

011014. Resolution of Retirement Requests and Waivers Prior to Board of Inquiry

Upon receipt of a request for retirement in lieu of further administrative processing, a request for resignation for the good of the Service, or a request for a BOI waiver, and in coordination with CMC (JPL), the GCMCA who convened the BOI may hold the BOI proceedings in abeyance pending approval or disapproval of the request. This paragraph does not apply to unqualified or qualified resignation requests.

0111. RELATED PERSONNEL ACTIONS

011101. Personnel/Administrative Hold

Upon receipt of the required notification of officer misconduct or substandard performance of duty under paragraph 0104 or 0108 of this Volume, the Director, Manpower Management (Dir, MM), in conjunction with local administrative centers, will hold in abeyance all pending personnel actions (i.e., promotion, retirement, separation, transfer to the Reserve component, or PCS/PCA orders) for the reported officer. 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 or civilian authorities. In limited circumstances (e.g., mission requirements or extraordinary delay in the adjudication of a civilian case) commanders may request, in writing and with appropriate justification, execution of PCS orders or transfer to the Reserve component before resolution of the allegation(s). Such requests shall be forwarded via the chain of command to CMC (JPL) for approval on a case-by-case basis.

011102. Service Obligation

As provided in SECNAVINST 1920.6\_, officers serve at the pleasure of the President and no terminal dates are established for their commissions. In addition, as provided in SECNAVINST 1920.6\_, neither retirement nor release from active duty alters an individual's status as a commissioned or warrant officer until the officer's commission or warrant has been terminated. Accordingly, officers may be kept past their EAS or retirement date for administrative proceedings as appropriate. As provided in 10 U.S.C. § 1181 and SECNAVINST 1920.6\_, SECNAV and the ASN, M&RA, have been delegated the authority to administer the separation of officers for voluntary and involuntary reasons.



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011103. Mandated Separation Dates

SECNAVINST 1920.6\_ addresses specific cases in which officers are either involuntarily separated or retired due to age, service limitations, or failure to be selected for promotion. In such cases, because separation is mandated by statute, it can only be deferred in the case of action taken with a view toward trial by court-martial, or, in limited instances, for medical reasons. Administrative processing for cause is not a valid reason to retain an officer on active duty beyond a mandated separation date.

## 0112. PROMOTIONS

011201. General

The Marine Corps must select those officers who are best and fully qualified for promotion to meet the needs of the Marine Corps. Accordingly, selection boards should have all relevant information available when making a recommendation regarding an officer's qualifications for promotion. The timely processing of officer misconduct and substandard performance of duty cases ensures that appropriate adverse information is properly included in an officer's OMPF for review by promotion selection boards.

011202. Procedure

Adverse information is not always available to promotion selection boards. Usually, this occurs when an officer has a pending misconduct or substandard performance of duty case at the time the board convenes, when adverse material was not entered into the officer's OMPF until after the board convened, or when an officer commits misconduct or engages in substandard performance of duty after being recommended for promotion by a board. CMC (JPL) is responsible for screening the results of selection boards for any substantiated or alleged adverse information that might affect an officer's suitability for promotion. Additionally, CMC (JPL) is responsible for screening each monthly promotion MARADMIN before its release as an additional safeguard. If an officer selected for promotion has adverse information or alleged adverse information, that officer's promotion may be delayed or withheld. The difference between delay and withhold is largely a matter of timing. A promotion withhold occurs when SECNAV withholds an officer recommended for promotion by a board from nomination to the Secretary of Defense, the President, or the Senate, as appropriate. Promotion withholds are coordinated between CMC (JPL) and Officer Promotions (MMPR-1). A promotion delay occurs when CMC (or designee) or an officer's CO delays an officer's promotion after the nomination and approval processes have been completed but before the promotion has been effectuated. Withholds and delays of promotion will be handled in accordance with applicable directives and are not automatic.

011203. Reporting

Monthly promotion MARADMINs charge COs with ensuring that officers to be promoted are mentally, physically, morally, and professionally qualified for promotion. In cases where officers are not qualified, the CO can initiate a delay of promotion. Officers selected for promotion but not listed in the monthly MARADMIN may not be delayed until the officer's name appears in a promotion MARADMIN. Guidance on effectuating promotion delays is detailed in each MARADMIN announcing the promotion authority. When a command desires to delay a promotion, it should contact CMC (JPL) and Officer Promotions (MMPR-1) immediately to ensure appropriate notifications are made to the officer and in the MCTFS. Commanders must give written notice to an officer outlining the grounds for delay before the effective date of promotion, unless it is impracticable to do so. This notice must give the officer the opportunity to submit a statement. Commanders are highly encouraged to contact CMC (JPL) for



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assistance in drafting the written notice. Figure 15-35 provides a command promotion delay template that may be used in the event that consultation with CMC (JPL) is not possible before the effective date of promotion.

011204. Closed Cases

If an officer's promotion has been withheld or delayed, and the misconduct or substandard performance of duty case is closed by the appropriate authority without the officer's separation, CMC (JPL) will notify the officer via a Notice and Comment letter of the right to submit matters in support of the promotion. CMC (JPL) will send the Notice and Comment letter directly to the officer via electronic mail. CMC (JPL) will send a courtesy copy to the appropriate staff judge advocate. The officer will have 10 calendar days to submit matters in support of his or her promotion. This 10-day period may be extended for an additional 20 calendar days upon the officer's request. CMC (JPL) will coordinate with the staff judge advocate in the officer's command before acting upon the officer's request. If no matters are received within the 10-day period, and an extension has not been requested and approved, the officer will be deemed to have waived the right to submit matters, and the promotion delay or withhold will be processed accordingly. Promotion matters shall be addressed to CMC (JPL) via the officer's chain of command. The promotion matters shall be endorsed through the commanding general (CG) at the top of the officer's operational chain of command. CG endorsements shall be processed by that CG's SJA. Once endorsed by the CG, the promotion matters will be forwarded to CMC (JPL) for routing to CMC. If the officer declines to submit matters, he or she shall notify the chain of command in writing using the acknowledgement letter that CMC (JPL) provides as an enclosure to the Notice and Comment letter. The declination shall then be forwarded to CMC (JPL) via the chain of command using the process described in this paragraph.

011205. Adverse Material Advisory Board (AMAB)

Promotion withholds and delays are reviewed by the AMAB. The AMAB consists of the SJA to CMC; the Dir, MM; and the DC, M&RA. After AMAB review, the Staff Director, Headquarters Marine Corps, and the Assistant CMC will also review promotion withholds and delays. Each general officer in this process personally reviews the promotion withhold or delay and makes a recommendation to the CMC. The CMC will personally review every promotion withhold or delay and make a final decision or recommendation. The routing of a promotion withhold or delay after AMAB review depends on the rank of the officer and whether his or her promotion has been delayed or withheld (see MCO P1400.31C, Marine Corps Promotion Manual, Volume 1, Officer Promotions; SECNAVINST 1420.1\_, Promotion, Special Selection, Selective Early Retirement, and Selective Early Removal Boards for Commissioned Officers of the Navy and Marine Corps; SECNAVINST 1412.6\_, Promotion of Officers to the Grade of Lieutenant (Junior Grade) in the Navy and to the Grade of First Lieutenant in the Marine Corps; and SECNAVINST 1412.9\_, Marine Corps Limited Duty Officer and Warrant Officer Programs, Promotions, and Continuation Procedures; for additional guidance on promotion delays and withholds). Commanders should contact their SJA for guidance regarding grade-specific promotion delay and withhold issues.

011206. Promotion Recommendations

Per paragraph 011204, above, command endorsements should contain a recommendation regarding promotion and, if applicable, an appropriate date of rank. An officer's promotion withhold or delay will ultimately result in promotion with original date of rank, promotion with an adjusted date of rank, or removal from the promotion list. In the case of a second lieutenant or warrant officer, however, promotion withhold or delay will ultimately result in promotion with original date of rank, promotion



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with an adjusted date of rank, notice to reapply for promotion in six months, or discharge. Promotion with original date of rank is generally appropriate if the allegations against an officer have been unsubstantiated. If promotion is authorized, SECNAV may adjust an officer's date of rank for any part of delay in which SECNAV determines that an officer was unqualified for promotion. SECNAV has delegated this authority to the CMC for second lieutenants. A recommendation for an adjusted date of rank shall not be punitive in nature but, rather, should reflect the time needed for an officer to recover from an incident such that he or she may regain the moral authority to lead Marines. Command endorsements should appropriately address this concern. If an officer is removed from the promotion list, he or she will be considered to have failed selection.

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Figure 15-1**NJP Notification and Acknowledgement**

From: Commanding General/Officer

To: Rank First Name MI Last Name MOS USMC/R

Subj: NOTIFICATION OF INTENT TO IMPOSE NONJUDICIAL PUNISHMENT

Ref: (a) Paragraph 4, Part V, MCM

(b) JAGINST 5800.7F (JAGMAN)

(c) MCO 5800.16 (LSAM), Vol 15 (Officer Misconduct and Substandard Performance of Duty)

(d) Investigation/Evidence

(e) SECNAVINST 1920.6\_

1. In accordance with references (a) through (c), and based upon the information in reference (d), you are hereby notified that I intend to conduct an Article 15, Uniform Code of Military Justice (UCMJ), nonjudicial punishment (NJP) hearing in your case.

2. You are advised of the following with regard to the proposed NJP:

a. That you are accused of the following violations of the UCMJ:  
[List offense(s) and respective UCMJ articles violated.]

b. Unless attached to or embarked in a vessel, you have the right to refuse NJP. You may demand trial by court-martial in lieu of NJP. If trial by court-martial is demanded, charges could be referred for trial by special or general court-martial. At a special or general court-martial, you have the right to be represented by counsel.

c. That you may, upon request, examine available statements and evidence upon which the allegations are based.

d. That you have the right not to make any statement concerning these offenses.

e. That any statement you do make may be used against you during these proceedings, in trial by court-martial, or in administrative separation proceedings under reference (e).

f. That you may consult with a lawyer, either a civilian lawyer retained by you at your own expense, or a judge advocate at no expense to you, if one is reasonably available.

g. To be present at the hearing, or if you waive such personal appearance, to submit written matters for consideration.

h. That, if you request personal appearance, you will receive a hearing at which you will be accorded the following rights:

(1) To be advised of the offense(s) of which you are alleged to have committed;



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(2) That you will not be compelled to make any statement regarding the offense(s) charged and that any statement you do make can be used against you;

(3) To be present during the presentation of all information against you, including the testimony of witnesses present and the receipt of written statements. Copies of any statements will be furnished to you;

(4) To have made available to you for inspection, all items of information in the nature of physical or documentary evidence to be considered by me;

(5) To submit, orally, or in writing, or both, any matter in defense, extenuation, or mitigation, for consideration by me in determining whether you committed the offense(s) in question and, if so, an appropriate punishment;

(6) To have present witnesses, upon request, if their statements are relevant and they are reasonably available;

(7) To be accompanied at the hearing by a personal representative to speak on your behalf. The command has no obligation to provide such a personal representative. It is your own obligation to obtain and arrange for the presence of such a personal representative if you wish one. The personal representative need not be a lawyer; and

(8) To have the proceeding open to the public, unless I determine that the proceedings should be closed for good cause, or unless the punishment to be imposed will not exceed restriction for 14 days and an oral reprimand.

3. You are further advised that if NJP is imposed, you have the right to appeal the NJP to the next superior authority within five working days, if you consider the punishment unjust or disproportionate to the offense(s) for which it is imposed. Such an appeal must be made within a reasonable time following the imposition of NJP. In the absence of unusual circumstances, an appeal made more than five days following imposition of NJP may be considered as not having been made within a reasonable time. Such an appeal must be in writing and should include your reasons for regarding the NJP as unjust or disproportionate. You may be required to undergo NJP imposed while your appeal is pending, except that if action is not taken on the appeal five days after the appeal was submitted, and you so request, any unexecuted punishment involving restraint shall be stayed until action on the appeal is taken.

4. You are further advised that a report of this NJP will be made to the Commandant of the Marine Corps, (Deputy Commandant, Manpower and Reserve Affairs (DC M&RA)) and that you may be subject to involuntary separation proceedings directed by DC M&RA or an Alternate Show Cause Authority in accordance with the procedures set forth in reference (c). If you are voluntarily or involuntarily separated before you complete an active duty

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service requirement incurred because you received advanced education assistance (United States Naval Academy, Reserve Officer Training Corps, Platoon Leaders Class, Funded Law Education Program, etc.), you may be required to reimburse the Government on a pro-rata basis for the unserved portion of your service obligation.

5. You will indicate, by return endorsement hereon, your understanding of the foregoing and your decision whether to accept NJP, and return the endorsement to the [Unit] Staff Judge Advocate within five working days.

I. M. COMMANDING

\*\*\*\*\*

\_\_\_\_\_  
(Date)

## FIRST ENDORSEMENT

From: Rank First Name MI Last Name MOS USMC/R  
To: Commanding General/Officer

1. I hereby acknowledge my understanding of the advice stated above and my right to demand trial by court-martial in lieu of NJP.
2. I [do]/[do not] desire to demand trial by court-martial and [am]/[am not] willing to accept punishment under Article 15, UCMJ.
3. Prior to making my decision, I [did not have]/[had] the opportunity to consult with a lawyer. I understand that action under reference (e) is not precluded by my acceptance of NJP.

\_\_\_\_\_  
(Signature of accused)\_\_\_\_\_  
(Date)\_\_\_\_\_  
(Witness, typed or printed name)



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Figure 15-2**NJP Notification Based on Fact-Finding Body**

From: Commanding General/Officer

To: Rank First Name MI Last Name MOS USMC/R

Subj: NOTIFICATION OF INTENT TO IMPOSE NONJUDICIAL PUNISHMENT

Ref: (a) Paragraph 4, Part V, MCM

(b) JAGINST 5800.7F (JAGMAN)

(c) MCO 5800.16 (LSAM), Vol 15 (Officer Misconduct and Substandard Performance of Duty)

(d) SECNAVINST 1920.6\_

Encl: (1) Record of formal fact-finding body

1. You are hereby informed that, in accordance with the references, I intend to impose nonjudicial punishment (NJP) on you based upon the information contained in the enclosure.

2. You are advised that the offense(s) for which you will receive NJP is/are: [List offense(s) and respective UCMJ articles violated].

3. You are advised that under the references, you have the following rights with regard to the proposed NJP:

a. Unless attached to or embarked in a vessel, the right to refuse NJP.

b. The right to submit, in writing, any matter in defense, extenuation, or mitigation, for consideration by me in determining whether you committed the offense(s) in question and, if so, an appropriate punishment.

c. The right to appeal the NJP to the next superior authority within five working days, if you consider the punishment unjust or disproportionate to the offense(s) for which it is imposed. Such an appeal must be made within a reasonable time following the imposition of NJP. In the absence of unusual circumstances, an appeal made more than five days following imposition of NJP may be considered as not having been made within a reasonable time. Such an appeal must be in writing and should include your reasons for regarding the NJP as unjust or disproportionate. You may be required to undergo NJP imposed while your appeal is pending, except that if action is not taken on the appeal five days after the appeal was submitted, and you so request, any unexecuted punishment involving restraint shall be stayed until action on the appeal is taken.

4. You are further advised that a report of this NJP will be made to the Commandant of the Marine Corps, (Deputy Commandant, Manpower and Reserve Affairs (DC M&RA)) and that you may be subject to involuntary separation proceedings directed by DC M&RA or an Alternate Show Cause Authority in



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accordance with the procedures set forth in references (c) and (d). If you are voluntarily or involuntarily separated before you complete an active duty service requirement incurred because you received advanced education assistance (United States Naval Academy, Reserve Officer Training Corps, Platoon Leaders Class, Funded Law Education Program, etc.), you may be required to reimburse the Government on a pro-rata basis for the unserved portion of your service obligation.

5. You will indicate, by return endorsement hereon, your understanding of the foregoing and your decision whether to accept NJP, and return the endorsement to the [Unit] Staff Judge Advocate within five working days.

I. M. COMMANDING

\*\*\*\*\*

(Date)

## FIRST ENDORSEMENT

From: Rank First Name MI Last Name MOS USMC/R  
To: Commanding General/Officer

1. I hereby acknowledge my understanding of the advice stated above and my right to demand trial by court-martial in lieu of NJP.
2. I [do]/[do not] desire to demand trial by court-martial and [am]/[am not] willing to accept punishment under Article 15, UCMJ.
3. Prior to making my decision, I [did not have]/[had] the opportunity to consult with a lawyer. I understand that action under reference (d) is not precluded by my acceptance of NJP.

(Signature of accused)

(Date)

(Witness, typed or printed name)

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Figure 15-3

## Acknowledgement of NJP Appeal Rights

From: Rank First Name MI Last Name MOS USMC/R  
 To: Commanding General/Officer who imposed NJP  
 Subj: ACKNOWLEDGMENT OF NONJUDICIAL PUNISHMENT APPEAL RIGHTS  
 Ref: (a) SECNAVINST 1920.6  
 (b) MCO 5800.16 (LSAM), Vol 15 (Officer Misconduct and Substandard Performance of Duty)  
 (c) MCO 1900.16 w/ch 1 (MARCORSEPMAN)

1. I [Rank First Name MI Last Name MOS USMC/R], assigned or attached to [unit], have been informed of the following facts concerning my right of appeal as a result of [NJP authority] nonjudicial punishment held on [date NJP imposed].

2. My appeal must be submitted within a reasonable time. Five working days after the punishment is imposed is normally considered a reasonable time in the absence of unusual circumstances. Any appeal submitted thereafter may be rejected as not timely. If there are unusual circumstances which I believe will make it extremely difficult or not practical to submit an appeal within the five-day period, I should immediately advise you of such circumstances and request an appropriate extension of time in which to file my appeal.

a. The appeal must be in writing.

b. There are only two grounds for appeal; that is:

(1) The punishment was unjust; or

(2) The punishment was disproportionate to the offense(s) for which it was imposed.

3. I understand that, if I submit an appeal, it may be referred to a military lawyer for consideration and advice before action is taken on the appeal.

4. \_\_\_\_\_ I intend to appeal the imposition of NJP.

\_\_\_\_\_ I do not intend to appeal the imposition of NJP.

[If a Board of Inquiry will be recommended, add the following language:]

5. I have been notified of my right to submit a request for [resignation][retirement] in lieu of administrative separation processing.

\_\_\_\_\_ I desire to submit a request for [resignation] [retirement] in lieu of administrative separation processing in accordance with references (a) through (c).

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\_\_\_\_\_ I do not desire to submit a request for [resignation]  
[retirement] in lieu of administrative separation processing.

\_\_\_\_\_  
(signature)

\_\_\_\_\_  
(date)

\_\_\_\_\_  
(witness signature)

\_\_\_\_\_  
(date)



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Figure 15-4

**Acknowledgement of Punitive Letter of Reprimand**

From: Commanding General/Commanding Officer who imposed NJP

To: Rank First Name MI Last Name MOS USMC/R

Subj: ACKNOWLEDGEMENT OF PUNITIVE LETTER OF REPRIMAND AND  
APPEAL RIGHTS

Ref: (a) CG/CO, [Command] ltr [SSIC] [Code] of [Date]  
(b) JAGINST 5800.7F (JAGMAN)

1. I acknowledge receipt of reference (a) on \_\_\_\_\_.

2. As indicated in the references, I understand that I may appeal the punitive letter of reprimand. I acknowledge that I have five working days from the date I received the punitive letter of reprimand to submit an appeal. The appeal, if made, will be addressed to the Commanding General, [Unit] via the Commanding General [Unit].

In view of the above, I [do not] intend to appeal the punitive letter of reprimand.

3. Per the references, I understand that I may forward, within 15 days of receipt of the final decision on my appeal, or five days of the date of my notification of my intent not to appeal, a statement concerning this letter for inclusion in my Official Military Personnel File (OMPF).

In view of the above, I [do not] intend to submit a statement concerning the punitive letter of reprimand for inclusion in my OMPF.

I. M. OFFICER



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Figure 15-5  
Report of NJP

From: Commanding General/Officer (who imposed NJP)  
 To: Commandant of the Marine Corps (JPL)  
 Via: (1) Chain of Command  
 (2) Alternate Show Cause Authority

Subj: REPORT OF NONJUDICIAL PUNISHMENT IN THE CASE OF [RANK FIRST NAME MI  
 LAST NAME MOS USMC/R]

Ref: (a) MCO 5800.16 (LSAM), Vol 15 (Officer Misconduct and Substandard  
 Performance of Duty)  
 (b) Paragraph 4, Part V, MCM  
 (c) JAGINST 5800.7F (JAGMAN)  
 (d) UCMJ  
 (e) SECNAVINST 1920.6  
 (f) MCO 1900.16 w/ch 1 (MARCORSEPMAN)

Encl: (1) Verbatim record of NJP hearing  
 (2) [Punitive letter of reprimand]  
 (3) Investigation/Evidence  
 (4) Notification of intent to impose NJP and  
 acknowledgement  
 (5) Acknowledgement of NJP appeal rights  
 (6) [Acknowledgement of receipt of punitive letter of  
 reprimand and appeal rights]  
 (7) [Appeal]  
 (8) SACC screen and treatment completion (if required)  
 (9) Medical evaluation (if required)  
 (10) PTSD/TBI screen (if required)  
 (11) Acknowledgment of advanced education assistance  
 reimbursement requirement  
 (12) Acknowledgment of receipt

1. This report is submitted per paragraph 010605 of reference (a).
2. On [date], following the applicable provisions of references (b), (c), and (d), I imposed nonjudicial punishment (NJP) on [Rank Name]. The charges and disposition thereof are as follows:

<u>Charge(s)</u>	<u>Plea</u>	<u>Finding</u>	<u>Appeal/Status</u>
Article _____	[G/NG]	[G/NG]	[Yes/Denied]
			[Yes/Approved]
			[No]

3. [Rank Name] voluntarily accepted NJP and I imposed the following punishment: [set forth punishment imposed-forfeitures shall be expressed in whole dollar amounts]. See enclosures (1) and (2).

4. The circumstances giving rise to the imposition of NJP in this case are: [Provide concise, even-handed explanation of the offense(s),

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including significant matters in aggravation, extenuation, and mitigation.] See enclosure (3).

5. A verbatim record of the NJP hearing is contained in enclosure (1). [Rank Name] was present at the hearing and was accorded all rights contained in enclosure (4). [Rank Name] indicated [his/her] acceptance of the imposition of NJP and [his/her] desire not to demand court-martial in enclosure (4).

6. I advised [Rank Name] of [his/her] right to appeal the NJP [and punitive letter of reprimand]. See enclosure(s) (5) [and (6)].

7. [On [date],] [Rank Name] [did not] appeal[ed] the NJP [and/or the punitive letter of reprimand]. See enclosures (5)-(7).

8. [If substance-related incident] On [date], the [Name] Substance Abuse Counseling Center evaluated [Rank Name] and found that [he/she] [did/did not] meet the criteria for a substance-related disorder. The counselor recommended that [Rank Name] attend [treatment]. On [date], [Rank Name] completed the recommended treatment. See enclosure (8).

9. [If separation recommended] On [date], a medical provider evaluated [Rank Name] and found that he/she is qualified for separation, enclosure (9). [Brief synopsis of any condition(s) and whether the condition(s) had impact on the officer's behavior.]

10. [If separation recommended and PTSD/TBI screen required per paragraph 010302.D of reference (a)] On [date], an appropriately privileged medical provider—as enumerated in paragraph 010302.D of reference (a)—evaluated [Rank Name] for Post-Traumatic Stress Disorder (PTSD) and Traumatic Brain Injury (TBI), enclosure (10). [Rank Name] screened positive for PTSD/TBI. [State whether PTSD/TBI had impact on the officer's behavior.] [Explain reason for recommended separation and characterization of service]. [OR]

10. [If separation recommended and PTSD/TBI screen required per paragraph 010302.D of reference (a)] On [date], an appropriately privileged medical provider—as enumerated in paragraph 010302.D of reference (a)—evaluated [Rank Name] for Post-Traumatic Stress Disorder (PTSD) and Traumatic Brain Injury (TBI), and found that he/she does not have PTSD/TBI, enclosure (10).

11. [Rank Name] has been advised of the reimbursement requirement for advanced education assistance. [Rank Name's] acknowledgment of this requirement is contained in enclosure (11). I am not aware that [Rank Name] received any advanced education assistance. [OR]

11. [Rank Name] has been advised of the reimbursement requirement for advanced education assistance. [Rank Name's] acknowledgment of this requirement is contained in enclosure (11). [[Rank Name] attended the Naval Academy and received advanced education assistance in the approximate amount of \$\_\_\_\_.]/[[Rank Name] received advanced education assistance via the [Platoon Leaders Class/Naval Reserve Officer Training



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Corps program] in the approximate amount of \$\_\_\_\_.] I [do not] recommend that the reimbursement requirement be waived in this case.

12. [Rank Name] will be afforded the opportunity to read this report. [Rank Name] will acknowledge that adverse information pertaining to this incident may be included in [his/her] Official Military Personnel File, enclosure (12).

13. I [do not] recommend that [Rank Name] be required to show cause for retention in the Marine Corps at a Board of Inquiry pursuant to reference (e). [Comments as to the character of the officer and the allegations of substandard performance of duty/misconduct and moral or professional dereliction.] [OR]

13. [For probationary officers] I [do not] recommend that [Rank Name] be separated via notification procedures for [substandard performance of duty and misconduct and moral or professional dereliction] with a [General (Under Honorable Conditions)/Honorable] characterization of service pursuant to reference (e). [Comments as to the character of the officer and the allegations of substandard performance of duty/misconduct and moral or professional dereliction.]

I. M. GENERAL

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Figure 15-6  
Report of No Misconduct

From: Commanding General  
To: Commandant of the Marine Corps (JPL)  
  
Subj: REPORT OF NO MISCONDUCT IN THE CASE OF [RANK FIRST NAME MI LAST  
NAME MOS USMC/R]  
  
Ref: (a) MCO 5800.16 (LSAM), Vol 15 (Officer Misconduct and Substandard  
Performance of Duty)  
(b) SECNAVINST 1920.6\_  
  
Encl: (1) Investigation/Evidence

1. This report is submitted per paragraph 010602 of reference (a).
2. I have reviewed the allegations involving [Rank Name] contained in the enclosure and find that [Rank Name] did not commit the alleged misconduct.
3. [Summary of incident, investigative efforts, and reason misconduct is unsubstantiated.] Accordingly, the allegations are unsubstantiated and this case is closed.

I. M. GENERAL

Copy to:  
SJA, [Alternate Show Cause Authority]  
SJA, [Chain of Command]  
[Rank Name of Accused]



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Figure 15-7

**Acknowledgement of Advance Education Recoupment**

From: Rank First Name MI Last Name MOS USMC/R

To: Commanding General/Officer, Unit

Subj: ACKNOWLEDGEMENT OF ADVANCED EDUCATION ASSISTANCE RECOUPMENT

1. I understand that, if I am voluntarily or involuntarily separated before I complete an active duty service requirement incurred because I received advanced education assistance (United States Naval Academy, Reserve Officer Training Corps, Platoon Leaders Class, Funded Law Education Program, etc.), I may be required to reimburse the Government on a pro-rata basis for the unserved portion of my service obligation.

I. M. OFFICER

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Figure 15-8

**Acknowledgement of Receipt of Report**

From: Rank First Name MI Last Name MOS USMC/R

To: Commanding General, Unit

Subj: ACKNOWLEDGEMENT OF RECEIPT OF REPORT OF [NJP, MISCONDUCT, CIVILIAN CONVICTION, COURT-MARTIAL CONVICTION, BOI] AND INCLUSION OF ADVERSE MATERIAL IN OFFICIAL MILITARY PERSONNEL FILE

Ref: (a) CG, [Unit] ltr [SSIC] [Code] of [date] (Report)

(b) MCO P1070.12K w/ch 1 (IRAM)

1. I hereby acknowledge that I received reference (a) on \_\_\_\_\_ (date) and that I have 10 calendar days to submit either a response or written indication that I have no matters to submit.

2. I understand that the adverse material in reference (a) will be forwarded to the Deputy Commandant, Manpower and Reserve Affairs (DC M&RA) for a decision on whether the material will be included in my Official Military Personnel File (OMPF) in accordance with reference (b). I further understand that if DC M&RA elects to include the adverse material into my OMPF, any statement I submit will be included in my OMPF along with the adverse material. If I choose not to submit a statement and DC M&RA elects to include the adverse material into my OMPF, I understand that this letter will be included in my OMPF along with the adverse material in reference (a).

3. ( ) I desire to submit a statement.

( ) I do not desire to submit a statement and understand that this letter will be included in my OMPF if DC M&RA elects to include the adverse material in my OMPF.

I. M. OFFICER

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Figure 15-9  
Report of Misconduct

From: Commanding General/Officer  
 To: Commandant of the Marine Corps (JPL)  
 Via: (1) Chain of Command  
 (2) Alternate Show Cause Authority

Subj: REPORT OF MISCONDUCT IN THE CASE OF [RANK FIRST NAME MI  
 LAST NAME MOS USMC/R]

Ref: (a) MCO 5800.16 (LSAM), Vol 15 (Officer Misconduct and Substandard  
 Performance of Duty)  
 (b) MCO P1070.12K w/ch 1 (IRAM)  
 (c) SECNAVINST 1920.6\_

Encl: (1) Investigation/Evidence  
 (2) Administrative Counseling  
 (3) SACC screen and treatment completion (if required)  
 (4) Medical evaluation (if required)  
 (5) PTSD/TBI screen (if required)  
 (6) Acknowledgment of advanced education assistance  
 reimbursement requirement  
 (7) Acknowledgement of receipt

1. This report is submitted per paragraph 010604 of reference (a).
  2. [Synopsis of offense] The circumstances giving rise to this Report are: [Provide concise, even-handed explanation of the reported misconduct including significant matters in aggravation and extenuation and mitigation.] See enclosure (1).
  3. [Synopsis of disposition, if any] [On [date], I administratively counseled [Rank Name] in accordance with paragraph 3005 of reference (b), enclosure (2).] [I addressed [Rank Name's] misconduct via administrative measures.\*]
- (\*Note: Do not mention the issuance of non-punitive letters of caution or informal counseling. Generically describe such actions as "administrative measures.")
4. [If substance-related incident] On [date], the [Name] Substance Abuse Counseling Center evaluated [Rank Name] and found that [he/she] [did/did not] meet the criteria for a substance-related disorder. The counselor recommended that [Rank Name] attend [treatment]. On [date], [Rank Name] completed the recommended treatment. See enclosure (3).
  5. [If separation recommended] On [date], a medical provider evaluated [Rank Name] and found that [he/she] is qualified for separation, enclosure (4). [Brief synopsis of any condition(s) and whether the condition(s) had impact on the officer's behavior.]



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6. [If separation is recommended and PTSD/TBI screen required per paragraph 010302.D of reference (a)] On [date], an appropriately privileged medical provider—as enumerated in paragraph 010302.D of reference (a)—evaluated [Rank Name] for Post-Traumatic Stress Disorder (PTSD) and Traumatic Brain Injury (TBI), enclosure (5). [Rank Name] screened positive for PTSD/TBI. [State whether PTSD/TBI had impact on the officer's behavior.] [Explain reason for recommended separation and characterization of service.] [OR]

6. [If separation is recommended and PTSD/TBI screen required per paragraph 010302.D of reference (a)] On [date], an appropriately privileged medical provider—as enumerated in paragraph 010302.D of reference (a)—evaluated [Rank Name] for Post-Traumatic Stress Disorder (PTSD) and Traumatic Brain Injury (TBI), and found that [he/she] does not have PTSD/TBI, enclosure (5).

7. [Rank Name] has been advised of the reimbursement requirement for advanced education assistance. [Rank Name's] acknowledgment of this requirement is contained in enclosure (6). I am not aware that [Rank Name] received any advanced education assistance. [OR]

7. [Rank Name] has been advised of the reimbursement requirement for advanced education assistance. [Rank Name's] acknowledgment of this requirement is contained in enclosure (6). [[Rank Name] attended the Naval Academy and received advanced education assistance in the approximate amount of \$\_\_\_\_.]/[Rank Name] received advanced education assistance via the [Platoon Leaders Class/Naval Reserve Officer Training Corps program, etc.] in the approximate amount of \$\_\_\_\_. I [do not] recommend that the reimbursement requirement be waived in this case.

8. [Rank Name] will be afforded the opportunity to read this report. [Rank Name] will acknowledge that adverse information pertaining to this incident may be included in [his/her] Official Military Personnel File, enclosure (7).

9. I [do not] recommend that [Rank Name] be required to show cause for retention in the Marine Corps at a Board of Inquiry pursuant to reference (c). [Comments as to the character of the officer and the allegations of substandard performance of duty/misconduct and moral or professional dereliction.]

9. [For probationary officers] I [do not] recommend that [Rank Name] be separated via notification procedures for [substandard performance of duty and misconduct and moral or professional dereliction] with a [General (Under Honorable Conditions)]/[Honorable] characterization of service pursuant to reference (c). [Comments as to the character of the officer and the allegations of substandard performance of duty/misconduct and moral or professional dereliction.]

I. M. GENERAL



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**Figure 15-10**  
**Report of Civilian Conviction**

From: Commanding General/Officer  
 To: Commandant of the Marine Corps (JPL)  
 Via: (1) Chain of Command  
 (2) Alternate Show Cause Authority

Subj: REPORT OF CIVILIAN CONVICTION IN THE CASE OF [RANK FIRST NAME MI  
 LAST NAME MOS USMC/R]

Ref: (a) MCO 5800.16 (LSAM), Vol 15 (Officer Misconduct and Substandard  
 Performance of Duty)  
 (b) MCO P1070.12K w/ch 1 (IRAM)  
 (c) SECNAVINST 1920.6\_

Encl: (1) Civilian arrest/court documents  
 (2) SACC screen and treatment completion (if required)  
 (3) Medical evaluation (if required)  
 (4) PTSD/TBI screen (if required)  
 (5) Acknowledgment of advanced education assistance  
 reimbursement requirement  
 (6) Acknowledgement of receipt

1. This report is submitted per paragraph 010606 of reference (a).
2. [Synopsis of offense] The circumstances giving rise to this report are: [Provide concise, even-handed explanation of the civilian conviction, including significant matters in aggravation and extenuation and mitigation.] See enclosure (1).
3. [Synopsis of disposition], enclosure (1). [Include documentation reflecting the satisfaction of any sentence imposed.]
4. [If substance-related incident] On [date], the [Name] Substance Abuse Counseling Center evaluated [Rank Name] and found that [he/she] [did/did not] meet the criteria for a substance-related disorder. The counselor recommended that [Rank Name] attend [treatment]. On [date], [Rank Name] completed the recommended treatment. See enclosure (2).
5. [If separation recommended] On [date], a medical provider evaluated [Rank Name] and found that [he/she] is qualified for separation, enclosure (3). [Brief synopsis of any condition(s) and whether the condition(s) had impact on the officer's behavior.]
6. [If separation recommended and PTSD/TBI screen required per paragraph 010302.D of reference (a)] On [date], an appropriately privileged medical provider—as enumerated in paragraph 010302.D of reference (a)—evaluated [Rank Name] for Post-Traumatic Stress Disorder (PTSD) and Traumatic Brain Injury (TBI), enclosure (4). [Rank Name] screened positive for PTSD/TBI. [State whether PTSD/TBI had impact on the officer's behavior.] [Explain reason for recommended separation and characterization of service]. [OR]

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6. [If separation recommended and PTSD/TBI screen required per paragraph 010302.D of reference (a)] On [date], an appropriately privileged medical provider—as enumerated in paragraph 010302.D of reference (a)—evaluated [Rank Name] for Post-Traumatic Stress Disorder (PTSD) and Traumatic Brain Injury (TBI), and found that he/she does not have PTSD/TBI, enclosure (4).

7. [Rank Name] has been advised of the reimbursement requirement for advanced education assistance. [Rank Name's] acknowledgment of this requirement is contained in enclosure (5). I am not aware that [Rank Name] received any advanced education assistance. [OR]

7. [Rank Name] has been advised of the reimbursement requirement for advanced education assistance. [Rank Name's] acknowledgment of this requirement is contained in enclosure (5). [[Rank Name] attended the Naval Academy and received advanced education assistance in the approximate amount of \$\_\_\_\_.]/[[Rank Name] received advanced education assistance via the [Platoon Leaders Class/Naval Reserve Officer Training Corps program, etc.] in the approximate amount of \$\_\_\_\_.] I [do not] recommend that the reimbursement requirement be waived in this case.

8. [Rank Name] will be afforded the opportunity to read this report. [Rank Name] will acknowledge that adverse information pertaining to this incident may be included in [his/her] Official Military Personnel File, enclosure (6).

9. I [do not] recommend that [Rank Name] be required to show cause for retention in the Marine Corps at a Board of Inquiry pursuant to reference (c). [Comments as to the character of the officer and the allegations of substandard performance of duty/misconduct and moral or professional dereliction.] [OR]

9. [For probationary officers] I [do not] recommend that [Rank Name] be separated via notification procedures for [substandard performance of duty and misconduct and moral or professional dereliction] with a [General (Under Honorable Conditions)]/ [Honorable] characterization of service pursuant to reference (c). [Comments as to the character of the officer and the allegations of substandard performance of duty/misconduct and moral or professional dereliction.]

I. M. GENERAL



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**Figure 15-11**  
**Report of Court-Martial Conviction**

From: Commanding General/Officer  
 To: Commandant of the Marine Corps (JPL)  
 Via: (1) Chain of Command  
 (2) Alternate Show Cause Authority

Subj: REPORT OF COURT-MARTIAL CONVICTION IN THE CASE OF [RANK FIRST NAME  
 MI LAST NAME MOS USMC/R]

Ref: (a) MCO 5800.16 (LSAM), Vol 15 (Officer Misconduct and Substandard  
 Performance of Duty)  
 (b) MCO P1070.12K w/ch 1 (IRAM)  
 (c) SECNAVINST 1920.6\_

Encl: (1) Record of trial  
 (2) SACC screen and treatment completion (if required)  
 (3) Medical evaluation (if required)  
 (4) PTSD/TBI screen (if required)  
 (5) Acknowledgment of advanced education assistance  
 reimbursement requirement  
 (6) Acknowledgement of receipt

1. This report is submitted per paragraph 010607 of reference (a).
2. [Synopsis of offense] The circumstances giving rise to this report are: [Provide concise, even-handed explanation of the court-martial conviction, including significant matters in aggravation and extenuation and mitigation.] See enclosure (1).
3. [Synopsis of disposition], enclosure (1). [Include documentation reflecting the satisfaction of any sentence imposed.]
4. [If substance-related incident] On [date], the [Name] Substance Abuse Counseling Center evaluated [Rank Name] and found that [he/she] [did/did not] meet the criteria for a substance-related disorder. The counselor recommended that [Rank Name] attend [treatment]. On [date], [Rank Name] completed the recommended treatment. See enclosure (2).
5. [If separation recommended] On [date], a medical provider evaluated [Rank Name] and found that [he/she] is qualified for separation, enclosure (3). [Brief synopsis of any condition(s) and whether the condition(s) had impact on the officer's behavior.]
6. [If separation recommended and PTSD/TBI screen required per paragraph 010302.D of reference (a)] On [date], an appropriately privileged medical provider—as enumerated in paragraph 010302.D of reference (a)—evaluated [Rank Name] for Post-Traumatic Stress Disorder (PTSD) and Traumatic Brain Injury (TBI), enclosure (4). [Rank Name] screened positive for PTSD/TBI. [State whether PTSD/TBI had impact on the officer's behavior.] [Explain reason for recommended separation and characterization of service.] [OR]

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6. [If separation recommended and PTSD/TBI screen required per paragraph 010302.D of reference (a)] On [date], an appropriately privileged medical provider—as listed in paragraph 010302.D of reference (a)—evaluated [Rank Name] for Post-Traumatic Stress Disorder (PTSD) and Traumatic Brain Injury (TBI), and found that [he/she] does not have PTSD/TBI, enclosure (4).

7. [Rank Name] has been advised of the reimbursement requirement for advanced education assistance. [Rank Name's] acknowledgment of this requirement is contained in enclosure (5). I am not aware that [Rank Name] received any advanced education assistance. [OR]

7. [Rank Name] has been advised of the reimbursement requirement for advanced education assistance. [Rank Name's] acknowledgment of this requirement is contained in enclosure (5). [[Rank Name] attended the Naval Academy and received advanced education assistance in the approximate amount of \$\_\_\_\_.]/[[Rank Name] received advanced education assistance via the [Platoon Leaders Class/Naval Reserve Officer Training Corps program, etc.] in the approximate amount of \$\_\_\_\_.] I [do not] recommend that the reimbursement requirement be waived in this case.

8. [Rank Name] will be afforded the opportunity to read this report. [Rank Name] will acknowledge that adverse information pertaining to this incident may be included in [his/her] Official Military Personnel File, enclosure (6).

9. I [do not] recommend that [Rank Name] be required to show cause for retention in the Marine Corps at a Board of Inquiry pursuant to reference (c). [Comments as to the character of the officer and the allegations of substandard performance of duty/misconduct and moral or professional dereliction.] [OR]

9. [For probationary officers] I [do not] recommend that [Rank Name] be separated via notification procedures for [substandard performance of duty and misconduct and moral or professional dereliction] with a [General (Under Honorable Conditions)/ Honorable] characterization of service pursuant to reference (c). [Comments as to the character of the officer and the allegations of substandard performance of duty/misconduct and moral or professional dereliction.]

I. M. GENERAL



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Figure 15-12

Report of No Substandard Performance

From: Commanding General

To: Commandant of the Marine Corps (JPL)

Subj: REPORT OF NO SUBSTANDARD PERFORMANCE OF DUTY IN THE CASE OF [RANK  
FIRST NAME MI LAST NAME MOS USMC/R]

Ref: (a) MCO 5800.16 (LSAM), Vol 15 (Officer Misconduct and Substandard  
Performance of Duty)

(b) SECNAVINST 1920.6\_

Encl: (1) Investigation/Evidence

1. This report is submitted per paragraph 010807.D of reference (a).
2. I have reviewed the allegations involving [Rank Name] contained in the enclosure and find that [Rank Name's] performance was not substandard.
3. [Summary of incident, investigative efforts, and reason substandard performance of duty is unsubstantiated.] Accordingly, the allegations are unsubstantiated and this case is closed.

I. M. GENERAL

Copy to:

SJA, [Alternate Show Cause Authority]

SJA, [Chain of Command]

[Rank Name of Accused]

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**Figure 15-13**  
**Report of Substandard Performance**

From: Commanding General/Officer  
 To: Commandant of the Marine Corps (JPL)  
 Via: (1) Chain of Command  
 (2) Alternate Show Cause Authority

Subj: REPORT OF SUBSTANDARD PERFORMANCE OF DUTY IN THE CASE OF [RANK  
 FIRST NAME MI LAST NAME MOS USMC/R]

Ref: (a) MCO 5800.16 (LSAM), Vol 15 (Officer Misconduct and Substandard  
 Performance of Duty)  
 (b) SECNAVINST 1920.6\_

Encl: (1) Investigation/Evidence  
 (2) SACC screen and treatment completion (if required)  
 (3) Medical evaluation (if required)  
 (4) PTSD/TBI screen (if required)  
 (5) Acknowledgment of advanced education assistance  
 reimbursement requirement  
 (6) Acknowledgement of receipt

1. This report is submitted per paragraph 010807.E of reference (a).
2. The circumstances giving rise to this Report are: [Provide concise, even-handed explanation of the reported substandard performance of duty including significant matters in aggravation and extenuation and mitigation.] See enclosure (1).
3. [If substance-related incident] On [date], the [Name] Substance Abuse Counseling Center evaluated [Rank Name] and found that [he/she] [did/did not] meet the criteria for a substance-related disorder. The counselor recommended that [Rank Name] attend [treatment]. On [date], [Rank Name] completed the recommended treatment. See enclosure (2).
4. [If separation recommended] On [date], a medical provider evaluated [Rank Name] and found that [he/she] is qualified for separation, enclosure (3). [Brief synopsis of any condition(s) and whether the condition(s) had impact on the officer's behavior.]
5. [If separation recommended and PTSD/TBI screen required per paragraph 10302.D of reference (a)] On [date], an appropriately privileged medical provider—as enumerated in paragraph 010302.D of reference (a)—evaluated [Rank Name] for Post-Traumatic Stress Disorder (PTSD) and Traumatic Brain Injury (TBI), enclosure (4). [Rank Name] screened positive for PTSD/TBI. [State whether PTSD/TBI had impact on the officer's behavior.] [Explain reason for recommended separation.] [OR]
5. [If separation recommended and PTSD/TBI screen required per paragraph 010302.D of reference (a)] On [date], an appropriately privileged medical provider—as enumerated in paragraph 010302.D of reference (a)—evaluated



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[Rank Name] for Post-Traumatic Stress Disorder (PTSD) and Traumatic Brain Injury (TBI), and found that [he/she] does not have PTSD/TBI, enclosure (4).

6. [Rank Name] has been advised of the reimbursement requirement for advanced education assistance. [Rank Name's] acknowledgment of this requirement is contained in enclosure (5). I am not aware that [Rank Name] received any advanced education assistance. [OR]

6. [Rank Name] has been advised of the reimbursement requirement for advanced education assistance. [Rank Name's] acknowledgment of this requirement is contained in enclosure (5). [[Rank Name] attended the Naval Academy and received advanced education assistance in the approximate amount of \$\_\_\_\_.]/[[Rank Name] received advanced education assistance via the [Platoon Leaders Class/Naval Reserve Officer Training Corps program, etc.] in the approximate amount of \$\_\_\_\_.] I [do not] recommend that the reimbursement requirement be waived in this case.

7. [Rank Name] will be afforded the opportunity to read this report. [Rank Name] will acknowledge that adverse information pertaining to this incident may be included in [his/her] Official Military Personnel File, enclosure (6).

8. I [do not] recommend that [Rank Name] be required to show cause for retention in the Marine Corps at a Board of Inquiry pursuant to reference (b). [Comments as to the character of the officer and the allegations of substandard performance of duty.] [OR]

8. [For probationary officers] I [do not] recommend that [Rank Name] be separated via notification procedures for substandard performance of duty with an Honorable characterization of service. [Comments as to the character of the officer and the allegations of substandard performance of duty.]

I. M. GENERAL

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Figure 15-14**BOI Direction Letter (Not Retirement Eligible)**

From: Commanding General/Commander

To: Commanding General, Unit

Subj: BOARD OF INQUIRY IN THE CASE OF [RANK FIRST NAME MI LAST NAME MOS USMC/R]

Ref: (a) SECNAVINST 1920.6

(b) MCO 5800.16 (LSAM), Vol 15 (Officer Misconduct and Substandard Performance of Duty)

(c) [Report of NJP/Misconduct/etc.]

1. Pursuant to paragraphs 13d of reference (a) and 010202 of reference (b), I have been designated an Alternate Show Cause Authority for the Marine Corps. In that capacity, I have reviewed the allegations in reference (c), and have determined that there is sufficient information to refer this case to a Board of Inquiry (BOI) for a recommendation as to whether [Rank Name] should be retained in the Marine Corps and, if separation is recommended, the recommended characterization of service.

2. Accordingly, you are directed to convene a BOI under the provisions of references (a) and (b) to consider [Rank Name's] case. The specific reasons for separation to be considered by the Board are [substandard performance of duty, misconduct, and moral or professional dereliction] as evidenced by one or more of the following:

a. [Applicable bases from Enclosure (3) of reference (a). If the officer is directed to show cause for the commission of an offense under the Uniform Code of Military Justice (UCMJ) punishable by confinement of six months or more, include the applicable Article(s)].

\*Note: BOI Notification (Figure 15-16) may only list bases listed here

3. [Rank Name] will be notified by separate correspondence that separation proceedings have been initiated and of his/her right to 30 days delay in which to prepare his/her case.

4. The written report of the BOI shall be forwarded to this Command (staff judge advocate (SJA)) via the chain of command. A verbatim transcript of the proceedings is required in any case where the Board finds that any of the allegations are supported by a preponderance of the evidence.

5. Correspondence relating to this and all other officer administrative separation processing should be mailed using Federal Express.

6. Reference (b) provides time goals for processing officer administrative separation cases. Failure to comply with those standards shall be addressed in the return endorsement.



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I. M. GENERAL

Copy to:

CMC (JAM)

SJA, [Alternate Show Cause Authority]

SJA, [Chain of Command]

[Rank Name of Accused]

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Figure 15-15

## BOI Direction Letter (Retirement Eligible)

From: Commanding General/Commander

To: Commanding General, Unit

Subj: BOARD OF INQUIRY IN THE CASE OF [RANK FIRST NAME MI LAST NAME MOS USMC/R]

Ref: (a) SECNAVINST 1920.6

(b) MCO 5800.16 (LSAM), Vol 15 (Officer Misconduct and Substandard Performance of Duty)

(c) [Report of NJP/Misconduct/etc.]

1. Pursuant to paragraphs 13d of reference (a) and 010202 of reference (b), I have been designated an Alternate Show Cause Authority for the Marine Corps. In that capacity, I have reviewed the allegations in reference (c), and have determined that there is sufficient information to refer this case to a Board of Inquiry (BOI) for a recommendation as to whether [Rank Name] should be involuntarily retired from the Marine Corps and, if retirement is recommended, whether [Rank Name] should be retired in his/her current grade or a lesser grade.

2. Accordingly, you are directed to convene a BOI under the provisions of references (a) and (b) to consider [Rank Name's] case. The specific reasons for separation to be considered by the Board are [substandard performance of duty, misconduct, and moral or professional dereliction] as evidenced by one or more of the following:

a. [Applicable bases from Enclosure (3) of reference (a). If the officer is directed to show cause for the commission of an offense under the Uniform Code of Military Justice (UCMJ) punishable by confinement of six months or more, include the applicable Article(s)].

\*Note: BOI Notification (Figure 15-17) may only list bases listed here

3. [Rank Name] will be notified by separate correspondence that separation proceedings have been initiated and of his/her right to 30 days delay in which to prepare his/her case.

4. The written report of the BOI shall be forwarded to this Command (staff judge advocate (SJA)) via the chain of command. A verbatim transcript of the proceedings is required in any case where the Board finds that any of the allegations are supported by a preponderance of the evidence.

5. Correspondence relating to this and all other officer administrative separation processing should be mailed using Federal Express.

6. Reference (b) provides time goals for processing officer administrative separation cases. Failure to comply with those standards shall be addressed in the return endorsement.

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I. M. GENERAL

Copy to:

CMC (JMJ)

SJA, [Alternate Show Cause Authority]

SJA, [Chain of Command]

[Rank Name of Accused]

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Figure 15-16**BOI Notification (Not Retirement Eligible)**

From: Alternate Show Cause Authority/Commanding General

To: Rank First Name MI Last Name MOS USMC/R

Subj: NOTIFICATION OF BOARD OF INQUIRY

Ref: (a) SECNAVINST 1920.6

(b) CG, [Unit] ltr 1920 Code of [date] (BOI dir ltr)

Encl: (1) Rights of a Respondent

(2) Acknowledgment of Notice

1. Pursuant to references (a) and (b), you are notified that a Board of Inquiry (BOI) will be convened to make a recommendation on your retention in the U.S. Marine Corps. The specific reason[s] for separation to be considered by the Board [is]/[are] [substandard performance of duty], [misconduct, and moral or professional dereliction] as evidenced by [one of] the following:

a. [Basis/Bases for separation from reference (b).]\*

\*Note: May only notify the officer of the reason(s) and basis/bases as directed by the Show Cause Authority/Alternate Show Cause Authority.

2. The BOI will make the following determinations, by majority vote, based on evidence presented at the hearing:

a. A finding on the reason[s] for separation. This finding is based on a preponderance of the evidence standard; and

b. One of the following:

(1) If the Board finds that [one or more of] the reason[s] for separation [is]/[are] supported by sufficient evidence to warrant separation, it may recommend your separation and make an additional recommendation as to the appropriate characterization of service; or

(2) If the Board finds that the reason[s] for separation are not supported by sufficient evidence to warrant separation for cause, upon receipt of the Report of the BOI, the Deputy Commandant, Manpower and Reserve Affairs will close your case.

3. The most adverse characterization of service that the Board may recommend is ([Honorable\*])/[Other Than Honorable]).

\*Note: If the officer is only directed to show cause for substandard performance of duty, the board may only separate the officer with an Honorable characterization of service.



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4. You have 30 days in which to prepare your case. As the respondent, you are entitled to exercise the rights set forth in enclosure (1). Your failure to invoke any of these rights will not be considered as a bar to the BOI proceedings.

5. This letter is the notice required by reference (a). You will be notified of the names of the Board members and of the date and location of the hearing by separate correspondence.

6. You are directed to acknowledge receipt of this notification by completing enclosure (2) and returning it to this Command (staff judge advocate (SJA)) within five working days of receipt.

I. M. Commanding  
(Can be signed by direction)

Copy to:  
CMC (JAM)  
SJA, [Alternate Show Cause Authority]  
SJA, [Chain of Command]  
[Rank Name of Respondent]

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Figure 15-17

## BOI Notification (Retirement Eligible)

From: Alternate Show Cause Authority/Commanding General

To: Rank First Name MI Last Name MOS USMC/R

Subj: NOTIFICATION OF BOARD OF INQUIRY

Ref: (a) SECNAVINST 1920.6

(b) CG, [Unit] ltr 1920 Code of [date] (BOI dir ltr)

Encl: (1) Rights of a Respondent

(2) Acknowledgment of Notice

1. Pursuant to references (a) and (b), you are notified that a Board of Inquiry (BOI) will be convened to make a recommendation on your retention in the U.S. Marine Corps. The specific reason[s] for involuntary retirement to be considered by the Board [is]/[are] [substandard performance of duty], [misconduct, and moral or professional dereliction] as evidenced by [one of] the following:

a. [Basis/Bases for retirement from reference (b).]\*

\*Note: May only notify the officer of the reason(s) and basis/bases as directed by the Show Cause Authority/Alternate Show Cause Authority.

2. The BOI will make the following determinations, by majority vote, based on evidence presented at the hearing:

a. A finding on the reason[s] for retirement. This finding is based on a preponderance of the evidence standard; and

b. One of the following:

(1) If the Board finds that [one or more of] the reason[s] for retirement [is]/[are] supported by sufficient evidence to warrant retirement, it may recommend your retirement and make an additional recommendation as to retirement grade; or

(2) If the Board finds that the reason[s] for retirement are not supported by sufficient evidence to warrant retirement for cause, upon receipt of the Report of the BOI, the Deputy Commandant, Manpower and Reserve Affairs will close your case.

3. Because you are a retirement-eligible officer, if the Board recommends retirement, the Board will also recommend whether you should be retired in your current grade or a lesser grade. The Board must recommend the grade in which you last served satisfactorily. [If the DC M&RA has authorized the Board to recommend a characterization of service: "The board may make an additional characterization as to the appropriate characterization of your service. The most adverse characterization of service of service that the Board may record is \_\_\_\_\_." The Board's recommendation is

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merely a recommendation; the final decision as to retirement grade rests with the Secretary of the Navy.

4. You have 30 days in which to prepare your case. As the respondent, you are entitled to exercise the rights set forth in enclosure (1). Your failure to invoke any of these rights will not be considered as a bar to the BOI proceedings.

5. This letter is the notice required by reference (a). You will be notified of the names of the Board members and of the date and location of the hearing by separate correspondence.

6. You are directed to acknowledge receipt of this notification by completing enclosure (2) and returning it to this Command (staff judge advocate (SJA)) within five working days of receipt.

I. M. Commanding  
(Can be signed by direction)

Copy to:  
CMC (JAM)  
SJA, [Alternate Show Cause Authority]  
SJA, [Chain of Command]  
[Rank Name of Respondent]



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**Figure 15-18**  
**BOI Convening Order**

From: Commanding General  
To: Senior Member USMC/R

Subj: APPOINTING ORDER FOR THE BOARD OF INQUIRY IN THE CASE OF [RANK  
FIRST NAME MI LAST NAME MOS USMC/R]

Ref: (a) SECNAVINST 1920.6  
(b) MCO 5800.16 (LSAM), Vol 15 (Officer Misconduct and Substandard  
Performance of Duty)

1. In accordance with the references, you are hereby appointed as the Senior Member of the Board of Inquiry (BOI) in the case of [Rank First Name MI Last Name MOS USMC/R]. The following other officers are appointed as members:

- a. [Rank Initials Last Name], U.S. Marine Corps; and
- b. [Rank Initials Last Name], U.S. Marine Corps.

2. [Rank Initials Last Name], U.S. Marine Corps is appointed as the Legal Advisor.

3. You will be guided in the performance of your duties by the provisions of references (a) and (b). The BOI hearing shall be held at [Marine Corps Base Name] in [physical location] or as otherwise directed. The BOI is scheduled for [date]. The hearing is anticipated to take [no more than one day][x days]. The uniform will be [uniform].

I. M. GENERAL

Copy to:  
SJA, [Unit]  
BOI Members  
Recorder  
Counsel for Respondent  
Legal Advisor



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Figure 15-19(a)

**Request for Waiver of Minimum Legal Advisor Qualifications**

From: Command SJA

To: Commandant of the Marine Corps (JPL)

Subj: REQUEST FOR WAIVER OF MINIMUM LEGAL ADVISOR QUALIFICATIONS IN THE  
CASE OF [RANK FIRST NAME MI LAST NAME MOS USMC/R]

Ref: (a) MCO 5800.16 (LSAM), Vol 15 (Officer Misconduct and Substandard  
Performance of Duty)

1. Background. Pursuant to paragraph 010903.B of the reference, a legal advisor for a Board of Inquiry (BOI) must be a judge advocate in the pay grade of O-4 or above who has previously been a BOI recorder, a BOI counsel for the respondent, or who is or has been, a military judge or a staff judge advocate to a GCMCA. A frocked O-4 meets the pay grade requirement to serve as a legal advisor. The reference further provides that if the minimum qualifications for a BOI legal advisor cannot be met, the Staff Judge Advocate for the General Court-Martial Convening Authority may request a waiver of the minimum qualifications from the Commandant of the Marine Corps (JPL).

2. Request. Request a waiver of the minimum recorder qualifications for [Attorney Rank Name].

3. Justification. [As applicable]

4. The point of contact for this matter is [...].

I. M. SJA

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Figure 15-19(b)

Request for Waiver of Minimum BOI Recorder Qualifications

From: Command SJA

To: Commandant of the Marine Corps (JPL)

Subj: REQUEST FOR WAIVER OF MINIMUM RECORDER QUALIFICATIONS IN THE CASE  
OF [RANK FIRST NAME MI LAST NAME MOS USMC/R]

Ref: (a) MCO 5800.16 (LSAM), Vol 15 (Officer Misconduct and Substandard  
Performance of Duty)

1. Background. Pursuant to paragraph 010903.A of the reference, a recorder for a Board of Inquiry (BOI) must be a judge advocate in the pay grade of O-3 or above who has had at least one year of trial experience. The reference further states that if the minimum qualifications for a BOI recorder cannot be met, the Staff Judge Advocate for the General Court-Martial Convening Authority may request a waiver of the minimum qualifications from the Commandant of the Marine Corps (JPL).

2. Request. Request a waiver of the minimum recorder qualifications for [Attorney Rank Name].

3. Justification. [As applicable]

4. The point of contact for this matter is [...].

I. M. SJA

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Figure 15-20  
BOI ScriptBOARD OF INQUIRY SCRIPT

IN THE CASE OF \_\_\_\_\_

**PRELIMINARY NOTES**

1. Attendance at the board hearing is the primary duty of an officer so detailed. Members, the recorder, and the defense counsel cannot miss the board proceedings unless prevented by illness, ordered away, or excused IN WRITING by a written modification to the convening order signed by the convening authority.

2. This guide is based on SECNAVINST 1920.6 and Volume 15 of the LSAM. All participants should thoroughly familiarize themselves with the references.

3. The recorder must obtain a Privacy Act statement from the respondent if the respondent plans to provide sworn or unsworn testimony at the hearing.

4. The following abbreviations are used throughout this Guide:

SRMBR: Senior Member of the Board  
 MBR: Member of the Board  
 COUNSEL: Counsel for the Respondent  
 REC: Recorder for the Board  
 RESP: Respondent  
 BOARD: Board of Inquiry  
 UCMJ: Uniform Code of Military Justice

**SECTION I. PRELIMINARIES**

SRMBR: This board of inquiry will come to order. The reporter will note the time and date for the record.

REC: The Commanding General, \_\_\_\_\_ [Convening Authority], convened this board by an appointing order dated \_\_\_\_\_ (with a modification dated \_\_\_\_\_). The following officers named in that order are present:

\_\_\_\_\_ as the SENIOR MEMBER  
 \_\_\_\_\_ and \_\_\_\_\_ as the Board.

(If the respondent is a reserve officer, state the following: The following members are reserve officers, as is the respondent: \_\_\_\_\_).



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REC: (All officers named in the appointing order are present) (The following officer(s) listed in the appointing order(s) (is) (are) absent with the express consent of the convening authority)

\_\_\_\_\_).

REC: \_\_\_\_\_ has been named as recorder for the board and is present. \_\_\_\_\_ has been assigned as the counsel for the respondent and is present. The respondent does not have an individual military counsel (\_\_\_\_\_, has been assigned as the individual military counsel for the respondent and is present).

REC: Both the recorder and (the) (both) counsel for the respondent are lawyers certified under Article 27(b) (1), UCMJ.

REC: [(The respondent has no civilian counsel) (\_\_\_\_\_, a member of the \_\_\_\_\_ state bar, is the civilian counsel for the respondent and is present).]

REC: \_\_\_\_\_ has been appointed as court reporter and has been previously sworn.

REC: The board's legal advisor is \_\_\_\_\_, a judge advocate certified under Article 27(b) (1) of the UCMJ. The legal advisor provides such assistance as the board requires, but does not participate in closed sessions of the board.

SRMBR: The respondent is (present) (absent) (if absent, explain absence).

NOTE: ABSENCE OF RESPONDENT. The board may proceed with the respondent absent if he/she (1) is incarcerated by civil authorities, (2) has waived personal appearance by stating in writing or through counsel that he/she does not want to appear, or (3) fails to appear after he/she or his/her counsel has received notice of the date, time, and place of this hearing. See SECNAVINST 1920.6\_ concerning orders for reservists to appear at boards.

SRMBR: The record will reflect that this board is properly convened and constituted. The purpose of this board is to consider relevant facts in the case of the respondent and determine whether the respondent should be retained in the naval service or recommended for (discharge) (retirement) from the naval service by reason of (substandard performance of duty) (misconduct) (moral or professional dereliction) (retention not clearly consistent with the interests of national security (discharge) (retirement) from the naval service by reason of (substandard performance of duty) (misconduct) (moral or professional dereliction) (retention not clearly consistent with the interests of national security) (\_\_\_\_\_).

**SECTION II. RIGHT TO COUNSEL**



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SRMBR: I will now advise the respondent of his/her right to counsel before the board. These rights were listed in the notification. Does counsel desire that I explain these rights to the respondent?

COUNSEL: The respondent (desires explanation) (fully understands his/her right to counsel and does not desire further explanation).

**SECTION III. EXPLANATION OF RIGHT TO COUNSEL**  
**(OMIT AND GO TO SECTION IV IF RESPONDENT WAIVES EXPLANATION)**

SRMBR: I will now advise the respondent of his/her right to counsel before this board. If you have any questions, you should direct them to me, or, in private, to your counsel.

You have the following rights:

a. To have appointed as military counsel, a military lawyer certified under Article 27(b)(1), UCMJ.

b. To request individual military counsel of your own choice if the counsel is reasonably available. Both the appointed and individual military counsel may represent you only if the convening authority, in his or her sole discretion, approves a written request from you requesting representation by both counsel and stating in detail why such representation is necessary to ensure a fair hearing.

c. To retain civilian counsel at no expense to the government, in addition to, or in lieu of, military counsel. Consultation with, or retention of civilian counsel, shall not delay orderly processing of the board. The government will not reimburse you for costs or fees of civilian counsel or for any other expenses incurred concerning any board proceedings.

SRMBR: Do you understand your right to counsel before this board of inquiry?

RESP: (Yes) (No) sir/ma'am.

SRMBR: By whom do you wish to be represented?

RESP: \_\_\_\_\_ sir/ma'am.

NOTE: The respondent may elect to represent him/herself at the board, but his/her detailed defense counsel should still be present. If he/she desires to represent him/herself, he/she must so state on the record and sign a written waiver of counsel, which will be included as a government exhibit. The senior member, after inquiring to ensure that the respondent is knowingly and voluntarily waiving his/her right to counsel, should state, "I find your waiver of counsel to be knowing and voluntary."

**SECTION IV. ADDITIONAL RIGHTS**

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SRMBR: In addition to your right to counsel, you have many other rights at this board. These were listed in the notification and the acknowledgment of rights. Does counsel desire that I explain these additional rights to the respondent?

COUNSEL: The respondent (desires explanation) (fully understands his/her rights and does not desire further explanation).

**SECTION V. EXPLANATION OF ADDITIONAL RIGHTS**  
**(OMIT AND GO TO SECTION VI IF RESPONDENT WAIVES EXPLANATION)**

SRMBR: I now will now advise you your rights before this board. If you have any questions, you should direct them to me, or, in private, to your counsel. You have the following rights:

1. To request reasonable additional time to prepare your case. This is time in addition to the 30 calendar days provided between the time of the notification and the time of the hearing. Before the hearing convenes, the convening authority decides continuance requests. After the hearing convenes, I, as the senior member, will decide them. However, the show cause authority must approve any request that continues the hearing for more than 60 calendar days from the date of notification.

2. To qualified counsel as explained in Section IV of this guide.

3. To present matters in your own behalf.

4. To full access to, and copies of, U.S. Government records relevant to the case. DC M&RA may withhold (1) classified information, or (2) information whose release is prohibited by federal law. A summary of classified information will be provided to the extent the interests of national security permit.

5. To the names of all witnesses in advance of the board hearing. Failure to provide any information or the name of a witness shall not preclude the board from considering the information or hearing the witness, provided you have had the opportunity to examine any statement, or talk with any witness presented, prior to consideration by the board.

6. To question or to challenge any member or the legal advisor for cause at the hearing or to present any information showing that the member cannot render a fair and impartial decision.

7. To request from the convening authority, or the board, the personal appearance before the board of any witness whose testimony you consider to be pertinent to your case, as provided in paragraph (9) of SECNAVINST 1920.6\_.

8. To submit prior to, or during the board, any matter from your service record; sworn or unsworn statements; affidavits; depositions; certificates; stipulations; letters; answers; and any other real or documentary evidence.



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9. You and counsel may question any witnesses appearing before the board. Any witness who testifies live to the board (in person or by telephone) must be under oath or affirmation, although you may make an unsworn statement.

10. You may remain silent or give sworn or unsworn testimony. You may testify, sworn or unsworn, personally or through counsel. The members and recorder can question or cross-examine you if you testify under oath. Neither the members nor the recorder may question or cross-examine you if you give unsworn testimony, but the recorder may present evidence to rebut the content of your unsworn testimony.

11. You or counsel may present argument on any matter before the board.

12. To receive a copy of the record of the proceedings. The record is the Report of the BOI and its enclosures, including the transcript and exhibits. Classified material may be redacted from the record and replaced with a summary.

13. To provide, within 10 calendar days after receiving the Report of the BOI, corrections of any errors, comments on the record, and any other matters concerning the board proceedings. You, or your counsel, may request an extension to the Alternate Show Cause Authority or Show Cause Authority who directed the BOI. Such requests for extension shall not exceed 20 calendar days.

14. To appear in person, with or without counsel, at all board proceedings except closed proceedings and deliberations.

Your failure to invoke any of these rights is a waiver of those rights and does not bar the board's proceedings, findings, or recommendations. You are also advised that if you are dissatisfied with the ultimate decision in your case that you may request relief from the Board for Correction of Naval Records or, if you are involuntarily separated, the Naval Discharge Review Board.

SRMBR: Do you have any questions concerning your rights at this board?

RESP: (Yes) (No), sir/ma'am.

**SECTION VI: GENERAL INSTRUCTIONS**

SRMBR: The purpose of this board is to give the respondent a full and impartial hearing and an opportunity to respond to and rebut the allegations which are the basis for referring this case to a board of inquiry. After hearing evidence from both sides, the board will determine whether the preponderance of the evidence proves those allegations. If a preponderance of the evidence does not support the allegations, the case will be closed by the Deputy Commandant, Manpower and Reserve Affairs (DC M&RA).

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**A. READ IF THE RESPONDENT IS NOT RETIREMENT-ELIGIBLE**

SRMBR: If the preponderance of the evidence supports the allegations, the board will recommend whether the respondent should be discharged. If it recommends discharge, it will also recommend the characterization of the discharge. Since a discharge would be at the grade the respondent currently holds, the board will not recommend a discharge grade if it recommends discharge in the respondent's current grade.

**B. READ IF THE RESPONDENT IS ELIGIBLE FOR RETIREMENT (OR TRANSFER TO THE RETIRED RESERVE)**

SRMBR: Depending on the officer's duty status, an officer, whether regular or Reserve, may be eligible for retirement; however, a Reserve officer may not be eligible for retirement, but may instead be eligible for transfer to the retired reserve. In this case, the officer is (eligible for retirement)(eligible for transfer to the retired reserve).

SRMBR: If the preponderance of the evidence supports the allegations, the board will recommend whether the respondent should be retired (transferred to the retired reserve). If it recommends retirement (transfer to the retired reserve), it will also recommend to the Secretary of the Navy whether retirement (transfer) should be in the current grade or the last grade satisfactorily held.

SRMBR: If the DC M&RA has authorized this board to recommend a characterization of service, the board will make such a recommendation. However, if DC M&RA has not authorized this board to recommend a characterization of service, the board shall not do so.

**C. READ IN ALL CASES**

SRMBR: Depending on the board's findings and recommendations, final action on the case will be taken by the DC M&RA or the Secretary of the Navy.

SRMBR: The members are informed that Congress created two separate systems for adjudicating officer misconduct cases.

SRMBR: The first system is the judicial system, implemented by the Uniform Code of Military Justice. The purpose of the judicial system is to determine guilt and punishment, and such determinations are made at nonjudicial punishment hearings or courts-martial.

SRMBR: The second system is the administrative system, which is implemented by statute and regulations. The purpose of the administrative system is not to punish but to determine whether an officer's performance or conduct warrants separation from the service. Thus, the board of inquiry examines allegations against an officer and, if it substantiates them, recommends whether the officer should be retained or separated (involuntarily retired).



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SRMBR: The officer's commander reviews each case of officer misconduct and determines the most appropriate means of resolving the allegations against the officer: the judicial system alone; the administrative system alone; or both systems.

SRMBR: The judicial and administrative systems may work independently. For example, a board of inquiry may be held without an officer receiving nonjudicial punishment. On the other hand, an officer may receive nonjudicial punishment but never have the case referred to a board of inquiry.

SRMBR: Likewise, the systems may work together; for example, an officer may receive nonjudicial punishment and then have his case referred to a board of inquiry. Referring an officer's case to a board of inquiry after the officer's case has been to a court-martial or to a nonjudicial punishment hearing is not double jeopardy.

SRMBR: Accordingly, this board of inquiry functions as an administrative rather than a judicial body. The rules of evidence applicable at courts-martial do not apply at this hearing; however, Article 31(b), UCMJ, does apply. No military member may be compelled to testify or produce evidence that will tend to incriminate that member or be required to answer questions not material to issues before the board.

SRMBR: The following will occur during the hearing: voir dire of the members and legal advisor and challenges for cause; motions; opening statements; presentation of exhibits; presentation of the government's case; presentation of the respondent's case; rebuttal; closing arguments from counsel; instructions for the members; and deliberation by the members. The members are cautioned not to make any decisions until after hearing all the evidence; final arguments of counsel; and instructions on deliberation. All board proceedings will be conducted in this room while the board is in session.

SRMBR: This board will consider any matter presented which is relevant to the issues before the board, whether written or oral, sworn or unsworn. Real evidence--as distinguished from testimonial or documentary evidence--may be shown and admitted to the board and should be accurately described or reproduced for the record. The board may refuse to consider any oral or written matter presented if it is irrelevant, not authentic, or unnecessarily repetitive or cumulative. However, evidence will not be excluded merely because it would be inadmissible in a court. If evidence is classified, the provisions of the Department of the Navy information security regulations will be observed.

SRMBR: Board decisions are made by majority vote based on the preponderance of the evidence, which is the standard of proof. A preponderance, which is the same standard for nonjudicial punishment hearings, is less than beyond reasonable doubt, which is the standard at a court-martial. A preponderance of the evidence proves a fact if the greater weight of evidence, i.e., 51% or more of the evidence, supports

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the fact. The weight of evidence is not determined by the sheer number of witnesses or volume of evidentiary matter; it is determined by the evidence which best accords with reason and probability. The board members will rely on their individual judgment and experience in determining the weight and credibility to be given to the evidence.

SRMBR: The legal advisor will rule on all matters of procedure, evidence, and challenges, except challenges to themselves. The convening authority will rule on all challenges for cause to the legal advisor.

SRMBR: Since the procedures used at this hearing may be unfamiliar to the board members, the members are encouraged to ask questions during the hearing about those procedures.

SRMBR: The hearing will be conducted in an atmosphere of decorum and dignity. Members and witnesses will be treated with respect and protected from questions which exceed the bounds of proper examination and propriety or which are intended merely to harass, annoy, or humiliate. Witnesses will be excluded from the hearing until after their testimony is complete.

**VII. CHALLENGES TO BOARD MEMBERS**

SRMBR: Does either side desire to question a member [or legal advisor] on possible grounds for challenge for cause?

REC: The recorder has (a few) (no) questions  
(\_\_\_\_\_).

COUNSEL: The respondent has (a few) (no) questions  
(\_\_\_\_\_).

SRMBR: Does the recorder or the respondent wish to challenge any board member or the legal advisor for cause?

REC: The recorder does (not).

COUNSEL: The respondent does (not).

SRMBR: [If a challenge is made, recess to resolve it. Consult the legal advisor if necessary. The senior member announces the results of the challenge and summarizes the reasoning behind the decision]

SRMBR: Are both sides ready to proceed?

REC: The recorder is ready  
(\_\_\_\_\_).

COUNSEL: Counsel for the respondent is ready  
(\_\_\_\_\_).

**SECTION VIII: MOTIONS AND OPENING STATEMENTS**



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SRMBR: Does either side have any motions?

REC: The government does (not)  
( ).

COUNSEL: The respondent does (not)  
( ).

SRMBR: [If a motion is made, recess to resolve it. Consult the legal advisor if necessary. The senior member announces the ruling of the motion and summarizes the reasoning behind the decision.]

SRMBR: The recorder may proceed with an opening statement.

REC: (The recorder has no opening statement)  
( ).

SRMBR: Counsel for the respondent may proceed with an opening statement or may wait until after the recorder has presented the government's case. When does counsel for respondent desire to give an opening statement?

COUNSEL: Counsel (will wait until after the government's case) (will give opening statement now) (has no opening statement)  
( ).

SRMBR: Unless either side objects, the board will receive each side's exhibits now so that the members can review them before hearing testimony. Any exhibits received and reviewed now is merely to assist the Board in understanding the case and possibly ask more informed questions, when appropriate. The Board remains cautioned to not pre-decide any issues before this Board. Does either side object to this procedure?

REC: The recorder (does) (does not) object.

COUNSEL: The recorder (does) (does not) object.

**SECTION IX: PRESENTATION OF EXHIBITS**

REC: I will hand to the senior member the original government exhibits offered to the board. They are marked as "GE" and numbered as noted in the list of government exhibits in front of government exhibit one. I also have a copy of these exhibits for each member; please write on the copies but not the originals. Included in a separate folder with the original exhibits is the original findings worksheet which the members will use to record findings and recommendations. Instructions are at the top of the worksheet.

SRMBR: Does the respondent object to any of these exhibits?

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COUNSEL: The respondent (does) (does not) object (for the following reasons: \_\_\_\_\_) (If needed, recess to consult legal advisor).

SRMBR: All government exhibits are admitted (except for GE \_\_\_\_\_) (The following objections are decided as follows: \_\_\_\_\_) (summarize the reasoning behind the decision)). Does the respondent have any exhibits?

COUNSEL: The respondent offers the following exhibits marked as "RE" and lettered:

RE A: \_\_\_\_\_  
 RE B: \_\_\_\_\_  
 RE C: \_\_\_\_\_  
 RE D: \_\_\_\_\_

SRMBR: Does the recorder object to any of these exhibits?

REC: The recorder (does) (does not) object (for the following reasons: \_\_\_\_\_) (If needed, recess to consult legal advisor).

SRMBR: All respondent exhibits are admitted (except for RE \_\_\_\_\_) (The following objections are decided as follows: \_\_\_\_\_) (summarize the reasoning behind the decision)).

SRMBR: The board will recess to review these documents. The reporter will note the time and date for the record.

**SECTION X: WITNESSES**

SRMBR: The board will come to order. All persons who were present when the board recessed are again present. The reporter will note the time and date for the record. The recorder may present the government's case.

REC: The government (calls \_\_\_\_\_ as a witness) (has nothing further).

NOTE: All witnesses will be sworn. ***OATH: Do you swear or affirm that the evidence you shall provide at this hearing shall be the truth, the whole truth, and nothing but the truth?*** The order of questioning: direct examination by recorder; cross-examination by respondent's counsel; redirect (as necessary); re-cross (as necessary); examination by the board. If during live testimony any witness subject to the UCMJ provides information indicating that he or she committed an offense under the UCMJ, s/he will be advised of her/his rights under Article 31(b) of the UCMJ.

SRMBR: Does the government have any more witnesses?

REC: The government (has no further witnesses) (\_\_\_\_\_).



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SRMBR: Does the respondent have any witnesses?

COUNSEL: The respondent (calls \_\_\_\_\_ as a witness) (has nothing further).

NOTE: All witnesses will be sworn (the respondent, however, may give unsworn testimony; if he/she gives unsworn testimony, neither the board nor the members can cross-examine him/her). ***OATH: Do you swear or affirm that the evidence you shall provide at this hearing shall be the truth, the whole truth, and nothing but the truth?*** The order of questioning: direct examination by counsel for respondent; cross-examination by the recorder; redirect (as necessary); re-cross (as necessary); examination by the board. If the respondent testifies (sworn or unsworn), he/she will sign and date a Privacy Act statement to be attached to the record as a government exhibit. If during live testimony any witness subject to the UCMJ provides information indicating that he/she committed an offense under the UCMJ, s/he will be advised of her/his rights under Article 31(b) of the UCMJ.

SRMBR: Does the respondent have any more witnesses?

COUNSEL: The respondent (has no further witnesses) (\_\_\_\_\_).

**XI. REBUTTAL**

SRMBR: Does the government have any rebuttal evidence?

REC: The government has (none) (calls the following witnesses: \_\_\_\_\_).  
(submits the following exhibits: GE- \_\_\_\_\_).

SRMBR: (The following government exhibits are admitted: GE- \_\_\_\_\_).  
.

SRMBR: Does the respondent have any more evidence?

COUNSEL: The respondent has (none) (calls the following witnesses: \_\_\_\_\_).  
(submits the following exhibits: RE- \_\_\_\_\_).

SRMBR: (The following respondent's exhibits are admitted: RE- \_\_\_\_\_).

SRMBR: Does any member of the board want to recall a witness, call an additional witness, or obtain any further evidence?

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SRMBR: The members (do not want to recall a witness, call an additional witness, or obtain any further evidence) (want to \_\_\_\_\_).

**XII. CLOSING ARGUMENTS**

SRMBR: Are both sides prepared for argument?

REC: The government is.

COUNSEL: The respondent is.

SRMBR: The recorder may proceed.

REC: \_\_\_\_\_.

SRMBR: Counsel for the respondent may proceed.

COUNSEL: \_\_\_\_\_.

SRMBR: Does the recorder have any final argument?

REC: The government (has no rebuttal) (has the following rebuttal:

\_\_\_\_\_) .

SRMBR: Does either side have anything further to present?

REC: The Government has (nothing further) (\_\_\_\_\_) .

COUNSEL: The respondent has (nothing further) (\_\_\_\_\_) .

**XIII: INSTRUCTIONS ON DELIBERATION**

SRMBR: The board will make the following determinations by majority vote based on the preponderance of the evidence presented at the hearing:

**A. READ IF RESPONDENT IS NOT ELIGIBLE FOR  
RETIREMENT (OR TRANSFER TO THE RETIRED RESERVE)**

SRMBR: If the board finds that the evidence DOES NOT SUBSTANTIATE the allegations, the board will recommend that the case be closed. If the board finds that the evidence SUBSTANTIATES the allegations, the board will make one of two recommendations:

(1) it will recommend that the respondent, notwithstanding the substantiated allegations, be retained and that the case be closed, OR

(2) it will recommend that the respondent be separated.



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SRMBR: If the board recommends separation, it must recommend characterization of service. If the basis for separation is substandard performance, the characterization of service must be honorable. If the basis includes misconduct or moral or professional dereliction, the board may recommend an Honorable, a General (Under Honorable Conditions), or an Other Than Honorable characterization of service.

SRMBR: During deliberation, the board will review the guidance in SECNAVINST 1920.6C on determining retention and characterization.

**B. READ IF THE RESPONDENT IS ELIGIBLE FOR  
RETIREMENT (OR TRANSFER TO THE RETIRED RESERVE)**

SRMBR: If the board finds that the evidence DOES NOT SUBSTANTIATE the allegations, the board will recommend that the case be closed. If the board finds that the evidence SUBSTANTIATES the allegations, the board will make one of two recommendations:

(1) it will recommend that the respondent, notwithstanding the substantiated allegations, not be retired and close the case, OR

(2) it will recommend that the respondent be retired (transferred to the retired reserve).

SRMBR: If the board recommends retirement (or transfer to the retired reserve), it must recommend a retirement grade.

SRMBR: Since an officer retires at the highest grade in which the officer served satisfactorily, the board must determine if the officer has served satisfactorily in the current grade. If that service is satisfactory, the board recommends retirement (or transfer to the retired reserve) in the current grade; if that service is unsatisfactory, the board recommends retirement (or transfer to the retired reserve) in the last grade satisfactorily held.

SRMBR: In determining if service in grade was satisfactory, the board will consider the record of service during the entire period the grade was held. The board will follow the guidance in enclosure (6) of SECNAVINST 1920.6\_.

SRMBR: In order to retire in grade (or be transferred to the retired reserve) the officer must also have served the minimum time required by statute or regulations. The respondent has (has not) served for a minimum time to be retired (transferred to the retired reserve) in grade.

NOTE: The recorder will provide retirement eligibility information to the members. 10 USC §§ 1370 and 6323 address regular and Reserve officers; section 1371 and 1293 address warrant officers; and section 12771 addresses officers eligible for transfer to the retired reserve. MCO 1900.16 w/ch 1 (MARCORSEPMAN) also addresses minimum time in grade requirements. Consult the legal advisor with any questions.



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SRMBR: If the DC M&RA has authorized this board to recommend a characterization of service, the board will make such a recommendation. However, if the DC M&RA has not authorized this board to recommend a characterization of service, the board shall not do so.

**C. READ IN ALL CASES**

SRMBR: Board deliberations include a full and free discussion of all matters presented for the board's consideration. The board will decide its findings and recommendations by majority vote. The senior member will record the findings and recommendations on the findings and recommendations worksheet by placing his or her initials in the blank beside any finding or recommendation decided by majority vote. Instructions are at the top of the worksheet. I have the original worksheet. Does either side object to the worksheet?

REC: The recorder (does) (does not) object (for the following reasons: \_\_\_\_\_) (If needed, recess to consult legal advisor).

COUNSEL: The respondent (does) (does not) object (for the following reasons: \_\_\_\_\_) (If needed, recess to consult legal advisor).

SRMBR: (The following objections are decided as follows: \_\_\_\_\_ (summarize the reasoning behind the decision)).

SRMBR: **[Read if evidence of preservice misconduct has been introduced]**  
The board is advised that SECNAVINST 1920.6\_ imposes a limitation on considering evidence of preservice misconduct. The board may only consider it for the purpose of deciding whether to recommend separation or retention of the respondent. Such evidence shall not be used in determining the recommendation for characterization of service. The board will affirmatively state on the findings and recommendations worksheet that such evidence was considered only for the purpose of determining whether it should recommend retention or separation.

SRMBR: **[Read if performance or conduct identified more than five years prior to the initiation of processing for separation has been introduced]**  
The board is advised that SECNAVINST 1920.6\_ imposes a limitation on considering performance or conduct identified more than five years prior to the initiation of processing for separation. Performance or conduct is deemed to have been "identified" when it is reported to the show cause authority. "Initiation of processing" is deemed to have occurred when the the show cause authority officially notifies the officer of administrative separation processing. The board will affirmatively state on the findings and recommendations worksheet that the board did not consider such evidence.



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SRMBR: [Read if the respondent is a Reservist being processed for separation based on conduct in the civilian community committed while the respondent was not on active duty or active duty for training and not wearing the military uniform] The board is advised that SECNAVINST 1920.6\_ imposes a limitation on the characterization of service for conduct in the civilian community of members of a reserve component who are not on active duty or active duty for training. Such conduct may form the basis for an Other Than Honorable characterization of service only if such conduct affects directly the performance of the member's military duties. Such conduct may form the basis for a General (Under Honorable Conditions) characterization of service only if such conduct has an adverse impact on the overall effectiveness of the Naval Service, including the military morale and efficiency. If a military member tests positive for the presence of illegal drugs in the member's body while in an active or inactive status, the drug abuse shall be deemed to have affected directly the member's readiness and performance of military duties. The board will review SECNAVINST 1920.6\_ during deliberation.]

SRMBR: Does either side have any questions or anything further?

REC: The Government has (none).

COUNSEL: The respondent has (none).

SRMBR: The board closed for deliberation at \_\_\_\_\_ hours, on \_\_\_\_\_. All parties, except board members, will leave the hearing room.

**XIV: ANNOUNCEMENT OF FINDINGS AND RECOMMENDATIONS**

SRMBR: The board opened at \_\_\_\_\_ hours \_\_\_\_\_ on \_\_\_\_\_. I will announce the findings and recommendations of the board by reading from the worksheet: (senior member reads findings and recommendations worksheet). The worksheet will be made an enclosure to the board's report.

SRMBR: The board has no minority report (The following member(s) will be submitting minority reports: \_\_\_\_\_ (summarize reason for minority report(s)); this (these) minority report(s) will include the extent of nonconcurrence with the majority and will be attached as an enclosure (enclosures) to the board's report).

SRMBR: Does anyone have any other business to bring before the board? If not, the board is adjourned.

**END OF PROCEEDING**

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Figure 15-21(a)**BOI Findings Worksheet (Not Retirement Eligible)**

(Note: Below is an example using the most common reasons for separation. Each reason listed on the BOI direction letter must be listed on the findings worksheet. The findings worksheet may NOT contain a basis for separation that is not in the BOI direction letter. The worksheet must be tailored for each case.)

**FINDINGS OF THE BOARD OF INQUIRY**

*[AS THE BOARD VOTES DURING DELIBERATION, THE SENIOR MEMBER INITIALS BLANKS ON THIS WORKSHEET TO INDICATE THE BOARD'S DECISIONS. THE SENIOR MEMBER WILL THEN ANNOUNCE THE BOARD'S DECISIONS BY READING THIS WORKSHEET WHEN THE BOARD RECONVENES.]*

[Rank First Name MI Last Name MOS USMC/R], by a majority vote, this Board of Inquiry finds that:

*[SELECT AND INITIAL NEXT TO PARAGRAPH (1) OR (2). IF 2 IS SELECTED, ALSO SELECT AND INITIAL PARAGRAPHS (3)-(5).]*

1. ALLEGATION(S) UNSUBSTANTIATED. The preponderance of the evidence substantiates none of the reasons for separation for cause. Accordingly, the Board recommends that your case be closed.
2. ALLEGATIONS(S) SUBSTANTIATED. The preponderance of the evidence substantiates [one or more of] the reason(s) for separation for cause as set forth below.
  - a. Substandard Performance of Duty. Specifically:
    - (1) Failure to demonstrate acceptable qualities of leadership required of an officer of [his/her] grade.
    - (2) Failure to properly discharge the duties expected of an officer of [his/her] grade and experience.
  - b. Misconduct and Moral or Professional Dereliction. Specifically:
    - (1) Commission of a military or civilian offense that, if prosecuted under the UCMJ, could be punished by confinement of six months or more, or if prosecuted under the UCMJ, would require specific intent for conviction. Specifically:
      - (a) A violation of Article [xxx], UCMJ.
      - (b) A violation of Article [xxx], UCMJ.

(list each Article separately)



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(2) \_\_\_\_\_ Intentional misrepresentation or omission of material fact in official written documents or official oral statements.

3. **RETENTION OR SEPARATION**. Having found that the preponderance of the evidence substantiates [one or more of] the reason(s) for separation:

a. \_\_\_\_\_ **Retention**. The Board finds that none of the reasons listed above warrant [Rank Name's] separation from the naval service and recommends closing the case.

b. \_\_\_\_\_ **Separation**. The Board recommends separating [Rank Name] from the naval service for the reason(s) listed above. The Board further recommends that [Rank Name's] service be characterized as:

- (1) \_\_\_\_\_ Honorable\*
- (2) \_\_\_\_\_ General (Under Honorable Conditions)
- (3) \_\_\_\_\_ Other Than Honorable

\*Note: If the CG directed the officer to show cause for substandard performance only, the only available characterization of service is Honorable.

*[SEE ENCLOSURE (5) OF SECNAVINST 1920.6\_ FOR GUIDANCE ON CHARACTERIZATION OF SERVICE RECOMMENDATION]*

4. **MINORITY REPORT**

*[IF ANY MEMBER OF THE BOARD DOES NOT CONCUR WITH THE MAJORITY, THE NONCONCURRING MEMBER MUST SUBMIT A MINORITY REPORT WHICH INCLUDES THE EXTENT OF NON-CONCURRENCE AS TO EACH FINDING AND RECOMMENDATION AND THE REASONS THEREFORE.]*

- a. \_\_\_\_\_ There is no minority report. OR
- b. \_\_\_\_\_ The minority report will be attached to the Report of the Board of Inquiry.

5. **ADDITIONAL CONSIDERATIONS**

a. **Preservice Misconduct**

*[IF THE BOARD CONSIDERS PRESERVICE MISCONDUCT, THE SENIOR MEMBER MUST INDICATE THAT THE MEMBERS CONSIDERED THE PRESERVICE MISCONDUCT ONLY FOR THE PURPOSE OF DETERMINING WHETHER TO RECOMMEND RETENTION OR SEPARATION.]*

- (1) \_\_\_\_\_ The Board of Inquiry did not consider preservice misconduct. OR

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(2) \_\_\_\_\_ The Board of Inquiry considered preservice misconduct, but only for the purpose of determining whether to recommend retention or separation.

**b. Misconduct Older Than Five Years**

[THE BOARD MAY NOT CONSIDER MISCONDUCT **IDENTIFIED** MORE THAN FIVE YEARS PRIOR TO THE INITIATION OF PROCESSING FOR SEPARATION TO FORM THE **BASIS** FOR SEPARATION (SUBSTANDARD PERFORMANCE OF DUTY OR MISCONDUCT AND MORAL OR PROFESSIONAL DERELICTION). THE SENIOR MEMBER MUST INDICATE THAT THE MEMBERS DID NOT CONSIDER THIS TYPE OF MISCONDUCT TO FORM THE BASIS OF SEPARATION. THE BOARD MAY CONSULT WITH THE LEGAL ADVISOR WITH QUESTIONS CONCERNING PRIOR MISCONDUCT. SECNAVINST 1920.6\_ ENCLOSURE (4), PARAGRAPH 11e]

(1) \_\_\_\_\_ The Board of Inquiry did not consider misconduct identified more than five years prior to the initiation of processing for separation.

\_\_\_\_\_  
 Initials Lname  
 Rank, USMC  
 President

\_\_\_\_\_  
 Initials Lname  
 Rank, USMC  
 Member

\_\_\_\_\_  
 Initials Lname  
 Rank, USMC  
 Member

\_\_\_\_\_  
 Initials Lname  
 Rank, USMC  
 Recorder

\_\_\_\_\_  
 Initials Lname  
 Rank, Service  
 Respondent's Counsel

\_\_\_\_\_  
 Initials Lname  
 Rank, Service  
 Respondent's Counsel



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Figure 15-21(b)  
BOI Findings Worksheet (Retirement Eligible)

(Note: Below is an example using the most common reasons for separation. Each reason listed on the BOI direction letter must be listed on the findings worksheet. The findings worksheet may NOT contain a basis for separation that is not in the BOI direction letter. The worksheet must be tailored for each case.)

**FINDINGS OF THE BOARD OF INQUIRY**

*[AS THE BOARD VOTES DURING DELIBERATION, THE SENIOR MEMBER INITIALS BLANKS ON THIS WORKSHEET TO INDICATE THE BOARD'S DECISIONS. THE SENIOR MEMBER WILL THEN ANNOUNCE THE BOARD'S DECISIONS BY READING THIS WORKSHEET WHEN THE BOARD RECONVENES.]*

[Rank First Name MI Last Name MOS USMC/R], by a majority vote, this Board of Inquiry finds that:

*[SELECT AND INITIAL NEXT TO PARAGRAPH (1) OR (2). IF 2 IS SELECTED, ALSO SELECT AND INITIAL PARAGRAPHS (3)-(5).]*

1. ALLEGATION(S) UNSUBSTANTIATED. The preponderance of the evidence substantiates none of the reasons for separation for cause. Accordingly, the Board recommends that your case be closed.
2. ALLEGATIONS(S) SUBSTANTIATED. The preponderance of the evidence substantiates [one or more of] the reason(s) for separation for cause as set forth below.
  - a. Substandard Performance of Duty. Specifically:
    - (1) Failure to demonstrate acceptable qualities of leadership required of an officer of [his/her] grade.
    - (2) Failure to properly discharge the duties expected of an officer of [his/her] grade and experience.
  - b. Misconduct and Moral or Professional Dereliction. Specifically:
    - (1) Commission of a military or civilian offense that, if prosecuted under the UCMJ, could be punished by confinement of six months or more, or if prosecuted under the UCMJ, would require specific intent for conviction. Specifically:
      - (a) A violation of Article [xxx], UCMJ.
      - (b) A violation of Article [xxx], UCMJ.

(list each Article separately)

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(2) \_\_\_\_\_ Intentional misrepresentation or omission of material fact in official written documents or official oral statements.

3. **RETENTION OR INVOLUNTARY RETIREMENT.** Having found that the preponderance of the evidence substantiates [one or more of] the reason(s) for involuntary retirement:

a. \_\_\_\_\_ **Retention.** The Board finds that none of the reasons listed above warrant [Rank Name's] involuntary retirement from the naval service and recommends closing the case.

b. \_\_\_\_\_ **Involuntary Retirement.** The Board recommends involuntarily retiring [Rank Name] for the reason(s) listed above. The Board further recommends that [Rank/Name] be retired:

(1) \_\_\_\_\_ In [his/her] current grade.

(2) \_\_\_\_\_ In the inferior grade of \_\_\_\_\_.

c. \_\_\_\_\_ **Characterization of Service.** (Only if authorized by the DC M&RA.) The Board recommends that [Rank/Name's] service be characterized as:

(a) \_\_\_\_\_ Honorable.

(b) \_\_\_\_\_ General (Under Honorable Conditions).

(c) \_\_\_\_\_ Other Than Honorable.

*[THE BOARD IS NOT LIMITED TO ONE GRADE LOWER THAN SNO'S CURRENT GRADE IF THE BOARD FINDS THAT SNO HAS NOT SATISFACTORILY HELD THAT INFERIOR GRADE. SEE ENCLOSURES (6) and (8) OF SECNAVINST 1920.6\_ FOR GUIDANCE ON RETIREMENT GRADE RECOMMENDATION.]*

#### 4. **MINORITY REPORT**

*[THE BOARD MAY NOT CONSIDER MISCONDUCT **IDENTIFIED** MORE THAN FIVE YEARS PRIOR TO THE INITIATION OF PROCESSING FOR SEPARATION TO FORM THE **BASIS** FOR SEPARATION (SUBSTANDARD PERFORMANCE OF DUTY OR MISCONDUCT AND MORAL OR PROFESSIONAL DERELICTION). THE SENIOR MEMBER MUST INDICATE THAT THE MEMBERS DID NOT CONSIDER THIS TYPE OF MISCONDUCT TO FORM THE BASIS OF SEPARATION. THE BOARD MAY CONSULT WITH THE LEGAL ADVISOR WITH QUESTIONS CONCERNING PRIOR MISCONDUCT. SECNAVINST 1920.6\_ ENCLOSURE (4), PARAGRAPH 11e]*

a. \_\_\_\_\_ There is no minority report. OR

b. \_\_\_\_\_ The minority report will be attached to the Report of the Board of Inquiry.

#### 5. **ADDITIONAL CONSIDERATIONS**



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**a. Preservice Misconduct**

[IF THE BOARD CONSIDERS PRESERVICE MISCONDUCT, THE SENIOR MEMBER MUST INDICATE THAT THE MEMBERS CONSIDERED THE PRESERVICE MISCONDUCT ONLY FOR THE PURPOSE OF DETERMINING WHETHER TO RECOMMEND RETENTION OR INVOLUNTARY RETIREMENT.]

(1) \_\_\_\_\_ The Board of Inquiry did not consider preservice misconduct. OR

(2) \_\_\_\_\_ The Board of Inquiry considered preservice misconduct, but only for the purpose of determining whether to recommend retention or involuntary retirement.

**b. Misconduct Older Than Five Years**

[THE BOARD MAY NOT CONSIDER MISCONDUCT **IDENTIFIED** MORE THAN FIVE YEARS PRIOR TO THE INITIATION OF PROCESSING FOR SEPARATION TO FORM THE **BASIS** FOR SEPARATION (SUBSTANDARD PERFORMANCE OF DUTY OR MISCONDUCT AND MORAL OR PROFESSIONAL DERELICTION). THE SENIOR MEMBER MUST INDICATE THAT THE MEMBERS DID NOT CONSIDER THIS TYPE OF MISCONDUCT TO FORM THE BASIS OF SEPARATION. THE BOARD MAY CONSULT WITH THE LEGAL ADVISOR WITH QUESTIONS CONCERNING PRIOR MISCONDUCT. SECNAVINST 1920.6\_ ENCLOSURE (4), PARAGRAPH 11.e]

(1) \_\_\_\_\_ The Board of Inquiry did not consider misconduct identified more than five years prior to the initiation of processing for separation.

\_\_\_\_\_  
Initials LName  
Rank, USMC  
President

\_\_\_\_\_  
Initials LName  
Rank, USMC  
Member

\_\_\_\_\_  
Initials LName  
Rank, USMC  
Member

\_\_\_\_\_  
Initials LName  
Rank, USMC  
Recorder

\_\_\_\_\_  
Initials LName  
Rank, Service  
Respondent's Counsel

\_\_\_\_\_  
Initials LName  
Rank, Service  
Respondent's Counsel

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Figure 15-22

## Report of BOI (Not Retirement Eligible)

From: Senior Board Member  
 To: Secretary of the Navy  
 Via: (1) Chain of Command  
       (2) Alternate Show Cause Authority  
       (3) Commandant of the Marine Corps (JPL)

Subj: REPORT OF THE BOARD OF INQUIRY IN THE CASE OF [RANK FIRST NAME MI  
 LAST NAME MOS USMC/R]

Ref: (a) SECNAVINST 1920.6  
       (b) MCO 5800.16 (LSAM), Vol 15 (Officer Misconduct and Substandard  
             Performance of Duty)  
       (c) CG, [Unit] ltr 1920 Code of [date] (BOI dir ltr)  
       (d) CG, [Unit] ltr 1920 Code of [date] (BOI convening  
             order)

Encl: (1) Transcript of the Board's proceedings  
       (2) Government Exhibits  
       (3) Respondent Exhibits  
       (4) Findings and Recommendations Worksheet  
       (5) [Minority Report]  
       (6) Certificate of Service  
       (7) Acknowledgement of Receipt  
       (8) Privacy Act Statement

1. This report is submitted per enclosure (8) of reference (a) and paragraph 010904.B of reference (b).

2. As directed by references (c) and (d), a Board of Inquiry (BOI) convened at [command/location] and conducted a hearing in accordance with the requirements of references (a) and (b).

3. Enclosures (1) through (8) are forwarded pursuant to references (a) and (b).

4. Reasons for showing cause for retention. The purpose of the BOI was to recommend whether the respondent should be separated from the U.S. Marine Corps, and if so, the appropriate characterization of service. The Board considered these specific reasons for separation:

a. [Insert bases from reference (c)].

5. Acts alleged. The specific acts supporting the above bases are: [insert brief summary of allegation(s)].

6. Respondent's position with respect to the allegation(s). The respondent asserts that [insert brief summary of the respondent's position].



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PARAGRAPHS SEVEN AND EIGHT WILL DEPEND ON THE BOI'S FINDINGS AND RECOMMENDATIONS.

**ALLEGATIONS UNSUBSTANTIATED**

7. Findings. The Board found that a preponderance of the evidence did not prove the allegations. See enclosures (1) and (4).

8. Recommendations. The Board recommended closing the case. Enclosures (1) and (4).

**ALLEGATIONS SUBSTANTIATED – RETENTION RECOMMENDATION**

7. Findings. The Board found that a preponderance of the evidence proved the allegations. See enclosures (1) and (4).

8. Recommendations. The Board recommended that the respondent be retained and that the case be closed. See enclosures (1) and (4).

**ALLEGATIONS SUBSTANTIATED – SEPARATION RECOMMENDATION**

7. Findings. The Board found that a preponderance of the evidence proved the allegations. See enclosures (1) and (4).

8. Recommendations. The Board recommended that the respondent be separated with [an Honorable][a General (Under Honorable Conditions)][an Other Than Honorable] characterization of service. See enclosures (1) and (4).

9. Service and background. As required by reference (a), the following information is submitted concerning the respondent's service record and background:

a. Date of birth:

b. Marital Status:

c. Civilian Education:

d. Date of Appointment:

e. Date of Rank:

f. MOS:

g. Service Schools: See NAVMC 118(8a) at Government Exhibit \_ in enclosure (2).

h. Decorations/awards: See NAVMC 118(9) at Government Exhibit \_ in enclosure (2).

i. Disciplinary History: None

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10. Preservice misconduct. [The Board did not consider any preservice misconduct.][The Board considered preservice misconduct, but only for the purpose of determining whether to recommend retention or separation. Specifically, the board considered [insert].]

11. Misconduct older than five years. The Board did not consider misconduct identified more than five years prior to the initiation of processing for separation.

12. Minority report. [There is no minority report.] [One of the members submitted a minority report, enclosure (5).] [Provide a brief explanation of the extent of nonconcurrence with the majority.]

13. Respondent's counsel will be served with a copy of this Report, enclosure (6). Respondent's counsel will have 10 calendar days from the date of service to submit written comments to this Report.

14. [Rank Name] will be afforded the opportunity to read this Report. [Rank Name] will acknowledge that adverse information pertaining to this incident may be included in his/her Official Military Personnel File (OMPF), enclosure (7). [Rank Name] will have 10 calendar days from receipt of this Report to submit written comments for inclusion in [his][her] OMPF.

I. M. SRMEMBER

I. M. MINORITY  
(If minority report attached)

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Figure 15-23  
Report of BOI (Retirement Eligible)

From: Senior Board Member  
 To: Secretary of the Navy  
 Via: (1) Chain of Command  
       (2) Alternate Show Cause Authority  
       (3) Commandant of the Marine Corps (JPL)

Subj: REPORT OF THE BOARD OF INQUIRY IN THE CASE OF [RANK FIRST  
 NAME MI LAST NAME MOS USMC/R]

Ref: (a) SECNAVINST 1920.6  
      (b) MCO 5800.16 (LSAM), Vol 15 (Officer Misconduct and Substandard  
           Performance of Duty)  
      (c) CG, [Unit] ltr 1920 Code of [date] (BOI dir ltr)  
      (d) CG, [Unit] ltr 1920 Code of [date] (BOI convening  
           order)

Encl: (1) Transcript of the Board's proceedings  
       (2) Government Exhibits  
       (3) Respondent Exhibits  
       (4) Findings and Recommendations Worksheet  
       (5) [Minority Report]  
       (6) Certificate of Service  
       (7) Acknowledgement of Receipt  
       (8) Privacy Act Statement

1. This report is submitted per enclosure (8) of reference (a) and paragraph 010904.B of reference (b).

2. As directed by references (c) and (d), a Board of Inquiry (BOI) convened at [command/location] and conducted a hearing in accordance with the requirements of references (a) and (b).

3. Enclosures (1) through (8) are forwarded pursuant to references (a) and (b).

4. Reasons for showing cause for retention. The purpose of the BOI was to recommend whether the respondent should be involuntarily retired from the U.S. Marine Corps, and if so, the recommended retirement grade. [If applicable: The Board was also directed by the DC M&RA to recommend a characterization of service.] The Board considered these specific reasons for involuntary retirement:

a. [Insert bases from reference (c)].

5. Acts alleged. The specific acts supporting the above bases are: [insert brief summary of allegation(s)].



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6. Respondent's position with respect to the allegation(s). The respondent asserts that [insert brief summary of the respondent's position].

PARAGRAPHS SEVEN AND EIGHT WILL DEPEND ON THE BOI'S FINDINGS AND RECOMMENDATIONS.

**ALLEGATIONS UNSUBSTANTIATED**

7. Findings. The Board found that a preponderance of the evidence did not prove the allegations. See enclosures (1) and (4).

8. Recommendations. The Board recommended closing the case. See enclosures (1) and (4).

**ALLEGATIONS SUBSTANTIATED – RETENTION RECOMMENDATION**

7. Findings. The Board found that a preponderance of the evidence proved the allegations. See enclosures (1) and (4).

8. Recommendations. The Board recommended that the respondent be retained and that the case be closed. See enclosures (1) and (4).

**ALLEGATIONS SUBSTANTIATED – RETIREMENT RECOMMENDATION**

7. Findings. The Board found that a preponderance of the evidence proved the allegations. See enclosures (1) and (4).

8. Recommendations. The Board recommended that the respondent be retired [in his/her current grade][in the lesser grade of [grade]]. See enclosures (1) and (4). [If applicable: The Board recommended that the respondent's service be characterized as \_\_\_\_\_.]

9. Service and background. As required by reference (a), the following information is submitted concerning the respondent's service record and background:

a. Date of birth:

b. Marital Status:

c. Civilian Education:

d. Date of Appointment:

e. Date of Rank:

f. MOS:

g. Service Schools: See NAVMC 118(8a) at Government Exhibit \_ in enclosure (2).



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h. Decorations/awards: See NAVMC 118(9) at Government Exhibit \_ in enclosure (2).

i. Disciplinary History: None

10. Preservice misconduct. [The Board did not consider any preservice misconduct.][The Board considered preservice misconduct, but only for the purpose of determining whether to recommend retention or retirement. Specifically, the board considered [insert].]

11. Misconduct older than five years. The Board did not consider misconduct identified more than five years prior to the initiation of processing for retirement.

12. Minority report. [There is no minority report.][One of the members submitted a minority report, enclosure (5).] [Provide a brief explanation of the extent of nonconcurrence with the majority.]

13. Respondent's counsel will be served with a copy of this Report, enclosure (6). Respondent's counsel will have 10 calendar days from the date of service to submit written comments to this Report.

14. [Rank Name] will be afforded the opportunity to read this Report. [Rank Name] will acknowledge that adverse information pertaining to this incident may be included in his/her Official Military Personnel File (OMPF), enclosure (7). [Rank Name] will have 10 calendar days from receipt of this Report to submit written comments for inclusion in [his][her] OMPF.

I. M. SRMEMBER

I. M. MINORITY  
(If minority report attached)

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Figure 15-24  
Minority Report

From: Board Member  
To: Secretary of the Navy  
Via: (1) Chain of Command  
(2) Alternate Show Cause Authority  
(3) Commandant of the Marine Corps (JPL)  
  
Subj: MINORITY REPORT IN THE CASE OF [RANK FIRST NAME MI LAST  
NAME MOS USMC/R]  
  
Ref: (a) MCO 5800.16 (LSAM), Vol 15 (Officer Misconduct and Substandard  
Performance of Duty)  
(b) SECNAVINST 1920.6\_

1. This report is submitted per paragraph 010904.B.2 of reference (a) and paragraph 12d of enclosure (8) of reference (b).

2. [A detailed explanation of why the member disagrees with the findings and recommendations of the BOI. When able, the member should focus specifically on evidence, testimony, or arguments that he/she found persuasive or unpersuasive.]

I. M. MINORITY

Copy to:  
[Rank Name of Respondent]

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Figure 15-25

**BOI Certificate of Service**

From: Rank First Name MI Last Name USMC/R (Recorder)  
To: Rank First Name MI Last Name USMC/R (Respondent's  
Counsel)

Subj: SERVICE OF THE REPORT OF THE BOARD OF INQUIRY IN THE CASE OF [RANK  
FIRST NAME MI LAST NAME MOS USMC/R]

Ref: (a) SECNAVINST 1920.6  
(b) MCO 5800.16 (LSAM), Vol 15 (Officer Misconduct and Substandard  
Performance of Duty)

Encl: (1) Report of the Board of Inquiry (BOI)

1. Per the references, you are hereby formally served with a copy of  
the Report of the BOI in the subject case.

2. You have 10 calendar days from the date of service to submit  
written comments to the Deputy Commandant, Manpower and Reserve  
Affairs. You must submit your comments via the chain of command and  
the Alternate Show Cause Authority. You may request an extension to  
submit comments from the [Alternate Show Cause Authority or Show Cause  
Authority who directed the BOI]. Such request for extension shall not  
exceed 20 calendar days.

3. You are requested to sign below to indicate acceptance of service.

I. M. RECORDER



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Figure 15-26Endorsement

\_\_\_\_ ENDORSEMENT on [Rank Name] ltr 1920 [Code] of [date]

From: Commanding General/Officer

To: Commandant of the Marine Corps (JPL)

Via: (1) Chain of Command  
(2) Alternate Show Cause AuthoritySubj: [REPORT OF [REPORT]]/[REQUEST FOR [TYPE] RESIGNATION IN LIEU OF  
FURTHER ADMINISTRATIVE PROCESSING]/[REQUEST FOR RETIREMENT IN LIEU  
OF FURTHER ADMINISTRATIVE PROCESSING]/[BOI WAIVER] IN THE CASE OF  
[RANK FIRST NAME MI LAST NAME MOS USMC/R]

Ref: (a) SECNAVINST 1920.C

(b) MCO 5800.16 (LSAM), Vol 15 (Officer Misconduct and Substandard  
Performance of Duty)

Encl: (x) DC ltr [SSIC] [code] of [date]

(x1) SACC screen and treatment completion (if required)

(x2) Medical evaluation

(x3) PTSD/TBI screen

(x4) Acknowledgment of advanced education assistance  
reimbursement requirement

1. Forwarded, [insert recommendation].

[Sample language to include if endorsement to Report of Misconduct, Report of NJP, Report of Court-Martial Conviction, or Report of Civilian Conviction] recommending that [Rank Name] [not] be required to show cause for retention in the Marine Corps at a Board of Inquiry. [Comments as to the character of the officer and the allegations of substandard performance of duty/misconduct and moral or professional dereliction.] [OR]

[Sample language to include if endorsement to administrative separation via notification procedures recommending separation] recommending that [Rank Name] be separated via notification procedures for [substandard performance of duty, misconduct, and moral or professional dereliction] with a [General (Under Honorable Conditions)]/ [Honorable] characterization of service. [Comments as to the character of the officer and the allegations of substandard performance of duty/misconduct and moral or professional dereliction.] [OR]

[Sample language to include if endorsement to administrative separation via notification procedures recommending retention] recommending that the administrative separation recommendation be denied and that [Rank Name] be retained. [Comments as to the character of the officer and the allegations of substandard performance of duty/misconduct and moral or professional dereliction.] [OR]



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[Sample language to include if endorsement to BOI recommending separation] recommending that [Rank Name] be separated for [substandard performance of duty, misconduct, and moral or professional dereliction] with [an Other Than Honorable]/[a General (Under Honorable Conditions)]/[an Honorable] characterization of service. [Comments as to the character of the officer and the allegations of substandard performance of duty/misconduct and moral or professional dereliction.] [OR]

[Sample language to include if endorsement to BOI recommending involuntary retirement] recommending that [Rank Name] be involuntarily retired for [substandard performance of duty, misconduct, and moral or professional dereliction] in [his/her current grade]/[the lesser grade of [grade]]. [Comments as to the character of the officer and the allegations of substandard performance of duty/misconduct and moral or professional dereliction.] [OR]

[Sample language to include if endorsement to BOI recommending retention] recommending that the case be closed. [OR]

[Sample language to include if endorsement to resignation request] recommending that [Rank Name's] request for [unqualified]/[qualified] resignation/[resignation for the good of the service] in lieu of administrative processing be approved and that [he/she] be separated with [an Honorable]/[General (Under Honorable Conditions)]/[Other Than Honorable] characterization of service. [Comments as to the character of the officer and the allegations of substandard performance of duty/misconduct and moral or professional dereliction.] [OR]

[Sample language to include if endorsement to retirement request] recommending that [Rank Name's] request for retirement in lieu of administrative processing be approved and that [Rank Name] be retired in [his/her current grade]/[the lesser grade of [grade]]. [Comments as to the character of the officer and the allegations of substandard performance of duty/misconduct and moral or professional dereliction.] [OR]

[Sample language to include if endorsement to BOI waiver (not retirement eligible)] recommending that [Rank Name] be separated for [substandard performance of duty, misconduct, and moral or professional dereliction] with [an Other Than Honorable]/[a General (Under Honorable Conditions)]/[an Honorable] characterization of service. [Comments as to the character of the officer and the allegations of substandard performance of duty/misconduct and moral or professional dereliction.] [OR]

[Sample language to include if endorsement to BOI waiver (retirement eligible)] recommending that [Rank Name] be involuntarily retired for [substandard performance of duty, misconduct, and moral or professional dereliction] in [his/her current grade]/[the lesser grade of [grade]]. [Comments as to the character of the officer and the allegations of substandard performance of duty/misconduct and moral or professional dereliction.]



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2. [Explain any delays in the processing of the case]
3. [Include if officer submits rebuttal matters] On [date], [Rank Name], [through counsel], submitted matters in response to the Report of [report], enclosure (x). [Brief summary of matters.] [Address each legal error raised in the matters.]
4. [Include if substance-related incident and SACC documents not already included in the package] On [date], the [Name] Substance Abuse Counseling Center evaluated [Rank Name] and found that [he/she] [did/did not] meet the criteria for a substance-related disorder. The counselor recommended that [Rank Name] attend [treatment]. On [date], [Rank Name] completed the recommended treatment. See enclosure (x1).
5. [Include if separation/involuntary retirement recommended and medical evaluation not already included in the package] On [date], a medical provider evaluated [Rank Name] and found that [he/she] is qualified for separation, enclosure (x2). [Brief synopsis of any condition(s) and whether the condition(s) had impact on the officer's behavior.] [OR]
5. [Include if separation/involuntary retirement recommended and medical evaluation already included in the package] [Comment on any condition that had an impact on the officer's behavior and explain reason for recommended separation and characterization of service/involuntary retirement and retirement grade.]
6. [Include if: 1) separation/involuntary retirement recommended; 2) PTSD/TBI screen required per paragraph 010302.D of reference (b); 3) screen is positive; and 4) screen is not already included in the package] On [date], a medical provider evaluated [Rank Name] for Post-Traumatic Stress Disorder (PTSD) and Traumatic Brain Injury (TBI), enclosure (x3). [Rank Name] screened positive for PTSD/TBI. [State whether PTSD/TBI had impact on the officer's behavior.] [Explain reason for recommended separation and characterization of service/ involuntary retirement and retirement grade.] [OR]
6. [Include if: 1) separation/involuntary retirement recommended; 2) PTSD/TBI screen required per paragraph 010302.D of reference (b); 3) screen is negative; and 4) screen is not already included in the package] On [date], a medical provider evaluated [Rank Name] for Post-Traumatic Stress Disorder (PTSD) and Traumatic Brain Injury (TBI), and found that [he/she] does not have PTSD/TBI, enclosure (x3). [OR]
6. [Include if: 1) separation recommended; 2) PTSD/TBI screen required per paragraph 010302.D of reference (b); 3) screen is positive; and 4) screen is already included in the package] [Comment on any positive screen/diagnosis and explain reason for recommended separation and characterization of service/ involuntary retirement and retirement grade.]
7. [Include if acknowledgement is not already in the package and the officer did not receive advanced education assistance] [Rank Name] has

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been advised of the reimbursement requirement for advanced education assistance. [Rank Name's] acknowledgment of this requirement is contained in enclosure (x4). I am not aware that [Rank Name] received any advanced education assistance. [OR]

7. [Include if education acknowledgement, type, and amount is not already included in the package and officer received advanced education assistance] [Rank Name] has been advised of the reimbursement requirement for advanced education assistance. [Rank Name's] acknowledgment of this requirement is contained in enclosure (x4). [[Rank Name] attended the Naval Academy and received advanced education assistance in the approximate amount of \$\_\_\_\_.]/[[Rank Name] received advanced education assistance via the [Platoon Leaders Class/Naval Reserve Officer Training Corps program, etc.] in the approximate amount of \$\_\_\_\_.] I [do not] recommend that the reimbursement requirement be waived in this case. [OR]

7. [Include if education acknowledgement, type, and amount is already included in the package and officer received advanced education assistance] I [do not] recommend that the reimbursement requirement be waived in this case.

I. M. GENERAL



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Figure 15-27

## Notification of Administrative Separation via Notification Procedure

From: Commander  
 To: Rank First Name MI Last Name MOS USMC/R

Subj: NOTIFICATION OF RECOMMENDATION FOR ADMINISTRATIVE  
 SEPARATION IN THE CASE OF [RANK FIRST NAME MI LAST NAME  
 MOS USMC/R]

Ref: (a) SECNAVINST 1920.6\_  
 (b) [Report of Misconduct/NJP/Civilian Conviction  
 (c) [Command Investigation/Evidence]

Encl: (1) Sample Resignation Format  
 (2) Acknowledgment of Respondent's Rights

1. In accordance with reference (a), I am recommending your separation from the Marine Corps with [a General (Under Honorable Conditions)] [an Honorable] characterization of service.\*

\*Note: If the officer is recommended for separation only for substandard performance of duty, the officer may only be separated with an Honorable characterization of service.

2. The specific reasons for your separation [is/are] [substandard performance of duty, misconduct, and moral or professional dereliction] as evidenced by the following:

[Insert appropriate [basis/bases] from Enclosure (3) of reference (a).]

3. Based upon reference (b), the factual [basis/bases] for this recommendation [is/are] as follows:

[Insert specific factual [basis/bases] supporting the recommendation.]

4. You are afforded the following rights regarding this recommendation for your separation:

a. The right to submit a statement to the Secretary of the Navy in rebuttal to this recommendation or to decline to make a statement.

b. The right to tender a resignation in lieu of separation processing. The format for such a resignation is included at enclosure (1).

c. The right to confer with a judge advocate concerning this matter.

d. The right to consult with a civilian counsel at your own expense. This right shall in no way be allowed to delay the orderly processing of this recommendation.



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e. The right, upon request, to be provided copies of the papers to be forwarded to the Secretary of the Navy to support your proposed separation. Any classified documents will be summarized.

5. You also have the right to waive the rights contained in paragraph 4(a)-(e), and any failure to respond as indicated in paragraph 7, below, shall constitute a waiver of these rights.

6. If you are voluntarily or involuntarily separated before you complete an active duty service requirement incurred because you received advanced education assistance (United States Naval Academy, Reserve Officer Training Corps, Platoon Leaders Class, Funded Law Education Program, etc.), you may be required to reimburse the Government on a pro-rata basis for the unserved portion of your service obligation.

7. You are directed to acknowledge receipt of this notification and to designate your election of rights in enclosure (2). All matters you submit concerning this recommendation are due to [me] within 10 calendar days of your receipt of this notice. You may request an extension of this time upon a timely showing of good cause.

I. M. COMMANDING

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Figure 15-28**Acknowledgement of Administrative Separation**

From: Rank First Name MI Last Name MOS USMC/R

To: CO/CG, Unit

Subj: ACKNOWLEDGMENT OF NOTIFICATION OF SEPARATION RECOMMENDATION

Ref: (a) [CO/CG], [Unit] ltr 1920 [Code] of [date]

1. I acknowledge receipt of the reference informing me of the recommendation for my administrative separation from the Marine Corps.
2. I understand the factual basis for my recommended separation and understand that I am being recommended for [a General (Under Honorable Conditions)]/[an Honorable] characterization of service.
3. I understand that, if I am voluntarily or involuntarily separated before I complete an active duty service requirement incurred because I received advanced education assistance (United States Naval Academy, Reserve Officer Training Corps, Platoon Leaders Class, Funded Law Education Program, etc.), I may be required to reimburse the Government on a pro-rata basis for the unserved portion of my service obligation.
4. I understand that I may submit matters in response to the proposed administrative separation within 10 calendar days of receipt of the notification.
5. \_\_\_\_\_ I (do) (do not) desire to submit matters to the Secretary of the Navy in rebuttal to this recommendation.
6. \_\_\_\_\_ I (do) (do not) desire to tender a resignation in lieu of separation processing.
7. \_\_\_\_\_ I (do) (do not) desire to confer with a judge advocate concerning this matter. \_\_\_\_\_ I have conferred with \_\_\_\_\_ on \_\_\_\_\_.
8. \_\_\_\_\_ I (do) (do not) desire to consult with a civilian counsel at my own expense. I understand that the processing of my case shall in no way be unduly delayed to await the availability of such civilian counsel.
9. \_\_\_\_\_ I (do) (do not) desire to be provided copies of the papers to be forwarded to the Secretary of the Navy to support the proposed separation. Any classified documents will be summarized.

I. M. MARINE

Date: \_\_\_\_\_



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Figure 15-29**Recommendation for Administrative Separation via Notification**

From: CG/CO (who notified officer of adsep)  
 To: Secretary of the Navy  
 Via: (1) Chain of Command  
 (2) Alternate Show Cause Authority  
 (3) Commandant of the Marine Corps (JPL)

Subj: RECOMMENDATION FOR ADMINISTRATIVE SEPARATION IN THE CASE  
 OF [RANK FIRST NAME MI LAST NAME MOS USMC/R]

Ref: (a) MCO 5800.16 (LSAM), Vol 15 (Officer Misconduct and Substandard  
 Performance of Duty)  
 (b) SECNAVINST 1920.6\_

Encl: (1) [Notification of AdSep]  
 (2) [Acknowledgement of Notification of AdSep]  
 (3) [Report of Misconduct/NJP/Civilian Conviction/Court-  
 Martial Conviction]  
 (4) [Command Investigation/Evidence, if any]  
 (5) [Any rebuttal matters by SNO]  
 (6) SACC screen and treatment completion (if required)  
 (7) Medical evaluation (if required)  
 (8) PTSD/TBI screen (if required by 10 USC § 1177 or  
 otherwise)  
 (9) Acknowledgment of advanced education assistance  
 reimbursement requirement

1. This recommendation is submitted per paragraph 011003 of reference (a).
2. Per reference (b), on [date], I notified [Rank Name], via enclosure (1), of my recommendation that [he/she] be administratively separated for cause, specifically: [insert basis for separation verbiage here: substandard performance of duty, misconduct, and moral or professional dereliction]. On [date], [Rank Name] acknowledged receipt of the notification, enclosure (2).
3. [Summary of allegations of misconduct and substandard performance of duty], enclosure (3).
4. On [date], [Rank Name] submitted matters in rebuttal, enclosure (4). [Rank Name] claims [Brief summary of SNO's matters]. [[Rank Name] requests to be retained.]
5. [If substance-related incident] On [date], the [Name] Substance Abuse Counseling Center evaluated [Rank Name] and found that [he/she] [did/did not] meet the criteria for a substance-related disorder. The counselor recommended that [Rank Name] attend [treatment]. On [date], [Rank Name] completed the recommended treatment, enclosure (5). (SACC documents do

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not need to be a separate enclosure if they are already attached to an enclosed Report).

6. On [date], a medical provider evaluated [Rank Name] and found that [he/she] is qualified for separation, enclosure (6). [Brief synopsis of any condition(s) and whether the condition(s) had impact on the officer's behavior.] (Medical Evaluation documents do not need to be a separate enclosure if they are already attached to an enclosed Report).

7. [If PTSD/TBI screen is required per paragraph 010302.D of reference (a)] On [date], a medical provider evaluated [Rank Name] for Post-Traumatic Stress Disorder (PTSD) and Traumatic Brain Injury (TBI), enclosure (7). [Rank Name] screened positive for PTSD/TBI. [State whether PTSD/TBI had impact on the officer's behavior.] [Explain reason for separation and recommended characterization of service.] (PTSD/TBI screen does not need to be a separate enclosure if it is already attached to an enclosed Report). [OR]

7. [If PTSD/TBI screen is required per paragraph 010302.D of reference (a)] On [date], a medical provider evaluated [Rank Name] for Post-Traumatic Stress Disorder (PTSD) and Traumatic Brain Injury (TBI), and found that [he/she] does not have PTSD/TBI, enclosure (7). (PTSD/TBI screen does not need to be a separate enclosure if it is already attached to an enclosed Report).

8. [Rank Name] has been advised of the reimbursement requirement for advanced education assistance. [[Rank Name's] acknowledgment of this requirement is contained in enclosure (8).] I am not aware that [Rank Name] received any advanced education assistance. (Acknowledgement does not need to be a separate enclosure if it is already attached to an enclosed Report). [OR]

8. [Rank Name] has been advised of the reimbursement requirement for advanced education assistance. [[Rank Name's] acknowledgment of this requirement is contained in enclosure (8).] [[Rank Name] attended the Naval Academy and received advanced education assistance in the approximate amount of \$\_\_\_\_.]/[[Rank Name] received advanced education assistance via the [Platoon Leaders Class/Naval Reserve Officer Training Corps program, etc.] in the approximate amount of \$\_\_\_\_.] I [do not] recommend that the reimbursement requirement be waived in this case. (Acknowledgement does not need to be a separate enclosure if it is already attached to an enclosed Report).

9. I notified [Rank Name] that I would recommend that [he/she] be administratively separated with [a General (Under Honorable Conditions)]/[an Honorable] characterization of service. [After considering [Rank Name's] matters [and any other relevant matters such as a positive screen for PTSD/TBI], I [continue to] recommend [that [Rank Name] be administratively separated with [a General (Under Honorable Conditions)]/[an Honorable] characterization of service.] [Comments as to the character of the officer and the allegations of misconduct/substandard performance.]



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I. M. COMMANDING

Copy to:  
[Rank Name of Accused]

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Figure 15-30**Voluntary Retirement in lieu of Further Administrative Processing**

From: Rank First Name MI Last Name MOS USMC/R  
 To: Secretary of the Navy  
 Via: (1) Chain of Command  
 (2) Alternate Show Cause Authority  
 (3) Commandant of the Marine Corps (JPL)

Subj: VOLUNTARY RETIREMENT REQUEST IN LIEU OF FURTHER  
 ADMINISTRATIVE PROCESSING FOR CAUSE IN THE CASE OF  
 [RANK FIRST NAME MI LAST NAME MOS USMC/R]

Ref: (a) SECNAVINST 1920.6  
 (b) MCO 5800.16 (LSAM), Vol 15 (Officer Misconduct and Substandard  
 Performance of Duty)  
 (c) MCO 1900.16 w/ch 1 (MARCORSEPMAN)

Encl: (1) [Report of Misconduct/NJP/Civilian Conviction/Court-  
 Martial Conviction or, if none, Investigation/  
 Evidence]  
 (2) CG, [SCA/ASCA] ltr 1920 [Code] of [date]  
 (3) Matters

1. Pursuant to references (a) through (c), I voluntarily request to retire in lieu of further processing for administrative separation for cause.
2. I understand that a Board of Inquiry (BOI) will not be convened to recommend my retirement grade to the Secretary of the Navy.
3. This request to retire is purely voluntary and, once submitted, I understand that it can only be withdrawn with the permission of the Secretary of the Navy.
4. I understand that the Secretary of the Navy may retire me in a lesser grade than I currently hold and that the retirement grade will be the highest grade in which I served satisfactorily, as determined by the Secretary of the Navy. I respectfully request to retire [in my current grade of [grade]].
5. This retirement request is based on [my nonjudicial punishment for \_\_\_\_\_/my civilian conviction for \_\_\_\_\_/my court-martial conviction for \_\_\_\_\_/ my misconduct/substandard performance of duty by \_\_\_\_\_], enclosure (1).
6. [If ASCA/SCA already directed show cause] On [date], [the Alternate Show Cause Authority/Show Cause Authority] directed that I show cause for retention at a BOI for [substandard performance of duty, misconduct, and moral or professional dereliction], enclosure (2). I admit [that I committed misconduct [and/or] that my performance of duty was substandard]. [OR]

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6. [If ASCA/SCA has not directed show cause] I admit that I am guilty of [all] the charges/allegations detailed in enclosure (1). I admit [that I committed misconduct [and/or] that my performance of duty was substandard].

Note: The officer must admit that his/her performance of duty was substandard, and if the officer is being required to show cause for misconduct, he/she must admit to committing the misconduct.

7. I understand that I may submit a sworn or unsworn statement or other material on my behalf for consideration by the Secretary of the Navy, and that any statements submitted in connection with this request, including admissions of guilt, are not admissible in a court-martial except as provided by Military Rule of Evidence 410, but may be admissible at other proceedings. [I hereby decline to submit any matters.]/[My matters are included in enclosure (3).]

8. I understand that, if I am voluntarily or involuntarily retired before I complete an active duty service requirement incurred because I received advanced education assistance (United States Naval Academy, Reserve Officer Training Corps, Platoon Leaders Class, Funded Law Education Program, etc.), I may be required to reimburse the Government on a pro-rata basis for the unserved portion of my service obligation.

9. In submitting this request, I consulted with [insert counsel's rank name, branch of service]/[name and address of civilian counsel], a qualified defense counsel.

I. M. MARINE

Date: \_\_\_\_\_



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**Figure 15-31****Resignation in lieu of Further Administrative Processing**

From: Rank First Name MI Last Name MOS USMC/R  
 To: Assistant Secretary of the Navy (M&RA)  
 Via: (1) Chain of Command  
 (2) Alternate Show Cause Authority  
 (3) Commandant of the Marine Corps (JPL)

Subj: REQUEST FOR RESIGNATION IN LIEU OF FURTHER ADMINISTRATIVE  
 PROCESSING FOR CAUSE IN THE CASE OF [RANK FIRST NAME MI  
 LAST NAME MOS USMC/R]

Ref: (a) SECNAVINST 1920.6  
 (b) MCO 5800.16 (LSAM), Vol 15 (Officer Misconduct and Substandard  
 Performance of Duty)  
 (c) MCO 1900.16 w/ch 1 (MARCORSEPMAN)

Encl: (1) [Report of Misconduct/NJP/Civilian Conviction/Court-  
 Martial Conviction or, if none, Investigation/  
 Evidence]  
 (2) CG, [SCA/ASCA] ltr 1920 [Code] of [date]  
 (3) Matters

1. Pursuant to references (a) through (c), I voluntarily tender my [unqualified resignation]/[qualified resignation]/[resignation for the Good of the Service] of my commission in the United States Marine Corps [Reserve] in lieu of [further] processing for administrative separation for cause. I understand that a Board of Inquiry (BOI) will not be convened to make a separation recommendation to the Secretary of the Navy.

2. [If unqualified resignation] I understand that, if the Secretary of the Navy approves my request for unqualified resignation, my service will be characterized as Honorable. [OR]

2. [If qualified resignation] I understand that, if the Secretary of the Navy approves my request for qualified resignation, my service may be characterized as General (Under Honorable Conditions). I respectfully request that my service be characterized as \_\_\_\_\_. [OR]

2. [If resignation for the good of the service] I understand that, if the Secretary of the Navy approves my request for resignation for the good of the service, my service may be characterized as Other Than Honorable. I respectfully request that my service be characterized as \_\_\_\_\_.

3. [If unqualified resignation] I have been informed and understand that if my resignation in lieu of processing for administrative separation for cause is accepted, I shall subsequently receive a certificate of honorable discharge from the naval service. [OR]

3. [If qualified resignation] I have been informed and understand that if my resignation in lieu of processing for administrative separation for



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cause is accepted, I may subsequently receive a certificate of general discharge from the Marine Corps; that such a separation, although considered by the Navy Department to be under honorable conditions, is not the highest qualitative type of separation provided for officers of the naval service, and that, while I shall be entitled to the major portion of veteran's rights and benefits presently authorized for former officers whose service has been similar to my own, should any present or future statutes specifically require an honorable discharge as a condition precedent to the granting of rights and benefits thereunder, my eligibility for any such rights and benefits may be at least doubtful.  
[OR]

3. [If resignation for the good of the service] I have been informed and understand that if my resignation in lieu of processing for administrative separation for cause is accepted, I may subsequently receive a characterization of service from the Marine Corps which will state upon its face that it is under other than honorable conditions; that I may be deprived of substantial rights, benefits, and bounties which Federal or State legislation confers or may hereafter confer upon persons with honorable service in, or separated from, the Armed Forces, that I may expect to encounter substantial prejudice in civilian life in situations where the nature of service rendered in, or the character of separation from, the Armed Forces may have a bearing.

4. This resignation is purely voluntary and, once submitted, I understand that it can only be withdrawn with the permission of the Secretary of the Navy.

5. This resignation is based on [my nonjudicial punishment for \_\_\_\_\_/my civilian conviction for \_\_\_\_\_/my court-martial conviction for \_\_\_\_\_/my misconduct/substandard performance of duty by \_\_\_\_\_], enclosure (1).

6. [If ASCA/SCA already directed show cause] On [date], [the Alternate Show Cause Authority/Show Cause Authority] directed that I show cause for retention at a BOI for [substandard performance of duty, misconduct, and moral or professional dereliction], enclosure (2). I admit [that I committed misconduct [and/or] that my performance of duty was substandard\*]. [OR]

6. [If ASCA/SCA has not directed show cause] I admit that I am guilty of the [charges/allegations] detailed in enclosure (1). I admit [that I committed misconduct [and/or] that my performance of duty was substandard\*].

\*Note: The officer must admit that his/her performance of duty was substandard, and if the officer is being required to show cause for misconduct, he/she must admit to committing misconduct.

7. I understand that I may submit a sworn or unsworn statement or other material on my behalf for consideration by the Secretary of the Navy, and that any statements submitted in connection with this request, including

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admissions of guilt, are not admissible in a court-martial except as provided by Military Rule of Evidence 410, but may be admissible at other proceedings. [I hereby decline to submit any matters.]/[My matters are included in enclosure (3).]

8. I understand that, if I am voluntarily or involuntarily separated before I complete an active duty service requirement incurred because I received advanced education assistance (United States Naval Academy, Reserve Officer Training Corps, Platoon Leaders Class, Funded Law Education Program, etc.), I may be required to reimburse the Government on a pro-rata basis for the unserved portion of my service obligation.

9. I understand that I do not rate nor do I desire a reserve commission.

10. In submitting this request, I consulted with [military counsel's rank name, branch of service]/[civilian counsel's name and address], a qualified defense counsel.

I. M. MARINE

Date: \_\_\_\_\_



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Figure 15-32  
Resignation in lieu of Trial

From: Rank First Name MI Last Name MOS USMC/R  
 To: Secretary of the Navy  
 Via: (1) Chain of Command  
       (2) Alternate Show Cause Authority  
       (3) Commandant of the Marine Corps (JPL)

Subj: REQUEST FOR RESIGNATION IN LIEU OF TRIAL IN THE CASE OF  
       [RANK FIRST NAME MI LAST NAME MOS USMC/R]

Ref: (a) MCO 1900.16 w/ch 1 (MARCORSEPMAN)  
       (b) SECNAVINST 1920.6\_

Encl: (1) Charge Sheet  
       (2) Evidence  
       (3) Matters

1. Pursuant to paragraph 4104.3 of reference (a), I voluntarily request to resign in lieu of trial by court-martial.
2. Prior to submitting this request, I have been afforded the opportunity to consult with counsel certified in accordance with Article 27(b), Uniform Code of Military Justice (UCMJ). I have consulted with my detailed defense counsel, [military counsel's name, rank, and branch of service], and I am entirely satisfied with [his/her] advice.
3. I understand that I am currently pending [status of court-martial] for the offense(s) listed in enclosure (1). Before I submitted this request, my detailed defense counsel explained to me each and every element of the offense(s) of which I am accused and I understand each and every element.
4. I acknowledge guilt to [one or more of the charge(s) and specification(s)] in enclosure (1)]. I make this acknowledgement voluntarily and of my own free will. I understand that a punitive discharge is authorized for [any one of the specification(s) contained in enclosure (1)].
5. I have reviewed the evidence in enclosure (2) and have had an opportunity to consult with my counsel regarding the evidence.
6. Having discussed this matter with my defense counsel, I believe that this request is in my best legal and personal interest. I understand that I have an unqualified right to withdraw this request at any time prior to it being approved by the Secretary of the Navy. I understand that any statement submitted by my counsel or me in connection with this request is not admissible against me in a court-martial except as provided by Military Rule of Evidence 410.
7. I understand that, if I am voluntarily or involuntarily separated before I complete an active duty service requirement incurred because I

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received advanced education assistance (United States Naval Academy, Reserve Officer Training Corps, Platoon Leaders Class, Funded Law Education Program, etc.), I may be required to reimburse the Government on a pro-rata basis for the unserved portion of my service obligation.

8. I have been informed and understand that if my resignation in lieu of trial is accepted, I may subsequently receive a characterization of service from the Marine Corps which will state upon its face that it is under other than honorable conditions; that I may be deprived of substantial rights, benefits, and bounties which Federal or State legislation confers or may hereafter confer upon persons with honorable service in, or separated from, the Armed Forces, that I may expect to encounter substantial prejudice in civilian life in situations where the nature of service rendered in, or the character of separation from, the Armed Forces may have a bearing.

9. With my understanding of the previous paragraph, I respectfully request to be discharged with a characterization of service as [General (Under Honorable Conditions)] per enclosure (5) of reference (b). In support thereof, I respectfully request that you consider [matters], enclosure (3).

I. M. MARINE

I. M. DEFENSE  
RANK, USMC  
DETAILED DEFENSE COUNSEL



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Figure 15-33

## Waiver of BOI (Not Retirement Eligible)

From: Rank First Name MI Last Name MOS USMC/R  
 To: Secretary of the Navy  
 Via: (1) Chain of Command  
 (2) Alternate Show Cause Authority  
 (3) Commandant of the Marine Corps (JPL)

Subj: VOLUNTARY WAIVER OF A BOARD OF INQUIRY IN THE CASE OF  
 [RANK FIRST NAME MI LAST NAME MOS USMC/R]

Ref: (a) SECNAVINST 1920.6  
 (b) MCO 5800.16 (LSAM), Vol 15 (Officer Misconduct and Substandard Performance of Duty)

Encl: (1) [Report of Misconduct/NJP/Civilian Conviction/Court-Martial Conviction or, if none, Investigation/Evidence]  
 (2) CG, [SCA/ASCA] ltr 1920 [Code] of [date]  
 (3) Matters

1. Pursuant to the references, I voluntarily waive my right to a Board of Inquiry (BOI) for processing for administrative separation for cause and I understand that a BOI will not be convened to make a separation recommendation to the Secretary of the Navy.

2. This waiver is purely voluntary and, once submitted, I understand that it can only be withdrawn with the permission of the Secretary of the Navy.

3. I understand that, if the Secretary of the Navy approves my waiver, I may be separated with an Other Than Honorable characterization of service. If I am separated from the Marine Corps, I respectfully request that my service be characterized as \_\_\_\_\_.

4. I have been informed and understand that if I am separated from the Marine Corps, I may receive a characterization of service from the Marine Corps which will state upon its face that it is under other than honorable conditions; that I may be deprived of substantial rights, benefits, and bounties which Federal or State legislation confers or may hereafter confer upon persons with honorable service in, or separated from, the Armed Forces, that I may expect to encounter substantial prejudice in civilian life in situations where the nature of service rendered in, or the character of separation from, the Armed Forces may have a bearing.

5. This waiver is based on [my nonjudicial punishment for \_\_\_\_\_/my civilian conviction for \_\_\_\_\_/my court-martial conviction for \_\_\_\_\_/my misconduct/substandard performance of duty by \_\_\_\_\_], enclosure (1).

6. [If ASCA/SCA already directed show cause] On [date], [the Alternate Show Cause Authority/Show Cause Authority] directed that I show cause for

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retention at a BOI for [substandard performance of duty, misconduct, and moral or professional dereliction], enclosure (2).

7. I understand that I may submit a sworn or unsworn statement or other material on my behalf for consideration by the Secretary of the Navy, and that any statements submitted in connection with this request, including admissions of guilt, are not admissible in a court-martial except as provided by Military Rule of Evidence 410, but may be admissible at other proceedings. [I hereby decline to submit any matters.]/[My matters are included in enclosure (3).]

8. I understand that, if I am voluntarily or involuntarily separated before I complete an active duty service requirement incurred because I received advanced education assistance (United States Naval Academy, Reserve Officer Training Corps, Platoon Leaders Class, Funded Law Education Program, etc.), I may be required to reimburse the Government on a pro-rata basis for the unserved portion of my service obligation.

9. [Regular Officers] I understand that I do not rate nor do I desire a reserve commission.

10. In submitting this waiver, I consulted with [military counsel's rank name, branch of service]/[civilian counsel's name and address], a qualified defense counsel.

I. M. MARINE

Date: \_\_\_\_\_



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Figure 15-34

## Waiver of BOI (Retirement Eligible)

From: Rank First Name MI Last Name MOS USMC/R  
 To: Secretary of the Navy  
 Via: (1) Chain of Command  
 (2) Alternate Show Cause Authority  
 (3) Commandant of the Marine Corps (JPL)

Subj: VOLUNTARY WAIVER OF A BOARD OF INQUIRY IN THE CASE OF  
 [RANK FIRST NAME MI LAST NAME MOS USMC/R]

Ref: (a) SECNAVINST 1920.6  
 (b) MCO 5800.16 (LSAM), Vol 15 (Officer Misconduct and Substandard Performance of Duty)

Encl: (1) [Report of Misconduct/NJP/Civilian Conviction/Court-Martial Conviction or, if none, Investigation/Evidence]  
 (2) CG, [SCA/ASCA] ltr 1920 [Code] of [date]  
 (3) Matters

1. Pursuant to the references, I voluntarily waive my right to a Board of Inquiry (BOI) for processing for involuntary retirement and I understand that a BOI will not be convened to make a separation recommendation to the Secretary of the Navy.

2. This waiver is purely voluntary and, once submitted, I understand that it can only be withdrawn with the permission of the Secretary of the Navy.

3. I understand that the Secretary of the Navy may retire me in a lesser grade than I currently hold and that the retirement grade will be the highest grade in which I served satisfactorily, as determined by the Secretary of the Navy. I respectfully request to retire [in my current grade of [grade]]. [If characterization of service has been authorized by the DC, M&RA: If I am involuntarily retired from the Marine Corps, I respectfully request that my service be characterized as \_\_\_\_\_.]

4. This waiver is based on [my nonjudicial punishment for \_\_\_\_\_/my civilian conviction for \_\_\_\_\_/my court-martial conviction for \_\_\_\_\_/my misconduct/substandard performance of duty by \_\_\_\_\_], enclosure (1).

5. [If ASCA/SCA already directed show cause] On [date], [the Alternate Show Cause Authority/Show Cause Authority] directed that I show cause for retention at a BOI for [substandard performance of duty, misconduct, and moral or professional dereliction], enclosure (2). I admit [that I committed misconduct [and/or] that my performance of duty was substandard\*]. [OR]

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5. [If ASCA/SCA has not directed show cause] I admit that I am guilty of the [charges/allegations] detailed in enclosure (1). I admit [that I committed misconduct [and/or] that my performance of duty was substandard\*].

\*Note: The officer must admit that his/her performance of duty was substandard, and if the officer is being required to show cause for misconduct, he/she must admit to committing the misconduct.

6. I understand that I may submit a sworn or unsworn statement or other material on my behalf for consideration by the Secretary of the Navy, and that any statements submitted in connection with this request, including admissions of guilt, are not admissible in a court-martial except as provided by Military Rule of Evidence 410, but may be admissible at other proceedings. [I hereby decline to submit any matters.]/[My matters are included in enclosure (3).]

7. I understand that, if I am voluntarily or involuntarily separated before I complete an active duty service requirement incurred because I received advanced education assistance (United States Naval Academy, Reserve Officer Training Corps, Platoon Leaders Class, Funded Law Education Program, etc.), I may be required to reimburse the Government on a pro-rata basis for the unserved portion of my service obligation.

8. In submitting this waiver, I consulted with [military counsel's rank name, branch of service]/[civilian counsel's name and address], a qualified defense counsel.

I. M. MARINE

Date: \_\_\_\_\_



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Figure 15-35  
Command Delay Letter

From: Commanding Officer  
 To: Rank First Name MI Last Name MOS USMC/R

Subj: NOTIFICATION OF PROMOTION DELAY

Ref: (a) MARADMIN XXX/XX  
 (b) 10 U.S. Code  
 (c) SECNAVINST 1420.1\_ (1stLt and above), 1412.9\_ (WO, CWO, and LDO), or 1412.6\_ (2ndLt)

Encl: (1) Acknowledgment of receipt

1. Per reference (a), you were scheduled for promotion to the grade of [grade] on [1 Month 20XX].
2. Prior to the release of the promotion authority, you [explain basis for delay, e.g. received nonjudicial punishment for disobeying a lawful order and fraternization].
3. After careful consideration of this information, your promotion has been delayed pending a determination of whether you are mentally, physically, morally, and professionally qualified for promotion. This action is being taken in accordance with references (b) and (c).
4. You are entitled to submit matters for consideration in response to your promotion delay. You may submit matters now or you may wait until all disciplinary and administrative proceedings are completed.
5. Enclosure (1) is an acknowledgment of receipt. Please note your decision and return this acknowledgement upon receipt of this letter. Enclosure (1) and any statements you wish to submit should be addressed, via your chain of command, to the Commandant of the Marine Corps (CMC) (JPL), Headquarters, U.S. Marine Corps, 3000 Marine Corps Pentagon, Washington, DC 20350-3000. Any statement or information you wish to provide must be submitted within 10 calendar days of receipt of this letter. For any questions regarding this matter, please contact your command's OSJA at (XXX)-(XXX)-(XXXX), and if you are represented by counsel, you should direct your attorney to contact your command's OSJA on your behalf with any questions.

I. M. COMMANDING

Copy to:  
 CMC (MMPR)  
 CMC (JPL)

UNITED STATES DISTRICT COURT  
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Present: The Honorable **DOLLY M. GEE, UNITED STATES DISTRICT JUDGE**

**KANE TIEN**

Deputy Clerk

**NOT REPORTED**

Court Reporter

Attorneys Present for Plaintiff(s)  
None Present

Attorneys Present for Defendant(s)  
None Present

**Proceedings: IN CHAMBERS—ORDER RE PLAINTIFF’S MOTION FOR  
PRELIMINARY INJUNCTION**

**I.  
INTRODUCTION**

On February 18, 2022, Plaintiff Mark Short filed a Complaint and an *Ex Parte* Application (“EPA”) for a temporary restraining order (“TRO”) against Defendants David Berger, Commandant of the United States Marine Corps (“USMC”), and Carlos Del Toro, Secretary of the Navy. [Doc. ## 1-2.] Plaintiff—an officer in the USMC—seeks to enjoin Defendants from disciplining him for his failure to receive a COVID-19 vaccine. He alleges that Defendants’ refusal to grant him a religious accommodation for an exemption from the USMC’s COVID-19 vaccine mandate violates his rights under the Free Exercise Clause of the First Amendment, the Religious Freedom Restoration Act (“RFRA”), the Administrative Procedures Act (“APA”), and 10 U.S.C. section 1107a. *See* Compl.

On February 20, 2022, the Court granted Plaintiff a TRO for the purpose of maintaining the status quo to allow for full, albeit expedited, briefing on a motion for preliminary injunction (“MPI”). [Doc. # 14 (“TRO Order”).] The Court emphasized that its assessment of the merits was “extremely limited”—it merely found that Plaintiff raised issues that warranted full briefing, and that the limited harm to Defendants from a brief preservation of the status quo for two weeks was outweighed by the potential harm to Plaintiff in the interim absent a TRO. *Id.*

Defendants filed their Opposition to the MPI on February 24, 2022. [Doc. # 17.] Plaintiff filed his Reply on February 28, 2022. [Doc. # 19.] The Court held a hearing on the motion on March 3, 2022. For the following reasons, Plaintiff’s MPI is **DENIED** and the TRO is **VACATED**.

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**II.  
FACTUAL BACKGROUND**

The COVID-19 pandemic has wreaked havoc on every facet of society over the past two years, and the United States military is no exception. As of February 22, 2022, there have been 385,425 cases of COVID-19 throughout the Department of Defense (“DoD”), and 93 servicemembers have died from the disease. Stanley Decl. ¶ 3 [Doc. # 17-1 at 146<sup>1</sup>].

In early 2021, vaccines against COVID-19 became available to the public, and in August 2021, the Pfizer vaccine received full approval from the U.S. Food and Drug Administration (“FDA”). An unvaccinated person has a 10-times greater chance of getting infected with the virus, a 17-times greater chance of getting hospitalized, and a 20-times greater chance of dying compared to a vaccinated person. *Id.* at ¶ 16. Among active-duty military servicemembers, between July and November 2021, those who were less than fully vaccinated were 14.6-times more likely to be hospitalized than those who were fully vaccinated. *Id.* at ¶ 18. Of the 93 deaths in the military from COVID-19, all but 5 were completely unvaccinated, and of those 5, only 2 were fully vaccinated and none were boosted. *Id.* at ¶ 3.

On August 24, 2021, following the FDA’s approval of the Pfizer vaccine, the Secretary of Defense directed the branches of the military to add the COVID-19 vaccine to the list of vaccines required for servicemembers, and to implement inoculations consistent with DoD’s preexisting immunization program. *See* Robinson Decl, Ex. 2 [Doc. # 17-1 at 7]. On August 30, 2021, the Department of the Navy issued its implementing policy for the Navy and USMC. *See id.*, Ex. 6 [Doc. # 17-1 at 78.] The policy noted that “[v]accination is the most effective tool we have to prevent widespread manifestation of COVID-19 in our force.” *Id.* It required all active duty servicemembers to be fully vaccinated within 90 days and stated that “failure to comply is punishable as a violation of a lawful order under Article 92, Uniform Code of Military Justice, and may result in punitive or adverse administrative action or both.” *Id.* The USMC issued further guidance on September 1, which provided for the availability of medical and administrative exemptions from the mandate. *Id.*, Ex. 7 [Doc. # 17-1 at 84].

Among the administrative exemptions officially provided are those for religious accommodation. Huntley Decl. ¶ 12 [Doc. # 17-1 at 96-97]. Religious accommodation requests are assessed on a “case-by-case basis,” but the reviewer may also consider the “individual and the cumulative effects of granting similar religious accommodation requests on the necessary

<sup>1</sup> All page references herein are to the page numbers inserted by the CM/ECF system.

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elements of mission accomplishment.” *Id.* If an initial request is denied, the servicemember may appeal the decision to the Commandant of the USMC. *Id.*

As of February 3, 2022, the USMC had denied 3,458 initial requests for religious accommodation where a chaplain had determined that the servicemember’s religious belief was sincere. Reid Decl., Ex. 1 [Doc. # 2-3 at 16]. No initial requests have been granted. *Id.* Three appeals have been granted. *Id.* The USMC has granted 232 temporary medical exemptions, and 21 permanent medical exemptions. *Id.*

Plaintiff is an active duty First Lieutenant in the USMC, stationed in Okinawa, Japan. Short Decl. ¶ 2 [Doc. # 2-2]. On September 17, 2021, he submitted a request for a religious accommodation from the vaccination requirement, based on his objections to the Pfizer vaccine because of his understanding that it gained approval through testing on aborted fetal cells. *Id.* at ¶ 6. Three squadron Commanders reviewed his request, with two recommending denial and one recommending approval. Short Decl., Ex. A [Doc. # 2-2 at 7-9]. A USMC chaplain interviewed Plaintiff and found his religious belief to be sincere. *Id.* at 12-13. In a letter from the Assistant Deputy Commandant for Manpower and Reserve Affairs,<sup>2</sup> Plaintiff’s request for an accommodation was denied. *Id.*, Ex. B [Doc. # 2-2 at 20]. The adjudicator determined that “there is no less-restrictive way of accommodating [Plaintiff’s] request that ensures military readiness and the preservation of the health of the force.” *Id.* Plaintiff appealed this decision. *Id.*, Ex. D [Doc. # 2-2 at 22]. He did not face any adverse disciplinary actions pending his appeal. *See* Short Decl. ¶ 15 (describing how discipline has yet to occur).

On February 15, 2022, E. M. Smith, the Assistant Commandant of the USMC denied Plaintiff’s appeal. *Id.*, Ex. G (“Appeal Denial”) [Doc. # 2-2 at 66-69]. The Appeal Denial ratified the initial denial decision, in response to Plaintiff’s objection that the initial decisionmaker did not have authority to adjudicate his request. *Id.* at 66, 68. It also found that the vaccination requirement does not substantially burden Plaintiff’s religious belief because fetal stem cells are not used in the Pfizer vaccine, and if Plaintiff has concerns with mRNA technology generally, he may receive the Johnson & Johnson vaccine. *Id.* at 67. The Appeal Denial also found that even if Plaintiff’s sincere religious beliefs were substantially burdened by vaccination, the military has a compelling interest in maintaining military readiness and the health and safety of the force, and no less restrictive means than Plaintiff’s vaccination would achieve these interests. *Id.* The Denial discussed the rise of the Delta and Omicron variants of COVID-19, the fact that Plaintiff works primarily indoors in close proximity to other service members and cannot work remotely, Plaintiff works in a deployable unit and therefore must be

<sup>2</sup> The letter was signed by a Michael Strobl “for” David A. Ottignon, the Assistant Deputy Commandant. Short Decl. ¶ 7, Ex. B [Doc. # 2-2 at 20].



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personally ready to deploy to austere environments on short notice, and measures such as masking, testing, and social distancing are less effective than vaccination and are incompatible with the demands of military life for active-duty Marines such as Plaintiff. *Id.* at 68.

Plaintiff was notified of this decision on February 17 and was given seven days to receive the first dose of the vaccine. *Id.*, Ex. H [Doc. # 2-2 at 70]. The notice warned that this constituted a “punitive lawful order” and that “[f]ailure to comply with it may result in adverse punitive or administrative action.” *Id.*

In general, Marines who refuse to get vaccinated without an approved exemption are processed for “separation,” based either on “convenience of the government” or on misconduct. Huntley Decl. ¶¶ 15, 20. Separation proceedings for officers with fewer than six years of service, which includes Plaintiff, must be completed within 30 days and involve written notice and an opportunity to submit written matters for consideration. *Id.* at ¶¶ 18-19; Short Decl. ¶ 14. According to Plaintiff, during the pendency of separation proceedings, he would be placed on the “Officer Disciplinary Notebook” (“ODN”), which will make him ineligible for deployment, promotion, military education boards, career level schools, and “all other normal career progressions.” Short Decl. ¶ 15.

### III. LEGAL STANDARD

A plaintiff seeking preliminary injunctive relief must show that: (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) an injunction is in the public interest. *Toyo Tire Holdings of Ams. Inc. v. Cont’l Tire N. Am., Inc.*, 609 F.3d 975, 982 (9th Cir. 2010) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). When the government is a party, the last two prongs of the injunction analysis merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). Under the Ninth Circuit’s “sliding scale” approach, the four “elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another.” *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). An injunction is therefore also appropriate when a plaintiff raises “serious questions going to the merits,” demonstrates that “the balance of hardships tips sharply in [their] favor,” and “shows that there is a likelihood of irreparable injury and that the injunction is in the public interest.” *Id.* at 1135 (quoting *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008)).

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**IV.  
DISCUSSION**

**A. Likelihood of Success on the Merits**

**1. Justiciability**

Before proceeding to assess the merits of Plaintiff's claims, the Court must first determine whether they are justiciable. The Ninth Circuit has held that when a claim challenges a military decision, the plaintiff must first (1) allege a violation of a recognized constitutional right, a federal statute, or military regulations, and (2) exhaust available intraservice remedies. *Wenger v. Monroe*, 282 F.3d 1068, 1072 (9th Cir. 2002) (citing *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971)) (the "*Mindes* test"). If the plaintiff satisfies both of these two threshold requirements, the Court then determines whether judicial review is appropriate by weighing the following factors: (1) the nature and strength of the plaintiff's claim; (2) the potential injury to the plaintiff if review is refused; (3) the extent of interference with military functions; and (4) the extent to which military discretion or expertise is involved. *Id.*

Defendants concede that Plaintiff has alleged constitutional and statutory violations. Opp. at 18. Plaintiff has not exhausted administrative remedies, however. Although he has received a decision on his appeal, he still must undergo separation proceedings before any permanent adverse consequences are imposed. Those proceedings enable him to submit a written rebuttal, as Plaintiff himself admits. See Short Decl. ¶ 14. Plaintiff dismissively characterizes the process as a mere routing of paperwork, with "only four signatures stand[ing] between him and separation." Reply at 8. But those four signatures amount to four separate gates through which Plaintiff must pass before facing separation, any one of which could decide to close the process upon review of Plaintiff's written submissions. See *Diraffael v. California Mil. Dep't*, No. CV 10-07240-DDP (VBKx), 2011 WL 13274364, at \*3 (C.D. Cal. Mar. 21, 2011) ("Because . . . discharge proceedings are still underway and to date no final determination has been reached, the present suit is premature.").

Plaintiff argues that he need not continue with administrative remedies because they would be futile. See *Wenger*, 282 F.3d at 1073 (administrative exhaustion not required "if the intraservice remedies do not provide an opportunity for adequate relief" or "if administrative appeal would be futile"). He devotes much of his briefs to arguing that the USMC's religious accommodation process is a sham, pointing to the facts that no initial requests for exemption have been granted and that his initial denial letter was a form template that is identical to the denials other servicemembers received. While no *initial* requests have been granted, three

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appeal requests have been granted.<sup>3</sup> Though the rate of success on appeal is admittedly quite low, it is not zero. And his Appeal Denial letter *was* individually tailored, discussing the particular requirements and limitations of his job—*e.g.*, that he must work indoors in close proximity to other servicemembers, and he must be ready to deploy at a moment’s notice. Additionally, Plaintiff’s evidence of futility focuses on the wrong administrative process. The process he has left to exhaust is the separation proceeding. He provides no evidence, other than argumentative conjecture, that separation proceedings are always decided against the appealing servicemember, such that engaging in the process would be futile.<sup>4</sup>

Even if exhaustion were futile, Plaintiff must still overcome the remaining *Mindes* factors. The first factor is the nature and strength of the plaintiff’s claims. Plaintiff only discusses his RFRA claim in any detail. As the Court examines below, Plaintiff’s RFRA claim is not likely to be meritorious. Nonetheless, because he has shown a substantial burden on his sincerely held religious belief such that RFRA’s “strict scrutiny” is triggered, and the claim is not frivolous, this factor is neutral. The second factor involves the potential injury to Plaintiff absent review. This is also discussed in more detail below—any harms Plaintiff will face are not irreparable or certain to occur. The second factor weighs against judicial review.

The third and fourth factors weigh strongly against judicial review. They look to the extent that the requested judicial action would interfere with military functions and the extent to which military discretion or expertise is involved. Forcing the USMC to adjust to the risks of including unvaccinated Marines in its ranks is a substantial interference. Though Plaintiff is just one person, the cumulative effect of accommodating all similar requests could require integrating over 3,000 additional unvaccinated servicemembers. Evaluating the risks to the health and safety of other soldiers, as well as to the combat readiness of the force, posed by the inclusion of unvaccinated Marines in the ranks necessarily involves “complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force[, which] are essentially professional military judgments.” *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973); *see also Bryant v. Gates*, 532 F.3d 888, 899 (D.C. Cir. 2008) (“military decisions and assessments of morale, discipline, and unit cohesion . . . are well beyond the competence of judges”)

<sup>3</sup> At the hearing, Plaintiff insisted that the three granted exemptions were for Marines who were already nearing separation, and so they are irrelevant. There is no evidence in the record supporting this factual contention. Even if it is true, however, it does not change the analysis—the exemptions are still relevant. The fact remains that the requests are individually assessed, even if to date the military has found that it can only accommodate an exemption for those who are close to separation without undermining its compelling interests.

<sup>4</sup> Servicemembers may also be excused from administrative exhaustion “if the petitioner will suffer irreparable harm if compelled to seek administrative relief.” *Wenger*, 282 F.3d at 1073. For the reasons discussed below in Part IV.B., any harms Plaintiff will suffer pending separation proceedings are not irreparable.

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(Kavanaugh, J., concurring). Moreover, when executive officials “undertake to act in areas fraught with medical and scientific uncertainties,” their judgments “should not be subject to second-guessing by an unelected federal judiciary, which lacks the background, competence, and expertise to assess public health.” *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1614 (2020) (Roberts, C.J., concurring) (internal quotation marks, alterations, and citations omitted).

The Fifth Circuit, in a very recent opinion involving an analogous challenge to the Navy’s failure to accommodate religious exemptions to its vaccine mandate, reached a different conclusion. *See U.S. Navy Seals 1-26 v. Biden*, ---F.4th---, No. 22-10077, 2022 WL 594375 (5th Cir. Feb. 28, 2022). It reasoned that the Navy has already granted hundreds of medical exemptions, and so it is “illogical” that the plaintiffs’ religious-based refusal to get vaccinated would impede military function any more than would other servicemembers who are just as unvaccinated. *Id.* at \*9 (citing *Air Force Officer v. Austin*, ---F. Supp. 3d---, No. 5:22-CV-00009-TES, 2022 WL 468799, at \*7 (M.D. Ga. Feb. 15, 2022)). First, the record here reflects different numbers—only 21 permanent medical exemptions have been granted in the USMC as of early February, compared to almost 3,500 requests for religious exemptions.<sup>5</sup> Only *permanent* medical exemptions are analogous to religious exemptions, because a religious belief is not likely to be temporary, and a temporary accommodation is much different—and likely much easier to accommodate—than a permanent one.<sup>6</sup> Second, the fact that the military has already accommodated some unvaccinated members could be all the more reason why it has a compelling interest in avoiding a slide down the slippery slope of potentially thousands more accommodations.<sup>7</sup> As the Court discusses below in greater detail, “it may be feasible for [the military] to manage the COVID-19 risks posed by a small set of objectively defined and largely time-limited medical exemptions. In contrast, it could pose a significant barrier to effective disease prevention to permit a much greater number of permanent religious exemptions.” *We*

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<sup>5</sup> Again, the Court must consider the implications if the USMC were to accommodate all those similarly situated to Plaintiff who requested a religious exemption.

<sup>6</sup> At the hearing, Plaintiff’s counsel argued that his religious accommodation may also be temporary, because the military may lift its vaccination requirement as the pandemic wanes. This is entirely speculative. The military has longstanding, indefinite vaccination requirements for a number of conditions that are not in a pandemic stage.

<sup>7</sup> Plaintiff argues that his unit, even now, is less than 70% fully medically ready and that he has been permitted to participate in military exercises, notwithstanding his unvaccinated status. Supp. Short Decl. ¶ 16 [Doc. # 19-1]. To adopt that as an acceptable benchmark, however, consigns the Marine Corps to mediocrity. The Court is not inclined to restrain the USMC from seeking to improve upon that percentage or prevent it from declining even lower.



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*The Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 286 (2d Cir. 2021); *see also Doe v. San Diego Unified Sch. Dist.*, 19 F.4th 1173, 1178 (9th Cir. 2021) (“if [the number of medical exemptions sought] is very small and the number of students likely to seek a religious exemption is large, then the medical exemption would not qualify as ‘comparable’ to the religious exemption in terms of the ‘risk’ each exemption poses”).<sup>8</sup>

The Fifth Circuit also dismissed the concerns about interfering with professional military judgments by quoting another court that said, “generals don’t make good judges—especially when it comes to nuanced constitutional issues.” *Navy Seals*, 2022 WL 594375, at \*10 (quoting *Air Force Officer*, 2022 WL 468799, at \*8) (alteration omitted). The *Air Force Officer* court reasoned that whether the service’s vaccine mandate withstands strict scrutiny is a “purely legal matter” that “doesn’t require ‘military expertise or discretion.’” 2022 WL 468799, at \*8 (quoting *Mindes*, 453 F.2d at 201). By this logic, any time a court evaluates any cause of action, it addresses a purely legal matter. The whole point of the *Mindes* doctrine is that sometimes, when the Court does its job of applying law to facts, it wades into areas of professional military judgment. In fact, the strict scrutiny test is highly factual. Articulating compelling government interests involves plenty of factual considerations, as does assessing whether less restrictive means are available. If the Court were to say that the military does not have a compelling interest in preventing the spread of COVID-19, or that there are less restrictive ways to achieve that goal other than by requiring Plaintiff to get vaccinated, it would necessarily involve itself in “complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force.” *Gilligan*, 413 U.S. at 10. Binding precedent indicates that the Court must tread carefully where issues of military preparedness are concerned.

Under the circumstances of this case, the Court finds that Plaintiff has not shown that his claims are justiciable.

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<sup>8</sup> In a particularly striking example of the unelected federal judiciary wading into areas fraught with medical and scientific uncertainty, the Fifth Circuit also questions “the comparative efficacy of vaccination” by pointing to anecdotes of COVID-19 outbreaks among fully vaccinated units. *Navy Seals*, 2022 WL 594375, at \*9 n.17; *see also Air Force Officer*, 2022 WL 468799, at \*10 (“Does a COVID-19 vaccine really provide more sufficient protection? This is especially curious given the number of people who have been and continue to be infected after becoming fully vaccinated and receiving a booster.”). This Court is no expert in viral transmission either, but purely as a matter of logic, simply because vaccination is not perfect in preventing onset of infection does not mean that it is not far superior to forgoing vaccination altogether—especially where the military’s own experience has shown it to prevent serious illness or death. *See Stanley Decl.* ¶ 3 (unvaccinated servicemembers are 14.6 times more likely to be hospitalized than those who are fully vaccinated).

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**2. RFRA**

Although the Court finds that Plaintiff has not made a sufficient showing of justiciability, because the justiciability test is intertwined with the merits, and for the sake of thoroughness, the Court next turns to the merits of Plaintiff's RFRA claim.<sup>9</sup> Plaintiff has not demonstrated that his RFRA claim is likely to succeed on the merits.

"Under RFRA, the Federal Government may not, as a statutory matter, substantially burden a person's exercise of religion, 'even if the burden results from a rule of general applicability.'" *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424, (2006) (quoting 42 U.S.C. § 2000bb-1(a)). "The only exception recognized by the statute requires the Government to satisfy the compelling interest test—to 'demonstrat[e] that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.'" *Id.*

Assuming that mandatory vaccination substantially burdens Plaintiff's exercise of religion,<sup>10</sup> Defendants bear the burden of showing that requiring Plaintiff to receive a vaccination as a condition of his service, over his religious objection, is the least restrictive means of furthering a compelling government interest. Plaintiff acknowledges that the government has a compelling interest in maintaining the military readiness of the USMC, *see* Reply at 17, which is the same interest that the USMC asserted in denying Plaintiff's request for an exemption. *See* Appeal Denial at 67. And the government certainly has a compelling interest in preventing the spread of COVID-19 amongst members of the Marine Corps. *See Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) ("Stemming the spread of COVID-19 is unquestionably a compelling interest[.]").

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<sup>9</sup> Plaintiff only seriously briefs the merits of his RFRA claim in his motion, so the Court only addresses this claim. Additionally, RFRA provides broader religious freedom protections than the Free Exercise Clause does, so if Plaintiff's RFRA claim fails, then his Free Exercise claim necessarily does too. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693-95 (2014). The Court declines to take up Plaintiff's belated request in his Reply to extend the TRO to allow him to brief his other claims, when he has made no initial showing whatsoever as to the likelihood of success of those claims. *See* Reply at 24; *see also Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) ("The district court need not consider arguments raised for the first time in a reply brief.").

<sup>10</sup> Defendants do not meaningfully contest that vaccination would burden Plaintiff's sincerely held religious belief, notwithstanding that the Appeal Denial seemed to do so.

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The pertinent question is whether requiring Plaintiff to be vaccinated is the least restrictive means of furthering these interests in military readiness and the health and safety of the force.<sup>11</sup> Defendants argue that no other preventative measures can provide the same level of safety and readiness—masking, surveillance testing, and/or social distancing are either less protective than vaccination or are incompatible with Plaintiff’s job duties. This is the same justification that the USMC gave for denying Plaintiff’s exemption. “[W]hen evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.” *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986).<sup>12</sup> This deference is layered on top of the deference that courts must give to expert policymakers on matters involving complex medical or scientific uncertainties. *See S. Bay*, 140 S. Ct. at 1614 (Roberts, C.J., concurring). Accordingly, the Court will not question the USMC’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. Given the empirical evidence in the record of the vaccine’s efficacy in preventing serious illness, hospitalization, and death from COVID-19, the USMC has used an evidence-based approach in its reliance on vaccination. It is also 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.

Plaintiff does not advance any particular less restrictive means that are as effective against a highly infectious virus and compatible with his mission. Instead, notwithstanding the wide deference afforded to military officials’ professional judgments, Plaintiff attempts to poke a number of holes in the USMC’s asserted interest in requiring him to be vaccinated. Perhaps most prominently, Plaintiff argues that the USMC’s refusal to grant him—or almost anyone

<sup>11</sup> The Fifth Circuit framed the question slightly differently, in terms of whether the government has a compelling interest in requiring the particular plaintiffs to be vaccinated over their religious objections. *Navy Seals*, 2022 WL 594375, at \*11-12. Regardless of the precise formulation, the analysis functionally proceeds the same.

<sup>12</sup> The legislative history of RFRA indicates that Congress intended the military deference principles of *Goldman* to continue to apply under the statute. *See* S. Rep. No. 103-111, at 12 (1993), 1993 U.S.C.C.A.N. 1892, 1901 (discussing *Goldman* and “intend[ing] and expect[ing] that such deference will continue under this bill”). In *Singh v. McHugh*, 185 F. Supp. 3d 201 (D.D.C. 2016), the court found that, under RFRA, it “must credit the Army’s assertions and give due respect to its articulation of important military interests,” though it could not rely entirely on the military leader’s “mere say-so” and must still go through the strict scrutiny test. *Id.* at 222 (quoting *Holt v. Hobbs*, 574 U.S. 352, 368 (2015)). That it is what the Court must do here. It does not rely *entirely* on the USMC’s judgment in a conclusory fashion and still undertakes the strict scrutiny analysis, but along the way it credits evidence-based assertions as to how best to further important military interests.

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else—a religious exemption is undermined by the fact that it grants medical exemptions to others. The Fifth Circuit emphasized this point as well, arguing that it renders the vaccine requirement “underinclusive.” *Navy Seals*, 2022 WL 594375, at \*12. First, on the record in this case, only 21 *permanent* medical exemptions<sup>13</sup> have been granted, a very small number relative to the size of the force. The USMC has fully resolved only 122 religious exemption requests through the appeal as of February 3, of which it has granted three, or roughly 2.5%.<sup>14</sup> *See Reid Decl.*, Ex. 1 [Doc. # 2-3 at 16]. Applying that rate to the 1,150 appeals currently still under review, the USMC would grant about 32 religious exemption requests. That is *more* than the number of permanent medical exemptions. There is thus *no* evidence in the record of any underinclusive or disparate treatment of religious exemption requests relative to other types of exemptions.

But even if the USMC grants more medical exemptions than it does religious exemptions, that does not necessarily mean that it fails the least-restrictive means test. If the USMC were to accommodate all religious exemptions based on sincerely held religious beliefs, it would have granted nearly 3,500 of them thus far—significantly more than the 21 permanent medical exemptions. In upholding New York’s statewide vaccine mandate for healthcare workers, which allowed for medical exemptions but not religious ones, the Second Circuit held that evidence of a small number of medical exemptions relative to a much larger amount of religious exemption requests “suggests that the medical exemption is not ‘as harmful to the legitimate government interests purportedly justifying’ the Rule as a religious exemption would be.” *We The Patriots*, 17 F.4th at 286 (citation omitted). The Ninth Circuit applied this same reasoning to a school vaccine mandate that allowed medical exemptions but not religious ones. *See Doe*, 19 F.4th at 1178 (“[I]f that number [of medical exemptions] is very small and the number of students likely to seek a religious exemption is large, then the medical exemption would not qualify as ‘comparable’ to the religious exemption in terms of the ‘risk’ each exemption poses to the government’s asserted interests.”).<sup>15</sup> Neither schools nor the state’s regulation of the healthcare

<sup>13</sup> The Fifth Circuit also seemed to miss the important distinction between a temporary accommodation and a permanent one. *See Navy Seals*, 2022 WL 594375, at \*12 (“[The Navy] has granted *temporary* medical exemptions to 17 Special Warfare members, yet no reason is given for differentiating those service members from Plaintiffs.”) (emphasis added).

<sup>14</sup> The appeal ruling is in fact the only decision that triggers RFRA and strict scrutiny, because only after the appeal is denied do Marines actually face the adverse consequences that amount to a substantial burden on their religion. And those Marines who choose not to appeal have certainly not exhausted administrative remedies.

<sup>15</sup> *We The People* and *Doe* involved the Free Exercise Clause, not RFRA. The circuit courts therefore engaged in this analysis not in the context of the least-restrictive means test, but in determining whether the mandates were neutral rules of general applicability that did not disfavor religion. But the argument that the



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industry are entitled to the level of deference that the military is. To the extent the USMC accommodates medical exemptions but not religious ones, that is therefore not a sign of underinclusiveness or discriminatory treatment, but rather is simply a reflection of what is feasible while still maintaining the government's interest. *See Dunn v. Austin*, No. 2:22-cv-00288 (E.D. Cal. Feb. 22, 2022), Hrg. Tr. at 42:11-18 [Doc. # 18-1] (citing *Doe* in upholding military vaccine mandate from religious freedom challenge). This Court is bound by Ninth Circuit authority, not that of the Fifth Circuit.

Plaintiff also argues—again, by pointing to the boilerplate denial of his initial request and to the low number of total religious exemptions granted—that the USMC has ignored RFRA's command to apply the least-restrictive means test narrowly “‘to the person’—the particular claimant whose sincere exercise of religion is being substantially burdened.” *Gonzalez*, 546 U.S. at 430-31.<sup>16</sup> But the record indicates that the USMC *did* evaluate Plaintiff's request individually, at least at the appeal phase—the Appeal Denial discussed the specific circumstances of Plaintiff's required duties. Moreover, the USMC has granted three religious exemptions at the appeal phase (2.5% of the total it has fully resolved), demonstrating that while the exemptions are admittedly difficult to obtain, the process is not a sham. The Court defers to the USMC concerning its judgment that very few Marines have jobs that allow the service to accommodate a religious exemption.

Notwithstanding the emphasis on individualized scrutiny, Plaintiff also makes arguments suggesting that vaccination broadly is unnecessary. He points to the fact that the USMC has not required booster shots and does not distinguish between boosted Marines and those who are fully vaccinated but not boosted. Merely because the USMC has not yet made the decision to require *more* vaccination does not mean that achieving a baseline level of vaccination is meaningless. Plaintiff also points out that his unit has never been deemed more than 80% fully medically ready due to various statuses unrelated to vaccination. Supp. Short Decl. ¶ 16 [Doc. # 19-1].

mandate is not the least restrictive means because its exemptions are underinclusive is essentially the same as saying that the mandate is not neutral, so the logic of those cases applies equally here. *See Air Force Officer*, 2022 WL 468799, at \*11 (general applicability test of the Free Exercise Clause “[s]ound[s] familiar” to the underinclusiveness argument with respect to the least-restrictive means test).

<sup>16</sup> Plaintiff also insists that the USMC failed to account for the fact that he is a healthy 26-year-old who is therefore unlikely to get seriously ill from COVID-19, even if he remains unvaccinated. Even if this were true, the USMC's primary concern in dealing with a highly infectious disease reasonably may not be that Plaintiff himself will get seriously ill, but that he will spread the virus to other Marines in his unit. Those Marines, even if fully vaccinated, can still get sick from the virus, as the Omicron surge has demonstrated. A substantial number of Marines out of commission at the same time with even a mild illness undoubtedly affects the readiness of the unit.

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The implication seems to be that because a number of Marines are not medically ready at any one time, it is not a problem if Plaintiff is also not medically ready *indefinitely*. The fact that the unit regularly deals with medical issues preventing full readiness is all the more reason not to allow *even more* servicemembers to become unfit for combat.

Finally, Plaintiff argues that he has been able to serve just fine before the vaccine mandate went into effect and before it was enforced against him, and that the USMC as a whole continued to function during the pandemic and before the mandate was enacted in August 2021. *See Supp. Short Decl.* ¶¶ 2-9. The Fifth Circuit made a similar point, that Navy Seals deployed effectively at various stages of the pandemic without being vaccinated, and that they “engage in life-threatening actions that may create risks of equal or greater magnitude than the virus.” *Navy Seals*, 2022 WL 594375, at \*12. Military service is inherently dangerous, but that should be all the more reason to endeavor to reduce preventable harms, not to throw up one’s hands and cast aside all precautions. 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. Like many millions of other essential workers, the military has heroically and with great ingenuity found ways to persevere during an unprecedented deadly pandemic.<sup>17</sup> 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.

## **B. Irreparable Harm**

As even the *Air Force Officer* court recognized, harms 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.” 2022 WL 468799, at \*12; *see also U.S. Navy SEALs 1-26 v. Biden*, ---F. Supp. 3d---, No. 4:21-CV-01236-O, 2022 WL 34443, at \*12 (N.D. Tex. Jan. 3, 2022) (“While significant and life-altering, these harms do not, by themselves, rise to the level of irreparable injury.”); *Hartikka v. United States*, 754 F.2d 1516, 1518 (9th Cir. 1985) (“loss of income, loss of retirement and relocation pay, and damage to [Plaintiff’s] reputation resulting from the stigma attaching to a less than honorable discharge” are not irreparable injuries).<sup>18</sup> The harms stemming from separation are also not irreparable for the

<sup>17</sup> 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.

<sup>18</sup> The parties are cautioned not to read much into the Court’s cursory review of these issues at the TRO stage, before it had the benefit of full briefing and the time to review the case law.

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additional reason that Plaintiff has an opportunity to challenge separation through the administrative process even before seeking relief in court.

Plaintiff does not meaningfully rebut this point. Instead, he argues—as his supporting authorities do—that “[t]he loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury.” *Diocese of Brooklyn*, 141 S. Ct. at 67 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); see also *Air Force Officer*, 2022 WL 468799, at \*12. But because 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. See *Marin All. For Med. Marijuana v. Holder*, 866 F. Supp. 2d 1142, 1160 (N.D. Cal. 2011) (“Plaintiffs’ constitutional claims are too tenuous to support a presumption of irreparable harm.”).

**C. Balance of the Equities and the Public Interest**

As already discussed, 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. See *Church v. Biden*, ---F. Supp. 3d---, No. CV 21-2815 (CKK), 2021 WL 5179215, at \*18 (D.D.C. Nov. 8, 2021) (“The government has amply demonstrated that military readiness and unit cohesion would be unacceptably harmed should the Court preliminarily enjoin the DoD Vaccine Mandate.”). Plaintiff’s “pecuniary interest is all the weaker when balanced against the public’s interest in public health, military readiness, and efficient administration of the federal government.” *Id.* Plaintiff maintains that both he and the public have an interest in not violating his constitutional rights, but he has not demonstrated a likelihood that his constitutional rights will actually be violated, for all the reasons discussed above.

Assuming that Plaintiff nonetheless has an interest in preserving his religious beliefs while serving as a Marine, this case then presents the classic dilemma of balancing an individual’s rights with the collective interest in health, safety, and security. The tension between these interests makes for difficult choices. Even if this is the pertinent question, it is perhaps worth remembering the familiar aphorism that one’s civil liberties can only extend so far as they do not harm others.<sup>19</sup> Because serving while unvaccinated poses a threat to the health and safety of his fellow Marines, Plaintiff’s interest in doing so is outweighed by the public’s interest in maintaining a near-fully vaccinated and near-fully medically ready force.

<sup>19</sup> In essence, the compelling interests test is Congress and the Constitution’s method of upholding this principle.

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**V.  
CONCLUSION**

In *Goldman v. Weinberger*, the Supreme Court held that the Constitution<sup>20</sup> does not provide an Orthodox Jew with the right to wear a yarmulke while in uniform, out of deference to the military’s professional judgment concerning “obedience, unity, commitment, and *esprit de corps*.” 475 U.S. at 507. Wearing a yarmulke does not increase the risk of spreading an infectious disease. If this Court can say one thing with certainty about the nation’s religious freedom laws, it is that the courts cannot treat some religious beliefs more favorably than others. Plaintiff’s request for a preliminary injunction is **DENIED**. The TRO against Defendants is **VACATED**.<sup>21</sup>

**IT IS SO ORDERED.**

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<sup>20</sup> At the time of *Goldman*, the test under the Free Exercise Clause was essentially the same as the current RFRA standard.

<sup>21</sup> At the conclusion of the hearing, the Court asked—merely to determine the practical import of its lifting of the TRO—whether Plaintiff had access to any FDA-approved vaccines on his base in Okinawa that he may take. The Court’s question was prompted by a suggestion in Plaintiff’s declaration that he may not have ready access to a vaccine, should he wish to comply with the USMC’s directive. *See* Short Decl. ¶ 12. This led to a confusing colloquy about whether the “Comirnaty” vaccine is the same as the “Pfizer BioNTech” vaccine and whether vaccines labeled as the latter are FDA-approved. This was not the subject of briefing in this motion, but appears to be relevant to Plaintiff’s claim under 10 U.S.C. section 1107(a).

As the Court noted above, *see* footnote 9, Plaintiff did not brief his section 1107(a) claim at all except for a cursory reference at the end of his Reply. Nor is the record developed as to these issues. To this point, the Court will merely urge, as a purely hortatory matter, that the USMC should not commence separation proceedings without giving Plaintiff a reasonable opportunity to receive an available FDA-approved vaccine, should he so choose.



1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF CALIFORNIA

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3 JONATHAN DUNN, ) Docket No. 22-CV-288  
4 Plaintiff, ) Sacramento, California  
5 v. ) February 22, 2022  
6 LLOYD J. AUSTIN, III, ET AL., ) 1:32 p.m.  
7 Defendants. ) Re: Preliminary injunction

8 TRANSCRIPT OF PROCEEDINGS  
9 BEFORE THE HONORABLE JOHN A. MENDEZ  
10 UNITED STATES DISTRICT JUDGE

11 APPEARANCES (via Zoom):

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15 ASSISTANT U.S. ATTORNEY  
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21 Proceedings reported via mechanical steno - transcript produced  
22 via computer-aided transcription

1 SACRAMENTO, CALIFORNIA, TUESDAY, FEBRUARY 22, 2022

2 --o0o--

3 (In open court via Zoom.)

4 THE CLERK: Calling civil case 22-0288, Dunn v.  
5 Austin, et al.

6 THE COURT: Good afternoon. And Counsel, if you  
7 would, state your appearances for the record, please.

8 MR. MOLLOY: Good afternoon, Your Honor. This is  
9 Thomas Molloy for plaintiff.

10 THE COURT: Okay. If you could get a little closer to  
11 your mic. I had a hard time hearing you, Mr. Molloy.

12 MR. MOLLOY: Good afternoon, Your Honor. This is  
13 Thomas Molloy for plaintiff.

14 THE COURT: Much better.

15 MS. ENLOW: Good afternoon, Your Honor; Courtney Enlow  
16 for the government.

17 THE COURT: Good afternoon. This began last week as a  
18 motion filed on behalf of Mr. Dunn, who I understand is also  
19 observing the hearing this afternoon, so welcome to the  
20 plaintiff.

21 As a temporary restraining order, the Court asked that  
22 the parties fully brief, as much as possible in a week's time,  
23 the issues raised by the TRO, again, on an expedited basis.  
24 And to the lawyers' credit, they were able to submit full  
25 briefs and supporting documentation within a week's time, so,

1 first, my compliments to the lawyers who probably didn't get  
2 much sleep this week. These are wonderful briefs, excellent  
3 briefs. It's an incredibly interesting issue, obviously, going  
4 on around the country at this time, including our court. And I  
5 always appreciate excellent lawyering and definitely had it in  
6 this case.

7 It makes our job harder, in some ways, because the  
8 arguments are so well formed and thought out, but it also makes  
9 our job easier when we have good lawyers on both sides, so  
10 thank you for that.

11 I've converted the TRO into a motion for preliminary  
12 injunction. I know, Mr. Molloy, you raised the issue that  
13 there may be further action taken against your client tomorrow,  
14 but I don't think that really significantly changes the issues  
15 as to whether injunctive relief should be granted either in the  
16 form of a restraining order or a preliminary injunction.

17 Let me take up first -- and, again, because the briefs  
18 are so well written, I don't have a lot of questions. And the  
19 way I conduct hearings normally is simply to raise questions  
20 and then I am prepared to rule today on the motion. I know  
21 that both parties want some type of indication from the Court.

22 And as a further preface, as much as I would love to  
23 issue a written order, that's not going to be possible. We're  
24 extremely burdened in the Eastern District. I'm not sure if  
25 the two of you are aware of how bad our court is, in terms of

1 the caseload that each judge carries. We're one judge down.  
2 We've been one judge down or two judges down for the past  
3 years. We only have six judges, four in Sacramento and two in  
4 Fresno. We only have three in Sacramento right now. We've had  
5 a caseload -- I've been on the bench almost 15 years --  
6 anywhere from 900 to 1,200 cases. And as much as I would like  
7 to issue a written opinion along the lines of the opinions that  
8 the lawyers have sent me in this case, it's just not feasible.  
9 I've got a lengthy criminal sentencing hearing on Friday; I  
10 start a trial on Monday. And I have, as I said, I think  
11 roughly 975 other matters that I get to handle right now. So  
12 the transcript is going to serve as the Court's decision and  
13 the discussions that we have and; in that vein, if there's  
14 anything you want to add that isn't already briefed -- I will  
15 cut you off if I think it's been thoroughly briefed and I  
16 understand the arguments, but if you want to add something for  
17 purposes of the record, please do so.

18 Ms. Enlow, let me start with you. I didn't  
19 necessarily see this in your opposition, but the case raises a  
20 question as to whether the plaintiff's belief in this case is,  
21 in fact, religious, that -- the test being obviously that in  
22 these cases the belief has to be religious, and it has to be  
23 sincerely held. But I'm focusing more on the: Is this really  
24 a religious belief or is this a political issue disguised as a  
25 religious belief? And so I'm wondering if, in fact, the



1 defendants are challenging the plaintiff with respect to that  
2 argument.

3 MS. ENLOW: We didn't raise it in the brief, Your  
4 Honor, because the compelling interests and the less  
5 restrictive means are so compelling for the government, but,  
6 going forward, we reserve the right to challenge it. It is  
7 questionable. He says that it's a religious ritual to take the  
8 vaccine.

9 Col. Poel's declaration clearly says that taking the  
10 vaccine -- putting the vaccine on the list of nine other  
11 vaccines was based on scientific principles alone.

12 Lt. Col. Dunn also said he developed this belief  
13 mid-September. Of course, that was three weeks after Secretary  
14 Austin ordered everyone to get vaccinated, so it's a little  
15 unclear why he didn't just go ahead and get vaccinated when he  
16 was ordered to do so.

17 So while we didn't challenge it in the preliminary  
18 injunction stage, we certainly intend to pursue that going  
19 forward.

20 THE COURT: Do you think it's a basis for me for  
21 denying injunctive relief at this stage, or do you think he's  
22 adequately demonstrated to the Court that this really is a  
23 religious-based belief?

24 MS. ENLOW: Your Honor, since we haven't briefed it or  
25 put more evidence in the record on that, I would move to

1 compelling interest on least restrictive means to base Your  
2 Honor's judgment on.

3 THE COURT: Okay. Mr. Molloy, my question is, it's  
4 clear from Lt. Col. Dunn's declaration that this is the only  
5 vaccine to which he objects. Isn't that inconsistent with his  
6 argument and his position that this is clearly grounded in  
7 religion?

8 Let me also expand that question. I'll let you  
9 respond. My concern is when I read paragraph 11 of his initial  
10 affidavit, not the second affidavit, that's the paragraph that  
11 explains to the Court how this is grounded in a sincerely-held  
12 religious belief.

13 There's a lot of reference to politics and political  
14 officials and government officials and decisions by government  
15 officials and very little discussion about the religious  
16 grounding of his belief. And so it raised questions such as:  
17 Is Lt. Col. Dunn worried about the health effects of the  
18 vaccine?

19 Does he disbelieve scientifically-accepted views that  
20 the vaccine is harmless to most people?

21 Does he believe that the COVID-19 vaccine may do more  
22 harm than good?

23 Is his moral belief that being vaccinated would be a  
24 sin an isolated moral teaching rather than a comprehensive  
25 system of beliefs about fundamental or ultimate matters?

1           And if he's going to be consistent, shouldn't he ask  
2           for a religious accommodation with respect to all vaccines in  
3           order for the Court to find that he has raised a protected  
4           religious belief in this case?

5           Those are my concerns when I read his affidavit. Go  
6           ahead.

7           MR. MOLLOY: Thank you, Your Honor. The first thing I  
8           would say in answer to your first question is no. I think that  
9           the fact that Lt. Col. Dunn objects only to this vaccine, not  
10          the others, actually strengthens his argument that it is a  
11          religious objection here.

12          He's not a general antivaxxer. He's not opposed to  
13          general health, you know, burdens that might come from  
14          vaccines.

15          He really is opposed to what he takes to be a  
16          religious ritual and government religious ritual.

17          And, as a Christian, there's ample evidence for this  
18          throughout the Old Testament. So King Nebuchadnezzar, Shadrak,  
19          Mishach, and Abednego refused to bow the knee to government  
20          orders that conflicted with their religious orders or with  
21          their religious conscience.

22          So there's ample Old Testament, religious, Christian  
23          support for refusing even a highly intertwined and politically  
24          charged -- in fact, oftentimes, the most politically charged  
25          get to the crux of religious objections even more sharply

1 because, as a Christian, one must worship, bow down, serve only  
2 God alone and not the government.

3 THE COURT: How do we go from a political mandate to  
4 this becomes a -- it almost sounds like you're arguing it's the  
5 establishment of a religion by the government, that President  
6 Biden's directive and the Department of Defense's directive  
7 that all military personnel need to be vaccinated is, in  
8 effect, the establishment of a religion, which would violate  
9 his beliefs that he can only worship one God and taking the  
10 vaccine would be a sin. Explain that to me again.

11 MR. MOLLOY: Yes, Your Honor. So, first, I would just  
12 reiterate, as Counsel Enlow said, they did not challenge the  
13 sincerity, they did not challenge that it's a religious belief  
14 and, in fact, all of the language by Lt. Col. Dunn is about it  
15 being a sin, that it violates his religion, so just want to  
16 reiterate that.

17 In terms of the substance of it, though, Lt. Col. Dunn  
18 has -- the chaplain agreed, everyone in his chain of command.  
19 No one doubts his sincerity. No one doubts that it's a sincere  
20 religious belief, that it's substantive and that's it's a sin.

21 What Lt. Col. Dunn has explained --

22 THE COURT: I'm sorry to interrupt. I want to make  
23 the record clear. This isn't a question about his sincerity.  
24 It really focuses on is this a religious-based objection or is  
25 it a political objection, that it doesn't fit the traditional



1 religious-based objections.

2 And there are other cases, obviously, out there where  
3 certain individuals who are Catholic have opposed this vaccine  
4 or some other vaccines on the basis that it may violate what  
5 they believe are tenets of the Catholic Church. That's not  
6 really this case. It's somewhat different.

7 And I'm really trying to understand the religious  
8 underpinning to his objection. His affidavit is a bit general,  
9 and I'm trying to -- and again, I also agree with both of you  
10 that it wasn't fully briefed and it's not the primary issue,  
11 but when I read briefs and get involved in cases like this,  
12 curious questions like this come up and it may be an issue down  
13 the road, so I wanted to give both of you an opportunity to  
14 address it at this point.

15 MR. MOLLOY: Thank you, Your Honor.

16 And I admit, political and religious questions often  
17 are intermixed, and that has not prevented the Supreme Court --  
18 for instance, the Pledge of Allegiance cases, objecting to  
19 those on religious bases. The Pledge of Allegiance is a highly  
20 political act, and it gets really to the core of one's role in  
21 society, one's allegiance to the government. So it's not  
22 surprising that very politically charged questions would also  
23 present really thorny questions of religious conscientious  
24 objection. And that has not prevented the Court from  
25 protecting religious objectors --

1 COURT REPORTER: I'm sorry, Counsel, I'm having a hard  
2 time understanding you.

3 THE COURT: Yeah, I am too. You're breaking up. I  
4 don't know if you want to lean in more or -- when you lean back  
5 a little, we're having a hard time hearing you.

6 And run it by me again how you believe his objection  
7 to only this vaccine actually strengthens the argument that  
8 it's based -- it's religious based.

9 MR. MOLLOY: Yes, Your Honor. So just to repeat what  
10 I had previously said, in case it was unclear, is, the Court  
11 routinely looks at issues that are highly politically charged.  
12 And I brought up the case of Pledge of Allegiance cases, which  
13 really get at one's role in society.

14 And it's not surprising that such politically charged  
15 questions will also present thorny issues for religious  
16 objectives. In fact, that can almost guarantee it because  
17 highly politically charged questions can raise the specter of  
18 idolatry and serving only one God.

19 In terms of Your Honor's second question in terms of  
20 general antivax, I think what that demonstrates is Lt. Col.  
21 Dunn is not trying to hide a health objection, is not trying to  
22 hide a general objection to vaccines in religious language.

23 He very clearly feels that this vaccine and all of the  
24 governmental messaging around it, all of the required and  
25 implied symbolic acts surrounding it present religious

1 questions.

2 He has taken more vaccines than pretty much any  
3 civilian, but this particular vaccine, like Nebuchadnezzar,  
4 like Shadrak, Mishach, Abednego, like Daniel, they felt that  
5 they could not bow the knee that required that amount of  
6 unthinking loyalty when it would result in personal --

7 THE COURT: Why can you bow the knee to a flu vaccine  
8 but not to a COVID-19 vaccine if his objection isn't to the  
9 health effects or that the vaccine is harmless, that the  
10 vaccine actually does more good than harm? Explain that  
11 difference. I'm using the flu vaccine as the example, but how  
12 does that make it clear that this really is a religious-based  
13 objection?

14 MR. MOLLOY: Well, Your Honor, I think what that gets  
15 to is the surrounding messaging, symbolism, surrounding acts,  
16 that's what makes something particularly religious.

17 The government messaging, the government compulsion,  
18 the government demonizing of citizens who refuse to get the  
19 vaccine, none of that was present with the flu vaccine. None  
20 of that --

21 THE COURT: We lost him.

22 Mr. Molloy, you froze. You froze for a second.  
23 Mr. Molloy, stop. You froze. Your connection is awful and  
24 we're losing you, so I'm not sure what's going on. We don't  
25 hear you at all, so find a spot where we can hear you.

1 MR. MOLLOY: My apologies, Your Honor. Is this  
2 better?

3 THE COURT: Much better.

4 Okay. You were explaining to me -- I raised the flu  
5 vaccine versus the COVID-19 vaccine issue, and you were  
6 explaining to me how that doesn't -- shouldn't cause concern  
7 for the Court.

8 MR. MOLLOY: Yes, Your Honor. So I believe Your  
9 Honor's question gets to the context surrounding required acts  
10 and the symbolic meaning of those required acts.

11 So as Lt. Col. Dunn stated in his affidavit, it really  
12 was the general -- the symbolic gesture that he takes this  
13 vaccine to require him to partake in the governmental messaging  
14 about how all of the problems surrounding the corona virus  
15 endemic, all of the not taking the vaccine makes one an immoral  
16 person. All of that surrounding messaging goes into requiring  
17 him to take the COVID-19 vaccine where none of that was present  
18 with the general flu vaccine. And so the fact that he does not  
19 object to run-of-the-mill flu vaccines I think really  
20 strengthens the fact that this is a real religious objection  
21 that Lt. Col. Dunn --

22 THE COURT: We lost you.

23 Ms. Enlow, are you still there? Ms. Enlow?

24 Is she muted?

25 Ms. Enlow? Oh, I love this. Ms. Enlow?



1           Okay. I'm going to take a break. You set this up  
2 again.

3           THE CLERK: Okay.

4           (Recess at 1:51 p.m. to 2:11 p.m.)

5           THE COURT: Mr. Molloy and Ms. Enlow, we're back. We  
6 apologize for the Zoom issues. I think I was almost done with  
7 the first issue I had raised.

8           And, Ms. Enlow, I just wanted to give you an  
9 opportunity if you wanted to add anything just on this issue,  
10 which, again, wasn't really briefed but was just something that  
11 I've been thinking about.

12          MS. ENLOW: No, Your Honor.

13          THE COURT: Or Mr. Molloy -- Mr. Molloy, I know you  
14 got cut off. Anything further you wanted to add?

15          MR. MOLLOY: Oh, yes, sir. Just wanted to -- the  
16 waiver point, again, the government has not briefed it and for  
17 good reason, Your Honor. *Hobby Lobby*, binding precedent, makes  
18 clear that federal courts shouldn't inquire into the  
19 reasonableness of a religious belief. They can inquire into  
20 the sincerity of a religious belief, of course, but *Hobby Lobby*  
21 specifically says, I quote, "Federal courts have no business  
22 addressing whether the religious belief asserted in a RFRA case  
23 is reasonable."

24          And I think no one doubted the sincerity. The  
25 chaplain's letter did not doubt sincerity. And the substance

1 of Lt. Col. Dunn's religious exemption, it's in Exhibit 2 of  
2 his first affidavit, really kind of in depth --

3 THE COURT: And so the record is clear, I'm not  
4 questioning the reasonableness. I'm simply questioning whether  
5 this is a religiously-held belief or not or whether it's a  
6 politically-based objection. And that, so the record is clear,  
7 was the reason for my questions.

8 Let's turn to the issues that were briefed, the two  
9 primary issues, among others and that is -- and this goes,  
10 obviously, to likelihood of success on the merits in terms of  
11 granting injunctive relief, whether there's a compelling  
12 governmental interest, the policy that's been adopted by the  
13 military and then the second part of that, and I think the guts  
14 of this case is whether this is narrowly tailored.

15 Again, the law that both sides agree is applicable  
16 here is that because this COVID-19 mandate, the policy adopted  
17 by the military, does burden plaintiff's free exercise of  
18 religion, the burden shifts to the government to show that the  
19 application of the burden to plaintiff specifically furthers  
20 the compelling governmental interest; and second, is the least  
21 restrictive means of furthering that compelling governmental  
22 interest.

23 Ms. Enlow, there were a number of arguments raised in  
24 response to your arguments with respect to compelling -- the  
25 compelling interest issue, the plaintiff arguing that the

1 Air Force does not have a compelling interest in vaccinating  
2 Lt. Col. Dunn; arguments such as this action does not challenge  
3 the mandate itself or the military's authority to require  
4 vaccinations, it challenges the denial of a religious exemption  
5 to a single officer. Defendants cannot justify that decision  
6 by invoking a broadly formulated interest in favor of vaccines.

7           They go on to argue -- he goes on to argue, "Other  
8 than the real possibility of a deployment, each step in  
9 defendant's parade of horrors is implausible."

10           And he goes on to argue that "It's unlikely that Lt.  
11 Col. Dunn will be infected because he has robust natural  
12 immunity. It's unlikely that any new infection would have any  
13 adverse effects on his health. In addition to his existing  
14 immunity, he's an extremely healthy 40-year-old, and such  
15 individuals are rarely sickened or hospitalized."

16           Third, "Although advanced treatments should almost  
17 certainly be unnecessary, there's no reason that oral  
18 antivirals, which can be taken at home, would not be available  
19 to a deployed unit."

20           Fourth, that it's speculation that he might infect  
21 other members of a unit.

22           And then fifth, his assertion that his unit might fail  
23 to complete its mission should one or more members of the unit  
24 become infected is a thoughtless insult to the dedication and  
25 determination of the airmen in that unit.

1 I know there's a lot there, there's several pages of  
2 argument, but I wanted to give you an opportunity to respond to  
3 anything raised in the reply brief on this compelling interest  
4 issue.

5 MS. ENLOW: Thank you, Your Honor. This comes down to  
6 what level of risk does the military have to accept when they  
7 deploy people abroad. This is not a generalized concern that's  
8 just spread across the entire military. This is -- the  
9 Air Force conducted an individualized assessment for Lt. Col.  
10 Dunn and concluded that given his position in leadership, given  
11 his position as a leader of a worldwide, rapidly deployable  
12 unit, they get orders to go, and in 72 hours you could be  
13 flying across the world, set up an airfield in an austere  
14 location with no medical services available. Given all of  
15 these factors, the Air Force concluded that he need to be  
16 vaccinated in order to further the Air Force's compelling  
17 interest in satisfying its mission.

18 And these airfields are used to support combat  
19 operations, to support humanitarian aid, to support aid to  
20 countries that are dealing with natural disasters. And if the  
21 airfield is not set up within the four-hour time frame that  
22 they're supposed to set up the airfield, then that risk not  
23 only of this particular unit not reaching its goal, not  
24 achieving its mission, but also has these trickle down effects.  
25 And these trickle down effects can be very serious depending on



1 why the Air Force needed that airfield right then right there.

2 So the idea that this is some kind of broad  
3 generalized assessment is false. They conducted the  
4 individualized assessment required under RFRA.

5 Now, he presents this -- the string of "mights" that  
6 you referenced earlier, Your Honor. That -- the string of  
7 mights could happen. That's the point. They could absolutely  
8 happen. The Air Force, the military itself has a lot of  
9 experience with people getting sick on the battlefield and has  
10 determined, based on its experience with that, based on the  
11 science of the vaccines, that the way to minimize any kind of  
12 risk of outbreak, any kind of risk of serious illness, risk  
13 that somebody would have to get airlifted out of there, thus  
14 taking away medical services from people that might get wounded  
15 in combat, the Air Force doesn't want to take that risk. It  
16 shouldn't have to take that risk.

17 The point of the Reserves is to deploy. That is his  
18 job, to be ready to deploy. And he is not medically ready.

19 The Air Force has -- the secretary of the Air Force,  
20 secretary of defense have both determined that these  
21 individuals who are deploying need to be medically ready to go,  
22 and especially for his unit that's going to deploy and within  
23 72 hours he has to be ready. The Air Force does not have to  
24 accept the risk that he might get seriously ill and have to be  
25 medevaced out.

1           His assertions that there's treatments and it will be  
2 fine because he's healthy, well, we've seen numerous reports,  
3 I'm sure the Court's aware, of pure healthy people without any  
4 kind of underlying conditions die from COVID. It's just  
5 reality. They get hospitalized.

6           And the fact that he's saying, "Oh, well, there could  
7 be treatments there," well, these are not areas where there's  
8 necessarily going to be a hospital. There may not be anything  
9 there. It might be a dirt strip. So the idea that there's  
10 going to be these treatments available for him, that's just  
11 based on nothing. It's entirely speculative.

12           THE COURT: One of the issues raised in other cases,  
13 and in particular the case out of Florida, was -- I don't want  
14 to call it a "criticism," but an observation by the Court that  
15 they were bothered by the general nature of the letters, almost  
16 a form letter rejecting these religious accommodation requests,  
17 that, as Mr. Molloy points out, the number of these requests  
18 that have been granted is minimal.

19           And then when you look further into what do the  
20 letters say, you can see they've been written by a lawyer, not  
21 by someone who's in the military, because they use all the  
22 right buzz words.

23           And that concerned the judge in Florida because the  
24 statute makes it clear that it's got to be an  
25 individualized-based decision. What is it about this member of

1 the military that makes it compelling that he be vaccinated?

2 And so it raises a question in my mind. There's a  
3 review process that I understand that each person goes through,  
4 several levels, it looks like. So even though the letter  
5 seemed to be almost a form letter, explain to me what went on  
6 in these reviews of his request for a religious accommodation.  
7 And do you think that satisfies the concern that was raised by  
8 the judge in Florida?

9 MS. ENLOW: It absolutely does, Your Honor. Thank  
10 you.

11 Major Streett's declaration lays this out in a lot of  
12 detail, but as a -- to kind of succinctly say it, once a member  
13 submits the religious accommodation request, his chain of  
14 command gives endorsements whether they agree or disagree with  
15 the request. They have no authority to grant or deny. It's  
16 just whether they agree or disagree.

17 The member meets with a chaplain. The member meets  
18 with a medical health provider to talk about the risk to not  
19 getting vaccinated and what would happen if he doesn't get  
20 vaccinated, like you can't go and deploy, for example.

21 And then this packet goes up to a higher level  
22 commander. The Air Force is a little more decentralized than  
23 the other services in that they have commanders of what they  
24 called "Maj Com" or the things like that. The Air Force  
25 reserve commander is what looked at his initial packet.

1 THE COURT: Does each --

2 Sorry to interrupt.

3 Does each person who's reviewing this religious  
4 accommodation request, do they provide sort of a written  
5 memorandum as to whether they endorse or not endorse?

6 The reason I ask is if this case proceeds and  
7 Mr. Molloy asks for discovery, would there be, in effect, this  
8 package of written endorsement or no endorsement for both  
9 Mr. Molloy and the Court to look at, in terms of the level of  
10 discussion and what was reviewed with the plaintiff?

11 MS. ENLOW: So, yes, it is written down.

12 THE COURT: Okay.

13 MS. ENLOW: The chain of command's recommendations are  
14 written. I believe the chaplain writes a memo. There's at  
15 least documentation about the medical review. And then there  
16 is a --

17 THE COURT: Are there psychologists involved at all?

18 MS. ENLOW: That's a really good question. I don't  
19 think so.

20 THE COURT: Okay.

21 MS. ENLOW: I believe it's just a medical,  
22 immunization specialty or just a general health specialty.

23 And so then after the Air Force Reserve command --  
24 commander makes a decision on the initial review, if there's an  
25 appeal, like there was here, then the packet goes -- the



1 appeal -- the appeal and then the packet all go up to the  
2 Air Force surgeon general for another independent review.

3 And the Air Force surgeon general is advised by a  
4 religious resolution team. It's a multidisciplinary team. It  
5 consists of chaplains, JAGs, medical professionals, and they  
6 each also review the packet and they provide their assessment.

7 And so when the Air Force surgeon general is  
8 getting -- what you see with this letter at the end, that is  
9 based on his assessment, you know, informed by his team that's  
10 informing him as well. So it is an individualized assessment.

11 The fact that the letter does not spell out every  
12 single, you know, command duty or things that like that that he  
13 has, that does not mean that it wasn't an individualized  
14 assessment.

15 THE COURT: Okay.

16 MS. ENLOW: And the Court and for that, unfortunately,  
17 is not engaging with that declaration for Major Streett or  
18 with -- you know, with the facts that they are individualized.

19 THE COURT: Okay. Mr. Molloy, do you want to respond  
20 at all? I know your reply brief covers this, but go ahead.

21 MR. MOLLOY: Yes, Your Honor. I would just say this  
22 long, individualized process of review has resulted in all --  
23 no exemptions for any airmen up until just a couple of weeks  
24 ago, so I don't think that that really supports the idea that  
25 the military, behind these boilerplate letters, is giving real

1 close scrutiny to an individual airman, their risks, their  
2 missions, because it's resulted in the exact same thing, exact  
3 same boilerplate letter every single time.

4 Second, I wanted to address -- I think it's telling  
5 Ms. Enrow used the word it "might" result in these impairments  
6 to the mission. I think that is correct. This could  
7 theoretically happen. But the Air Force regulations are clear  
8 that it has to have a real, not merely theoretical adverse  
9 impact. And it's clear that that's not the case here where  
10 only 28 airmen have been hospitalized in the entire period of  
11 the pandemic, only 6 have died. So I do think this qualifies  
12 as a theoretical, not a real impact.

13 THE COURT: Your client, if he was called up today to  
14 go to New Zealand or Australia, couldn't do it. They wouldn't  
15 allow him in the country.

16 Why shouldn't I be concerned about that? And there --  
17 I guess there's other countries. I know the government raised  
18 that in their opposition, but that's concerning to me. If I'm  
19 issuing orders and I'm in the military and I say to your  
20 client, to the Lieutenant Colonel, "Hop on the next plane,  
21 you're going to be in New Zealand," and he says, "Oh, I can't  
22 go there, I'm not vaccinated," how is that of benefit to the  
23 military?

24 MR. MOLLOY: Well, two things, Your Honor, I would  
25 say. First off, thankfully, we are now in a situation where

1 more and more countries are realizing that these draconian  
2 COVID measures are no longer required. And country after  
3 country, state after state, is -- including California, which  
4 has had some of the stricter regulations in the U.S., is  
5 realizing that these are no longer required and that COVID-19  
6 is endemic.

7 Second, I would say even if all of that's true, the  
8 military is in no worse position because if they get rid of  
9 Col. Dunn or he's on inactive Ready Reserve, they're down an  
10 airman anyway. And so allowing the exemption at least allows  
11 the Air Force have a plus one to their roster, to someone that  
12 they can maybe shift around and send to a different country.

13 THE COURT: Okay. And then lets talk about is this  
14 narrowly tailored. Are there other alternatives out there that  
15 would allow the government to accomplish its compelling  
16 interest but not require vaccination? There wasn't -- there  
17 was some mention, I don't think, Mr. Molloy, I got the  
18 impression, we're not really talking about teleworking. I  
19 didn't really consider that. I know it was raised, but I don't  
20 think that's something that your client is either advocating or  
21 pursuing. I just wanted to make sure that that's accurate.

22 MR. MOLLOY: Yes, Your Honor. That is accurate.

23 THE COURT: Okay. There's a lot of -- not a lot, but  
24 a significant amount of argument on what I would call the  
25 "natural immunity alternative." In affidavits submitted from

1 other cases, as the plaintiff writes in the reply brief, "While  
2 it's true that the CDC recommends vaccination even for  
3 individuals who have previously been infected, the relevant  
4 question is not whether a vaccine might provide Lt. Col. Dunn  
5 with some level of additional protection. The question is  
6 whether natural immunity is roughly equivalent or superior to  
7 the vaccine alone."

8 Is that the question, Ms. Enlow? Isn't natural  
9 immunity the least restrictive alternative here; and if not,  
10 why not?

11 MS. ENLOW: It is not, Your Honor. Col. Rans's  
12 declaration and Col. Poel's declaration made clear that there's  
13 no scientific consensus regarding the duration of any natural  
14 immunity or the level of protection that previous infection  
15 bestows upon an individual.

16 It's also unclear, for example, what variant plaintiff  
17 had or how many antibodies he has, what level of antibodies is  
18 even necessary to give someone immunity, what variant he was  
19 infected with, what his level of protection might be against a  
20 reinfection.

21 And because the science is unclear in the face of that  
22 uncertainty, the military, in accordance with CDC guidance, has  
23 determined that not being vaccinated is an unacceptable risk to  
24 the health of service members and to mission accomplishment.

25 And the Air Force recognizes -- they have that



1 regulation AFI -- sorry. I'm now blanking on the Act -- 48110,  
2 that's it, that says that prior infections for some diseases  
3 may alleviate the need for vaccination, essentially. But  
4 that's only when there's scientific proof that a person who has  
5 measles, for example, is not going to get reinfected. We don't  
6 have that with COVID. The science is unclear.

7 Col. Rans's declaration also points out that the  
8 studies involving vaccines are -- there are more of them and  
9 they're of higher quality, you know, control trials, things  
10 like that, that we just don't have with these natural immunity  
11 studies yet and, therefore, the military has assessed that it  
12 is not a lesser restrictive means of accomplishing the same  
13 interests in having everyone be healthy and ready to deploy.

14 And again, they couldn't deploy -- even having natural  
15 immunity, you can't deploy, as Your Honor pointed out, to  
16 certain countries.

17 THE COURT: Mr. Molloy writes in his reply brief,  
18 talking about your opposition, "Instead of engaging with any of  
19 the evidence presented by plaintiff, defendants simply throw up  
20 their hands and claim there are too many unknowns to accept  
21 natural immunity. Of course the efficacy of the vaccines  
22 themselves is unknown, and claims about the level of protection  
23 they provide has changed dramatically over the past year. We  
24 were initially told that vaccine effectiveness was at least 97  
25 percent at preventing symptomatic disease, severe and critical

1 disease and death. The CDC later admitted that vaccine  
2 efficacy wanes after just a few months.

3 "More recently, the CDC has admitted that vaccines are  
4 not as effective in preventing infection from the Omicron  
5 variant. Given the ever-changing guidance relating to vaccine  
6 efficacy, defendant should not be allowed to hide behind their  
7 purported ignorance regarding the benefits of natural immunity,  
8 which is, by now, well established."

9 MS. ENLOW: Again, I disagree that it's well  
10 established.

11 Based on Col. Rans's and Col. Poel's declarations, it  
12 is not. It is not. And in the face of that uncertainty, it is  
13 entirely reasonable for the military to put an approved vaccine  
14 on the list and not allow folks to rely on prior infection.

15 This is no different, really, from the flu vaccine.  
16 Flu vaccines' effectiveness is only -- I mean, flu -- Col. Poel  
17 said the flu vaccine was less than 50 percent some years, yet  
18 the military still requires it, and they still require it and  
19 they don't allow evidence of prior infections because the  
20 military is concerned that people are going to get sick on the  
21 battlefield and have to get airlifted out and cause harm to the  
22 mission.

23 THE COURT: Okay. Mr. Molloy, anything further you  
24 want to add to your brief?

25 MR. MOLLOY: Yes, Your Honor.

1 I would just say the government has the burden of  
2 proving that, so if there's any unclarity in the data, that is  
3 their burden of proof.

4 But the CDC even recognizes that persons who survived  
5 a previous infection had lower case rates than persons who are  
6 vaccinated alone and that the vaccine does not currently help  
7 against transmission and infection, especially of omicron, so  
8 to that point.

9 And then just one last thing. The only thing I wanted  
10 to press generally is that the need for an immediately -- an  
11 immediate preliminary injunction or at least a TRO taking  
12 effect ideally before the end of the day simply because  
13 Col. Haynes has already taken punitive action by removing  
14 Lt. Col. Dunn from command, he's signaled his intention to  
15 further punish him, and Lt. Col. Dunn expects further punitive  
16 action when he reports for orders tomorrow. So only the Court  
17 can prevent that, Your Honor.

18 THE COURT: Save that. We're going to get to  
19 irreparable injury in a second.

20 The other issue that's raised in this discussion  
21 regarding least restrictive measures is two others, routine  
22 testing and masking and social distancing. I know you raised  
23 those, Mr. Molloy. Honestly, I wasn't that convinced that  
24 those arguments were compelling.

25 I don't see that routine testing or simply having Col.

1 Dunn mask and social distance would be least restrictive  
2 alternatives that would carry out the compelling government  
3 interest.

4 I've read your reply brief. I just wanted to see if  
5 there's anything that you wanted to argue with respect to those  
6 two other arguments you raised in terms of least restrictive  
7 alternatives?

8 MR. MOLLOY: Yes, Your Honor. Just a simple point  
9 that even if any one of those particular measures may not be  
10 the most effective in isolation, them combined, along with the  
11 robust protections the CDC recognizes natural immunity provides  
12 is a much -- it's far less or far, yeah, less restrictive means  
13 of achieving a compelling interest.

14 THE COURT: Okay. The other components of injunctive  
15 relief, obviously, are likelihood of irreparable harm to the  
16 plaintiff in the absence of preliminary relief.

17 Mr. Molloy just spoke to that briefly as to what is  
18 likely to happen tomorrow. And, again, the argument that I see  
19 in all these cases is that there is a presumption of  
20 irreparable harm because constitutional and/or statutory rights  
21 have been infringed.

22 Ms. Enlow, why doesn't the discussion end there?

23 MS. ENLOW: Well, of course, they haven't been  
24 infringed, Your Honor. The government's brief makes clear that  
25 the military has complied with RFRA. There's no RFRA



1 violation. And then we didn't discuss First Amendment.  
2 Because the government wins on RFRA, we win or First Amendment  
3 as well. So that presumption goes out the window.

4 I also don't think the Ninth Circuit has, in  
5 particular, recognized that a RFRA violation is presumptive  
6 irreparable harm.

7 So then we're just left with what's going to happen to  
8 him now. And nothing that's going to happen to him is --  
9 constitutes irreparable harm. And there's two points here.  
10 The first one is these disciplinary actions that he's talking  
11 about; he might get a letter of reprimand, there might be  
12 something negative in his file that's issued tomorrow. That is  
13 not irreparable.

14 There is an Air Force board for correction of military  
15 records whose job it is, whose sole purpose is to correct any  
16 error or injustice in a service member's record. So he can  
17 always petition to that board. And if the board agrees with  
18 him, he could have that removed from his record. It's like it  
19 wasn't there.

20 THE COURT: Okay. That reminded me of a question I  
21 wanted to ask because I think -- I got the impression from his  
22 second affidavit that one of the things that can't possibly  
23 happen is he can't be reinstated as a lieutenant colonel. Is  
24 that accurate?

25 MS. ENLOW: He's still a lieutenant colonel. He

1       hasn't lost his rank, as far as I understand.

2               THE COURT: Right.

3               MS. ENLOW: He's been removed from command. Yes. So  
4       he he's been removed from command and that is correct. That  
5       it's a nonjusticiable action.

6               The Court cannot and should not entertain putting  
7       someone back in command when his commander has lost confidence  
8       in his leadership and judgment. That should not happen and  
9       cannot happen.

10              THE COURT: So he's ineligible for promotions as well,  
11       right? No matter what, he's going to leave the military as a  
12       lieutenant colonel?

13              MS. ENLOW: So promotions are considered by promotion  
14       boards, and I wouldn't speculate what they would do based on  
15       the record in front of them, but he would be -- he would be --  
16       if he still refuses to get vaccinated, he would be removed to  
17       the Individual Ready Reserve.

18              THE COURT: I get that. Let's assume, though, that  
19       he's successful, ultimately successful in his lawsuit here, and  
20       so he goes back to the Air Force board, he gets his military  
21       record corrected, but he can't advance any further in the  
22       Air Force. He can't -- I don't know what's after lieutenant  
23       colonel. Colonel, I would assume.

24              MS. ENLOW: Yes.

25              THE COURT: He will never become a colonel. Is that

1 right, Mr. Molloy? Is that accurate?

2 MR. MOLLOY: Yes, Your Honor. Being relieved from  
3 squadron command because of lack of faith from the commander,  
4 any type of recommendations that would come from his commander,  
5 there are just so many ways when a promotion board sees that,  
6 he's not going to be -- he's not going to be promoted. And  
7 that's definitely so if he's transferred to the inactive Ready  
8 Reserve.

9 THE COURT: If he's ultimately successful, does he get  
10 backpay?

11 MS. ENLOW: Yes, Your Honor. He can get backpay if  
12 he's ultimately successful.

13 THE COURT: Okay. Okay.

14 MS. ENLOW: He can be reinstated into the Reserves  
15 with backpay.

16 THE COURT: But he would be -- again, he would be  
17 reinstated as a lieutenant colonel, correct?

18 MS. ENLOW: Which is what he is now.

19 THE COURT: Okay.

20 MS. ENLOW: Yes.

21 THE COURT: But if he's reinstated, why would he not  
22 be eligible, then, at that point, for promotions? If his  
23 military record is cleared up and he's back and reinstated --  
24 fully reinstated, why would he not be eligible for a promotion?

25 MS. ENLOW: So you're correct. He would be eligible

1 for a promotion. It's a promotion board that would consider  
2 it.

3 THE COURT: Okay. Mr. Molloy, do you agree with that?

4 MR. MOLLOY: No, Your Honor, I do not.

5 So the promotion board is in October. So all the  
6 materials have to be before there.

7 And that promotion board, what they're going to see is  
8 that Lt. Col. Dunn was removed from squadron command because  
9 his superior officer lost faith in him, did not consider him  
10 effective to be a leader of men, all of that, to submit a  
11 lawful order. And that's discounting even any "around the  
12 side" recommendation letters that have to come from the  
13 superior officers. That's -- whether he can even find any  
14 other command anywhere else in the Air Force for him to  
15 continue to gain that experience and continue to gain that --  
16 those items on his resumé. So he's effectively been sidelined  
17 from any opportunities that would -- the promotion board would  
18 look to when considering his advancement to the rank of  
19 colonel, Your Honor.

20 THE COURT: Okay. I know we're speculating a little  
21 as to what could happen. And I know this puts -- in effect, it  
22 puts a big obstacle in his way. But it sounds to me as if he's  
23 not absolutely prohibited from being promoted if he actually is  
24 successful in his lawsuit and clears up his military record and  
25 is reinstated. There's nothing that says because he's now been



1 relieved of his command that he absolutely can no longer be  
2 promoted. Is there something? Go ahead.

3 MR. MOLLOY: Yes, Your Honor. He would miss that  
4 October review board, and there's no second chance for that.  
5 So if he misses that October 22 review board, it's over.

6 THE COURT: Why? I mean, is he retiring? Is he  
7 leaving the military? Is he --

8 MR. MOLLOY: Your Honor, because he'll miss all  
9 service opportunities between now and then. And so he's going  
10 to have, essentially, no military service for that October  
11 review board to review when assessing him for promotion.

12 THE COURT: But is there a review board every year?

13 MR. MOLLOY: I don't know the exact timing of every  
14 review board, Your Honor.

15 THE COURT: Okay. We're speculating a little. Okay.  
16 I get it.

17 And then the third and fourth elements of injunctive  
18 relief which get combined in these cases are balance of  
19 equities and the injunction is in the public interest. Both of  
20 you have thoroughly briefed those issues. I really don't have  
21 questions with regard to those issues.

22 Anything further that either counsel want to add?  
23 We'll take a short break, then I'll come back out and let you  
24 know my decision on the motion for injunctive relief.

25 But, Mr. Molloy, starting with you, anything further

1 that you want me to add?

2 MR. MOLLOY: Yes, Your Honor. I would just like to  
3 clarify if Lt. Col. Dunn misses that October 2022 promotion  
4 board, it is possible that in a future board he could be  
5 promoted, but all of that time of missing squadron command and  
6 missing military opportunities, that's gone forever. He is  
7 behind forever from that now.

8 THE COURT: Okay. Thank you for that.

9 Ms. Enlow, anything further?

10 MS. ENLOW: No, Your Honor. Thank you.

11 THE COURT: Okay. Give me a few minutes and then  
12 we'll come back out and discuss the Court's decision on this  
13 motion. Thank you so much for responding to my questions.

14 (Recess at 2:44 p.m. to 2:57 p.m.)

15 THE COURT: Okay. Back on the record. If you freeze  
16 up again, it's on our end, so we'll let you know. Wave your  
17 hands or something and let me know if you cannot hear me.

18 Okay. As I indicated, I am prepared to issue a ruling  
19 on this motion today. I know that, as I said, the parties  
20 would appreciate a ruling. I know the plaintiff would  
21 appreciate a ruling, given all that's going on, on a daily  
22 basis. Again, I wish I could issue a -- and have the time and  
23 the lack of 1,000 cases to issue a more comprehensive written  
24 ruling, but the transcript is going to have to serve as the  
25 Court's ruling.

1           As with all motions for preliminary injunction, you  
2 start with the legal principle that preliminary injunctions are  
3 extraordinary remedies and that courts should only issue  
4 injunctive relief if, in fact, the four elements of injunctive  
5 relief, likelihood of success on the merits, irreparable harm,  
6 balance of equities and the injunction is in the public  
7 interest have been demonstrated.

8           This issue, the issues raised by this lawsuit, place  
9 burdens on the government to prove to the Court, in particular  
10 as we discussed in this case that the policy in this case, the  
11 requirement of vaccinating or taking a COVID-19 vaccination is  
12 in furtherance of a compelling governmental interest and, in  
13 fact, that the government is employing the least restrictive  
14 means of furthering that compelling governmental interest.

15           In terms of -- and focusing just -- there are two  
16 claims here upon which the plaintiff is basing his motion, his  
17 claim under the Religious Freedom Restoration Act and then his  
18 claim -- his free exercise claim under the First Amendment.  
19 And the Court will take up both of those claims as to whether  
20 there's a basis for injunctive relief.

21           In terms of whether this policy is in furtherance of a  
22 compelling governmental interest, is there a likelihood of  
23 success on the merits that the Court would find that the policy  
24 is not in furtherance of a compelling governmental interest?  
25 The evidence and the arguments at this point do convince the

1 Court that this policy is, in fact, in furtherance of a  
2 compelling governmental interest.

3 As courts have said over and over again, and this  
4 Court takes to heart, the Court must give great deference to  
5 the professional judgment of military authorities concerning  
6 the relative importance of a particular military interest.

7 The government -- I'm sorry. The military has argued  
8 in this case that the mandatory vaccination policy against  
9 COVID-19 is necessary to protect the force and defend the  
10 American people, that it's necessary to ensure military  
11 readiness and it's necessary to ensure the health and safety of  
12 airmen and prevent the spread of infectious disease.

13 This comes down to me, to this Court, in terms of what  
14 Ms. Enlow raised, as to what is an acceptable level of risk.  
15 What level of risk is appropriate is the way that Ms. Enlow  
16 phrased it and argued it.

17 And, again, in this Court's view, the acceptable level  
18 of risk is a military decision that deserves great deference.  
19 And given that deference in these circumstances, it's clear to  
20 me that just on that issue of whether there is a compelling  
21 governmental interest that's been demonstrated here, that that  
22 issue comes out in favor of the military.

23 The plaintiff is not medically ready to deploy 100  
24 percent, as we discussed. There are still -- even though  
25 things change from day-to-day and month to month, I can only



1 take this case as we sit here today. He's not medically ready  
2 to deploy to certain areas of the world where he might be  
3 required to deploy.

4 And it does come down, as I said, to what level of  
5 risk is appropriate. If the military can eliminate almost all  
6 risk through this policy, then there is a compelling  
7 governmental interest. And if it's going to impact, as the  
8 government has argued or possibly impact -- I don't think it's  
9 speculation that it is a possibility that this could impact  
10 both military readiness and the need to adequately deploy in a  
11 fashion that the military wants deployment to occur, that the  
12 policy is necessary.

13 The tougher issue is, is this the least restrictive  
14 means of furthering this compelling governmental interest?

15 The government argues that the practice of vaccination  
16 and ordering the COVID-19 vaccination for all members of the  
17 Air Force is, in fact, the least restrictive means in fully  
18 accomplishing what the Court has found to be a compelling  
19 governmental interest.

20 There were, as we discussed, at least four reasons  
21 raised by the plaintiff as to why requiring the plaintiff to be  
22 vaccinated, why it is not, in fact, the least restrictive means  
23 of furthering the government's compelling governmental  
24 interest.

25 The government fails to satisfy this test when there

1 are, in fact, other alternatives of achieving its goal without  
2 imposing a substantial burden on the plaintiff's exercise of  
3 religion.

4 Here, again, the Court finds that at this stage of the  
5 proceedings, obviously the case has only been in front of the  
6 Court for a week and there is a lot more evidence that would be  
7 presented over time, but as we sit here today, the Court does  
8 find that the government has met its standard of showing why  
9 the proposed alternatives are not viable options.

10 First, although it was briefed, it really wasn't  
11 pursued, the idea that teleworking might be a least restrictive  
12 alternative. I think both sides agree that that's not an issue  
13 that the Court needs to take up or is really being pursued.  
14 You obviously cannot telework when you're deployed.

15 The second is the closer issue, the tougher issue in  
16 these cases. And I wanted to also mention, as the briefs do  
17 mention, we're operating in these cases right now in an area  
18 of, in effect, first impression.

19 While the parties have done an excellent job of giving  
20 the Court decisions issued by district court judges from around  
21 the country facing similar issues, almost identical issues to  
22 this Court, there's no Ninth Circuit precedent, there's no  
23 Supreme Court precedent in which this statute has been applied  
24 in a military context.

25 Obviously these cases will be appealed and we'll start

1 getting some guidance, but we're operating, as I've done in  
2 many cases over the past few years, in an area where there's no  
3 case on point, there's no precedent on point. And, again, you  
4 need to look simply at instructive cases in other areas, but  
5 none of these cases are binding on this Court.

6 So the issue is whether the natural immunity argument  
7 raised by the plaintiff is a sufficient alternative, is a least  
8 restrictive alternative that the Air Force should follow here.  
9 And the argument that was raised is that right now there is no  
10 scientific consensus and it's not well established in the face  
11 of that uncertainty. It's not well established in terms of the  
12 data concerning natural immunity and, in the face of that  
13 uncertainty, that the Court should not and cannot accept that  
14 and find that that is, in fact, the least restrictive means of  
15 furthering the compelling government interest here.

16 It was several Supreme Court judges that said that  
17 judges aren't scientists. This issue involves a lot of  
18 science. I appreciate the affidavits, but affidavits aren't  
19 subject to cross-examination, they aren't subject to full-blown  
20 hearings. And while they're helpful --

21 I lost Mr. Molloy. Okay.

22 -- they don't replace full-blown hearings or a  
23 full-blown explanation of issues like this.

24 And absent that, I am, like many judges, reluctant to  
25 make a scientific determination. And I do agree with the

1 government that on this issue there is a lack of consensus, and  
2 it's not well established that a natural immunity is effective,  
3 more effective or as effective as the vaccine.

4 And given that uncertainty, the Air Force here has  
5 determined that the best way to minimize risk is to require  
6 vaccination. Again, there are host countries that require  
7 vaccination and given the need for the military to be able to  
8 deploy the plaintiff on short notice to any location, the  
9 natural immunity alternative isn't feasible.

10 The plaintiff raises another argument that routine  
11 testing would be another least restrictive means of furthering  
12 a compelling government interest. The Court finds, however,  
13 that it's not always feasible to get the testing done,  
14 especially when you have to deploy quickly, and to get testing  
15 done within the time period required.

16 In the event that plaintiff did, in fact, test  
17 positive, the military would be forced to scramble to find a  
18 replacement. The military shouldn't be forced to scramble in  
19 these types of situations.

20 Again, the Court raises the fact raised by the  
21 defendants that there are a number of host nations that require  
22 vaccination for members to enter their countries. And, again,  
23 that wasn't specifically addressed by the plaintiff in the  
24 opposition -- in the reply brief.

25 As another district court also explained, the speed of



1 transmission usually outpaces test results, making test result  
2 availability not an effective alternative measure.

3 And then finally, masking and social distancing is  
4 another means that was raised by the plaintiff. It's not,  
5 again, the Court finds, feasible under these circumstances and  
6 given the plaintiff's specific responsibilities and duties in  
7 his role as the -- formally as the leader of -- I think it was  
8 up to at least 40 men.

9 We lost Mr. Molloy again.

10 Mr. Molloy, can you hear me? No.

11 Ms. Enlow, can you hear me?

12 MS. ENLOW: Yes, Your Honor.

13 THE COURT: Okay. So it's just Mr. Molloy right now.

14 You're in Washington, D.C., right?

15 MS. ENLOW: Yes, I am.

16 THE COURT: Okay. I think Mr. Molloy is in Texas.

17 He's back.

18 Can you hear me, Mr. Molloy?

19 MR. MOLLOY: Yes, Your Honor, I can. Yes, Your Honor.  
20 I'm sorry.

21 THE COURT: Okay. All right. And so I -- my finding  
22 with respect to the preliminary injunction motion is that, in  
23 fact, the government has demonstrated that requiring the  
24 vaccination -- requiring the plaintiff to be vaccinated, the  
25 COVID-19 vaccine, is, under these circumstances, these specific

1 circumstances, the least restrictive means of furthering the  
2 compelling governmental interest.

3 And again, as I have mentioned previously, I  
4 recognize, and there's a lot of discussion in the cases that I  
5 read, that military members are not excluded from the  
6 protection of statutes or constitutional rights. That is  
7 discussed over and over again.

8 But these same cases also make it clear that the Court  
9 should be more deferential to the defendant's judgment on what  
10 is required to obtain maximum readiness of the military.

11 There's a case out of the District of Columbia,  
12 *Singh v. McHugh*, which is cited by the defendants in that case.  
13 The Court noted the need to respect military judgment while  
14 still applying RFRA's strict standard.

15 For those reasons, the Court does find that the  
16 government is likely to show that the vaccination is the least  
17 restrictive means of achieving a compelling interest and that  
18 the plaintiff is unlikely to succeed on the merits of the RFRA  
19 claim.

20 I also would find that the plaintiff has not  
21 demonstrated a likelihood of success on his free exercise  
22 claim.

23 The Supreme Court has held that the right of free  
24 exercise does not relieve an individual of the obligation to  
25 comply with a valid and neutral law of general applicability on

1 the grounds that the law prescribes conduct that his religion  
2 prescribes.

3 A law that is neutral and of general applicability  
4 need not be justified by a compelling governmental interest  
5 even if the law has the incidental effect of burdening a  
6 particular religious practice. A law failing to satisfy these  
7 requirements must be justified by a compelling governmental  
8 interest and must be narrowly tailored to advance this  
9 interest.

10 There's a recent Ninth Circuit case and not a case  
11 involving military but involving a school district, *Doe v.*  
12 *San Diego Unified School District*, a 2021 Ninth Circuit case.  
13 In that case, the Ninth Circuit found that a student  
14 challenging her school district's vaccine mandate, which did  
15 not allow for a religious exception, was not likely to succeed  
16 on a free-exercise claim, as she had not raised a serious  
17 question about whether the mandate was neutral or generally  
18 applicable.

19 As to neutrality, the Ninth Circuit noted that the  
20 terms of the mandate did not make any reference to religion,  
21 nor had the student shown a likelihood that the mandate was  
22 implemented with the aim of suppressing religious belief rather  
23 than protecting the health and safety of students, staff and  
24 the community.

25 Turning to general applicability, the Court noted --

1 the Ninth Circuit noted that the only exempted students were  
2 those who qualified for a medical exemption, which furthered  
3 the government's interest in protecting student health and  
4 safety, and so it did not undermine the district's interest as  
5 a religious exception would and, accordingly, the mandate was  
6 subject to rational basis.

7           Similar to what is involved here, the terms of the  
8 Air Force mandate do not make any reference to religion, and  
9 plaintiff has not claimed and does not claim that the mandate  
10 was implemented with the aim of suppressing religious belief.

11           The fact that the Air Force has granted medical and  
12 administrative exemptions does not render the mandate not  
13 generally applicable. And as the Ninth Circuit recognized in  
14 the *Doe v. San Diego Unified School District* case, granting the  
15 medical exemption furthers their interest in ensuring military  
16 readiness and the health of their members as requiring a  
17 service member who is, for example, allergic to a component of  
18 the vaccine would harm their health.

19           Accordingly, these exemptions do not undermine the  
20 government's interests the way a religious exemption would and,  
21 thus, the government is likely to show that the mandate is  
22 generally applicable and does not violate the free exercise  
23 clause.

24           In the event that a court -- appellate court might  
25 believe, under the free exercise claim, that it's subject to



1 strict scrutiny for the same reasons that the Court has found  
2 that there's not a likelihood of success on the Religious  
3 Freedom Restoration Act, I also believe that the free exercise  
4 challenge would fail as well for the same reasons as the Court  
5 provided with respect to the Religious Freedom Restoration Act.

6 In terms of the likelihood of irreparable harm to the  
7 plaintiff and the other factors, given that the Court has found  
8 that there is not a likelihood of success on the merits of the  
9 two claims, the Court does not have to reach those issues, but  
10 I -- in terms of if it assists both the litigants and the  
11 appellate court, I think the irreparable harm issue is a close  
12 issue. I think it requires some further evidence.

13 There obviously is a number of cases, precedent, that  
14 indicates that there simply -- a court should find simply that  
15 there's a presumption of irreparable harm when a constitutional  
16 or statutory right has been infringed, but in a case where  
17 plaintiff has failed to demonstrate a sufficient likelihood of  
18 success on the merits, then a presumption wouldn't apply.

19 The plaintiff has argued that he is -- he's already  
20 suffered and he's likely to suffer irreversible harm to his  
21 career and reputation if he is removed from command.

22 I'm not sure the evidence is clear on that at this  
23 stage, as evidenced by the Court's questions on what could  
24 happen if he is ultimately successful in his lawsuit.

25 Military administrative and disciplinary actions,

1 including separation, are not, at least at this point in the  
2 Court's review of the evidence, not irreparable injuries.

3 It appears that the plaintiff could later be  
4 reinstated and provided backpay if he did prevail on his claim.  
5 So at this point I would find that the plaintiff, because he  
6 hasn't shown a likelihood of success, has also not met his  
7 burden on demonstrating a likelihood of irreparable harm.

8 And then the last factor is balance of equities in the  
9 injunction and public interest, third and fourth requirements  
10 of a preliminary injunction. Those two requirements merge when  
11 the government is involved. And in this case, again, court's  
12 are to give great deference to the professional judgment of  
13 military authorities concerning the relative importance of a  
14 particular military interest.

15 In *Winter*, the primary Supreme Court case that set  
16 forth the requirements for issuance of a preliminary  
17 injunction, the Supreme Court, in fact, reversed the granting  
18 of a preliminary injunction on the Navy on just the balance of  
19 equities in the injunction and the public interest factors  
20 alone.

21 The Court in *Winters* noted the importance of  
22 plaintiff's ecological, scientific and recreational interest in  
23 marine mammals but found those interests were plainly  
24 outweighed by the Navy's need to conduct realistic training  
25 exercises to ensure that it is able to neutralize the threat

1 posed by enemy submarines. Again, similarly here, the public's  
2 interest in military readiness and the efficient administration  
3 of the federal government does outweigh plaintiff's claims of  
4 job-related and pecuniary loss.

5           Serious questions have been raised. This is not,  
6 obviously, given what's gone on around the country in other  
7 cases, a case that district courts don't need further guidance  
8 on; but, as I mentioned, at this stage a preliminary  
9 injunction, especially enjoining the military, given all that's  
10 going on in the world at this time, it would be an  
11 extraordinary remedy in this Court's mind. And it can only be  
12 granted upon a clear showing that the plaintiff is entitled to  
13 the relief that he seeks here.

14           Courts should be and this court in particular is  
15 reluctant to enjoin the military when military readiness is at  
16 stake. I thought the discussion in the Texas case -- no. It  
17 was Georgia, I'm sorry -- by the judge in Georgia was  
18 particularly instructive even though I disagreed with where he  
19 came out on the issue, but there's a lot of discussion in this  
20 case and other cases I've seen in which the Court talks about  
21 how important it is for judges and district courts to seriously  
22 weigh what type of anticipated interference there is with the  
23 military function; would an injunction seriously impede the  
24 military in their performance of vital duties.

25           The cases strongly suggest that these type of cases

1 militate strongly against judicial review. We are entitled to  
2 review and the plaintiff is certainly entitled to his day in  
3 court, given the serious nature of his claim and the fact that  
4 it involves both statutory and constitutional issues.

5 But the judge in the Georgia case, again, which went  
6 in favor of the Air Force officer, it was an Air Force officer  
7 versus Lloyd Austin, says that "Courts must consider the extent  
8 to which the exercise of military expertise or discretion is  
9 involved, and courts should defer to the superior knowledge and  
10 experience of professionals in matters such as promotions or  
11 orders directly related to specific military function." And he  
12 writes over and over again, "Judges don't make good generals."  
13 I couldn't agree with that statement more.

14 These are difficult issues that you're asking a  
15 district court to make. And given the role of the military in  
16 protecting the American people and people around the world, I  
17 am reluctant to issue injunctive relief under these  
18 circumstances absent a clear -- a clearer or a clear showing  
19 that such injunctive relief should be granted.

20 That's really where I come out and where I disagree  
21 with the other cases that have been submitted, particularly by  
22 the plaintiff, where injunctive relief has been granted by the  
23 district court judge.

24 Hopefully I've made my decision clear, the basis for  
25 my decision. The motion for preliminary injunction is denied.



1 And I know that this will be pursued. Hopefully the transcript  
2 will be clear enough.

3 And again, I truly appreciate the lawyering in this  
4 case. I know it will continue as it moves up through the  
5 appellate courts. And given what's going on all around the  
6 country, it may end up in the Supreme Court. But thank you for  
7 contributing to the discussion and the legal issues, and we'll  
8 see where we end up. Thank you both.

9 Sorry, again, for the Zoom interruptions. We're going  
10 to go back to live hearings starting March 1st, so I appreciate  
11 your patience as well. Okay. Have a good afternoon.

12 MR. MOLLOY: Thank you, Your Honor.

13 MS. ENLOW: Thank you, Your Honor.

14 THE COURT: Thank you.

15 (Concluded at 3:29 p.m.)

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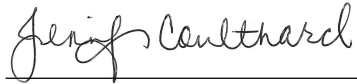
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C E R T I F I C A T E

I certify that the foregoing is a true and correct transcript of the record of proceedings in the above-entitled matter.



JENNIFER L. COULTHARD, RMR, CRR  
Official Court Reporter

February 28, 2022  
DATE