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September 13, 2022

Lyle W. Cayce, Clerk
United States Court of Appeals for the Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130-3408

Via ECF

Re: *U.S. Navy SEALs 1-26 v. Biden*, No. 22-10077 consolidated with 22-10534

Dear Mr. Cayce,

Pursuant to Federal Rule of Appellate Procedure 28(j), Plaintiffs-Appellees submit additional authority and newly discovered facts that counsel just became aware of this morning.¹ On June 2, 2022, the Department of Defense Acting Inspector General (DoDIG) sent a memo to the Secretary of Defense to inform him “of potential noncompliance with standards for reviewing and documenting the denial of religious accommodation requests of Service members identified through complaints submitted to [DoDIG]” regarding DoD’s handling of religious accommodation requests pertaining to the COVID-19 vaccine mandate. Among DoDIG’s findings, which undermine Defendants-Appellants’ arguments in this appeal:

- There is a “trend of generalized assessments rather than the individualized assessment that is required by Federal law and DoD and Military Service policies.”
- The denial memorandums reviewed “did not reflect an individualized analysis demonstrating that the Senior Military Official considered the full range of facts and circumstances relevant to the particular religious accommodation request.”

¹ See *DoDIG memo to SECDEF highlights deliberate violation of Federal Law within the DoD*, Terminal X (Sept. 13, 2022), <https://trmlx.com/dodig-memo-to-secdef-highlights-deliberate-violation-of-federal-law-within-the-dod/>.

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- The “volume and rate at which decisions were made to deny requests is concerning. . . . Assuming a 10-hour work day with no breaks or attention to other matters, the average review period was about 12 minutes for each package. Such a review period seems insufficient to process each request in an individualized manner and still perform the duties required of their position.”

A copy of the memo is attached.

Respectfully submitted,

/s/Heather Gebelin Hacker

Heather Gebelin Hacker

Counsel for Plaintiffs-Appellees

Encl: Info Memo from DoD Acting Inspector General Sean W. O'Donnell to Defense Secretary Lloyd Austin

cc: All counsel of record via ECF

CUI



SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

SEP - 2 2022

MEMORANDUM FOR UNDER SECRETARY OF DEFENSE FOR PERSONNEL AND
READINESS

SUBJECT: Referral of Info Memo from the Office of Inspector General Regarding Coronavirus
Disease 2019 Religious Accommodation Requests

Mandatory vaccination against coronavirus disease 2019 (COVID-19) is necessary to protect the Force and ensure its readiness to defend the American people. Uniform standards must be applied to all requests for medical or administrative exemption in a manner consistent with the law and DoD policy, including DoD Instruction 6205.02, "DoD Immunization Program," and DoD Instruction 1300.17, "Religious Liberty in the Military Services."

The DoD Office of Inspector General transmitted the attached Info Memo regarding information it received and reviewed concerning denials of religious accommodation requests from COVID-19 vaccination requirements. I am referring the Info Memo to you for appropriate action, in coordination with the Secretaries of the Military Departments and the DoD Office of General Counsel, as necessary and appropriate.

Handwritten signature: Stephen J. Bennett

Attachment:
As stated

cc:
Secretaries of the Military Departments
General Counsel of the DoD
Acting Inspector General of DoD



OSD005557-22/CMD007059-22

Controlled by: DoD OIG
Controlled by: Administrative Investigations
CUI Categories: PRIIG/INV/WHSTL
Limited Dissemination Control: FEDCON
POC: Marguerite Garrison 703-604-8500

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20220601/1440



INSPECTOR GENERAL
DEPARTMENT OF DEFENSE
4800 MARK CENTER DRIVE
ALEXANDRIA, VIRGINIA 22350-1500

INFO MEMO

June 02, 2022

FOR: SECRETARY OF DEFENSE

DepSecDef Action _____

FROM: Sean W. O'Donnell, Acting Inspector General

SUBJECT: Denials of Religious Accommodation Requests Regarding Coronavirus
Disease-2019 Vaccination Exemptions

- **Purpose.** To inform you of potential noncompliance with standards for reviewing and documenting the denial of religious accommodation requests of Service members identified through complaints submitted to my office.
- The Department of Defense (DoD) Hotline received dozens of complaints regarding denied religious accommodation requests from Service members. We found a trend of generalized assessments rather than the individualized assessment that is required by Federal law and DoD and Military Service policies.¹
- The denial memorandums we reviewed generally did not reflect an individualized analysis, demonstrating that the Senior Military Official considered the full range of facts and circumstances relevant to the particular religious accommodation request. For example, an Air Force general denied one Airman's request with the brief statement: "I disapprove your request for exemption from vaccinations under the provisions of AFI 48-110, paragraph 2-6.b.3."

¹ The Religious Freedom Restoration Act of 1993 (RFRA) prohibits the "Government [from] substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability" unless the Government "demonstrates 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." 42 U.S.C. §§ 2000bb-1(a), (b). The U.S. Supreme Court has clarified that RFRA "requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726-27 (2014) (citation omitted).

DoD Instruction 1300.17, "Religious Liberty in the Military Services," paragraph 3.2.d. ., requires that "[o]fficials charged with making recommendations or taking final action on a Service member's request for the accommodation of religious practices will review each request individually, considering the full range of facts and circumstances relevant to the specific request.... The means that is least restrictive to the requestor's religious practice and that does not impede a compelling governmental interest will be determinative." [Emphasis added.]

Prepared By: John Fazakerley, SA to DIG AI
Phone Number: 703-604 8764

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OSD004843-22/CMD006126-22

- We also reviewed appellate authority decisions that overturned denials of religious accommodation requests. Some of the appellate decisions included documentation that demonstrated a greater consideration of facts and circumstances involved in a request.
- Additionally, the volume and rate at which decisions were made to deny requests is concerning. The appeal authorities of the Services we reviewed indicated that an average of 50 denials per day were processed over a 90-day period. Assuming a 10-hour work day with no breaks or attention to other matters, the average review period was about 12 minutes for each package. Such a review period seems insufficient to process each request in an individualized manner and still perform the duties required of their position.
- We bring this to your attention for any action you deem appropriate to ensure that published guidance, including DoD Instruction 1300.17, "Religious Liberty in the Military Services," are followed when acting on requests for religious exemption from coronavirus disease-2019 (COVID-19) vaccination requirements. We will make available to the DoD General Counsel the complaints received by the Hotline that support our comments.
- Finally, we want to remind you of our recently announced Audit of Military Departments' Processing of Coronavirus Disease-2019 Vaccination Exemptions and Disciplinary Actions for Active Duty Service Members (Project No. D2022-D000AW-0081.000). The objective of this audit is to determine whether the Military Departments are processing exemption requests for the COVID-19 vaccination and taking disciplinary actions for active duty Service members in accordance with Federal and DoD guidance.
- If you have any questions, please contact me at 703-604-8300 or Marguerite Garrison, Deputy Inspector General for Administrative Investigations at 703-604-8500, or marguerite.garrison@dodig.mil. If you wish to discuss the specifics of the ongoing audit, please contact Brett Mansfield, Deputy Inspector General for Audit at 703-604-8900, or brett.mansfield@dodig.mil.

cc:

General Counsel of the Department of Defense