

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

CHRISTOPHER HARKINS, et al.,)
Plaintiffs,) Case No.
vs.) 23-1238C
UNITED STATES OF AMERICA,)
Defendant.)

Hearing via Telephone
Thursday, February 15, 2024
3:59 p.m.
Status Conference

BEFORE: THE HONORABLE ARMONDA O. BONILLA

Susanne Bergling, RMR-CRR, Court Reporter

1 APPEARANCES:

2

3 ON BEHALF OF THE PLAINTIFF:

4 DALE F. SARAN, ESQ.

5 Dale F. Saran, LLC

6 19744 W 116th Terrace

7 Olathe, Kansas 66061

8 (508) 415-8411

9 dale.saran@militarybackpay.com

10

11 ON BEHALF OF THE DEFENDANT:

12 KYLE S. BECKRICH, ESQ.

13 U.S. Department of Justice

14 P.O. Box 480, Ben Franklin Station

15 Washington, D.C. 20044

16 (202) 616-9322

17 kyle.beckrich@usdoj.gov

18

19 ALSO PRESENT FOR PLAINTIFF:

20 Mr. Johnson

21 Mr. Meyer

22

23 ALSO PRESENT FOR DEFENDANT:

24 Brian Judge, Coast Guard

25

1 P R O C E E D I N G S

2 - - - - -

3 (Proceeding called to order, 3:59 p.m.)

4 THE COURT: Good afternoon, Counsel. This is
5 Judge Bonilla. We are here this afternoon for a status
6 conference in Harkins vs. United States, Docket Number
7 23-1238.

8 Who's on the phone representing the Plaintiffs?

9 MR. SARAN: Your Honor, this is attorney Dale
10 Saran for the Plaintiffs and my co-counsel, Mr. Johnson
11 and Mr. Meyer, are also both on the call.

12 THE COURT: Good afternoon, Counsel.

13 And for the United States?

14 MR. BECKRICH: Good afternoon, Your Honor. This
15 is Kyle Beckrich on behalf of the United States. With
16 me on the call is Brian Judge, counsel for the Coast
17 Guard.

18 THE COURT: Good afternoon. I scheduled this
19 status conference to discuss Plaintiffs' complaint, ECF
20 Number 1, and the Government's pending motion to dismiss
21 for lack of subject matter jurisdiction and failure to
22 state a claim upon which relief can be granted under
23 Rules 12(b)(1) and 12(b)(6) of the rules of this Court,
24 Docket Number 7.

25 So as to not bury the lead, my plans for today

1 are to ask Plaintiffs' counsel a series of questions
2 about the sum and substance of each count of the
3 complaint, to grant in part and deny in part the
4 Defendant's pending motion to dismiss, direct Plaintiffs
5 to file an amended complaint based upon the Court's
6 rulings today on the remaining counts, making sure to
7 include the additional information required for
8 cognizable claims, which I will be discussing at length,
9 and set forth a briefing schedule for the parties to
10 file cross motions for judgment upon the Administrative
11 Record.

12 My review of the case reveals the following:
13 Plaintiffs' complaint is nearly 60 pages and appends 16
14 exhibits, totaling over 120 pages, and yet with each
15 counts material facts supporting the allegations are
16 omitted or described with such little detail that it's
17 impossible to fully understand or properly assess the
18 claims being alleged. In turn, Defendant's motion to
19 dismiss does not see the forest from the trees.

20 Now, as I currently understand this case -- and,
21 Mr. Saran, I will be relying upon you to correct me
22 where I am wrong and to fill in some missing gaps,
23 but --

24 MR. SARAN: Yes, sir.

25 THE COURT: -- Plaintiffs are seven former

1 members of the United States Coast Guard claiming that
2 they were involuntarily separated from the military over
3 their objection and/or refusal or failure to receive the
4 COVID-19 vaccine. Because the military order requiring
5 the vaccine was rescinded following their separations,
6 Plaintiffs allege they were unlawfully separated and,
7 therefore, entitled to reinstatement, correction of
8 their military records, and resulting back pay.

9 In addition to their claims of retroactive
10 rescission, Plaintiffs assert the vaccine order violated
11 the Emergency Use Product Act, 10 USC Section 1107(a),
12 in ordering service members to receive an unlicensed,
13 emergency use authorization -- an EAU -- sorry, EUA --
14 COVID-19 vaccine in the absence of a Presidential
15 waiver.

16 It also violated the Religious Freedom
17 Restoration Act of 1993 according to 42 USC Section
18 2000BB-1, et seq, by denying or ignoring Plaintiffs'
19 religious accommodation requests and/or their medical or
20 administrative exemption requests, and with regard to at
21 least one Plaintiff, a Mr. Matthew Powers, he alleges
22 that he was subject to an illegal exaction by the Coast
23 Guard in connection with his involuntary separation.

24 Mr. Saran, is that an accurate -- albeit a
25 high-level summary -- of your clients' claims in this

1 case?

2 MR. SARAN: Yes, sir. I believe that is an
3 accurate, high-level view of the Plaintiffs' claims.

4 THE COURT: Okay. Turning to Count 1, Plaintiffs
5 allege Defendant violated Section 525 of the Fiscal Year
6 2023 National Defense Authorization Act, otherwise known
7 as the FY23 NDAA. While the Coast Guard may be the
8 Maritime Security, Search and Rescue, and Law
9 Enforcement Service branch of the United States Armed
10 Forces, and one of this country's eight uniformed
11 services, the Coast Guard operates under the United
12 States Department of Homeland Security during peacetime.
13 We are not at war, not the Department of Defense nor,
14 more specifically, the Department of the Navy.

15 Now, based upon my understanding of the record
16 and the Coast Guard's mission historically, neither the
17 President nor Congress transferred the Coast Guard to
18 the Department of the Navy, in whole or in part, at any
19 time between 2020 and the present, and, therefore,
20 Section 525 -- sorry, Section 525 of the '23 -- 2023
21 NDAA, as well as Secretary of Defense Austin's memo on
22 mandatory service member COVID-19 vaccinations dated
23 August 24th, 2021, as supplemented on November 30th of
24 2021, as well as the Sec Def's subsequent rescission
25 memo, dated January 10th, 2023, do not apply to the

1 Coast Guard.

2 Now, I understand that DOD and DHS operate very
3 closely and typically under a series of memoranda of
4 understanding and memoranda of agreement or some other
5 type of agreements out of necessity, if not for
6 cohesion, and I also appreciate that DHS was adopting
7 and modeling the directives and orders issued by the
8 DOD, but the Coast Guard reports directly to the
9 Civilian Homeland Security Secretary, and it is the DHS
10 orders that are governed -- that govern the Coast Guard.

11 Now, Mr. Saran, while the Plaintiffs are welcome
12 to outline at a high level the relevant NDAA and DOD
13 orders that led to similar DHS orders applicable to the
14 Coast Guard -- and, therefore, your Plaintiffs or your
15 clients -- Section 525 of the FY 2023 NDAA does not
16 provide an independent claim for members of the Coast
17 Guard, and for this reason, I will grant Defendant's
18 motion to dismiss Count 1 of the complaint for failure
19 to state a claim upon which relief can be granted under
20 Federal Rule -- the rules of the Court of Federal
21 Claims, 12(b)(6).

22 Now, to be clear, in your amended complaint,
23 Plaintiffs may refer to any and all directives from DHS
24 and the Coast Guard that implemented, in whole or in
25 part, Section 525 of the FY 2023 NDAA and/or Secretary

1 Austin's mandate or rescission memos, and in doing so,
2 Plaintiffs may include an overview of the NDAA and/or
3 Secretary Austin's mandate and rescission memos as
4 relevant background information, but the claim must
5 otherwise directly and concisely address the actual
6 sources of law in issue.

7 Any questions on that, Mr. Saran?

8 MR. SARAN: No, sir.

9 THE COURT: Mr. Beckrich?

10 MR. BECKRICH: No, Your Honor.

11 THE COURT: Turning to Count 2, Plaintiffs next
12 allege Defendant violated 10 USC Section 1107(a) by
13 mandating service members receive an unlicensed EUA
14 COVID-19 vaccine. Before hearing from counsel, I will
15 share my high-level understanding of the facts relevant
16 to Count 2.

17 On August 23rd of 2021, the NDAA -- I'm sorry,
18 the FDA approved Biologic License Application -- or BLA
19 -- submitted by Pfizer and BioNTech for the original
20 purple cap formulation of Comirnaty. The next day,
21 August 24th of 2021, DOD Secretary Austin directed
22 members of the Armed Forces be vaccinated against
23 COVID-19.

24 Two days after that -- which means three days
25 after the FDA approved a COVID vaccine -- the Coast

1 Guard Commandant implemented Secretary Austin's August
2 24th, 2021, directive, specifically referencing the
3 FDA-approved vaccines, while DOD and DHS informed their
4 service members the vaccine mandate could be satisfied
5 by receiving an FDA-approved vaccine, an emergency use
6 vaccine, or a World Health Organization emergency use
7 vaccine.

8 There had not been and never was a Presidential
9 authorization mandating the administration of an
10 unlicensed EUA COVID-19 vaccine. So here is where my
11 confusion lies.

12 In the complaint Plaintiffs claim that they could
13 not get an FDA-licensed vaccine in August of 2021 when
14 the vaccine mandate was first issued, and for at least
15 several months thereafter, because no FDA-licensed
16 vaccines existed. That does not comport with the
17 timeline I have just outlined.

18 Plaintiffs further claim that compliance with the
19 military's mandate was impossible due to the
20 unavailability of FDA-licensed vaccines until at least
21 June of 2022. In this case, all seven Plaintiffs were
22 discharged -- or in Mr. Morrisey's case, transferred
23 from active to inactive reserves -- between July 29 and
24 December 1 of 2022, which is after the date of claimed
25 impossibility to secure an FDA-approved vaccine, as that

1 was resolved, according to the Plaintiffs, in June of
2 2022.

3 I am also confused as to why the claimed
4 unavailability of an FDA-approved vaccine is even
5 relevant given Plaintiffs' stated objection and refusal
6 to get any vaccine, whether FDA-approved or not.

7 Now, it might be different if, for example, a
8 Plaintiff claimed they tried to comply and simply could
9 not locate an FDA-approved vaccine or their only
10 alternative was an EUA or a WHO vaccine. Put simply,
11 Mr. Saran, I find it difficult to understand or accept
12 that a service member who legitimately wanted to receive
13 an FDA-licensed COVID vaccine and made the desire --
14 made that desire known to others, including his or her
15 chain of command, would not only be denied an FDA-
16 licensed vaccine, but then administratively separated
17 from the military for not receiving a vaccine.

18 So my first question for Mr. Saran is that
19 Plaintiffs' alleged compliance with the COVID vaccine
20 mandate was impossible due to the unavailability of FDA
21 licensed vaccines until at least June of 2022, and yet,
22 as I stated earlier, the earliest date of involuntary
23 separation or transfer was a month later, on or about
24 July 29th of 2022.

25 So if the FDA-licensed vaccines were available in

1 June and the first discharge did not occur until July,
2 why was compliance impossible?

3 MR. SARAN: Excuse me, Your Honor. The easy
4 answer is there were no licensed vaccines available,
5 period. And the second answer would be simply that the
6 adverse action was taken against the Plaintiffs prior to
7 their final separation.

8 In other words, other paperwork that would have
9 been unlawful, but for the availability of the vaccines,
10 actions were taken against Plaintiffs that had no
11 justification, no factual justification, where their
12 refusal at that point was an impossibility.

13 And then, of course, we add to it that -- and in
14 accordance with the pleadings -- many of these
15 Plaintiffs -- and I would have to look at each one
16 individually, I don't have a spreadsheet in front of
17 me -- but I believe all of the Plaintiffs had filed
18 religious accommodation requests, which were, in
19 essence, they were forced to undergo a farcical process
20 that was never going to result in anything but denial.

21 So they can't be --

22 THE COURT: Yes, so --

23 MR. SARAN: Oh, I'm sorry.

24 THE COURT: With regard to the religious
25 accommodations, we are going to touch upon those in a

1 few minutes and -- with regard to Count 3. I wanted
2 to -- and you anticipated my next question about the
3 administrative actions, because I was confused about the
4 timing of the discharge -- the discharges or transfers,
5 but my initial question is, what is the importance of,
6 in your complaint, the reference to June of 2022,
7 FDA-approved vaccines being available? If now you're
8 saying they were not available, when were they available
9 in your estimation?

10 MR. SARAN: The important point of June of '22
11 was that was the earliest point at which the DOD claimed
12 they could order the vaccines to make them available,
13 but that was never done, and then this all became sort
14 of overtaken by events, where they discharged people,
15 and then, of course, rescission happened within four
16 months afterwards.

17 THE COURT: And what about my other question of
18 if your clients all sought a religious exemption, how
19 does impossibility play into it if they never intended
20 or desired to comply?

21 MR. SARAN: Well, it's --

22 THE COURT: I mean, it's one thing to say I
23 should have been given a religious exemption, and for
24 that reason, I was illegally separated. It's quite
25 another to say it was impossible for me to get a vaccine

1 I had no intention of getting.

2 MR. SARAN: I understand, Your Honor. The point
3 is this, we're making -- as you'll note in the
4 complaint, while it's a complaint on behalf of these
5 seven Plaintiffs, it's a class action complaint, and so
6 we're making the allegations on behalf of the entire
7 class, and then the seven individuals represent these
8 large issues as they occurred.

9 So, in other words, we've mentioned -- as you
10 mentioned, I believe, earlier -- that there were claims
11 that they couldn't be gotten, that medical exemptions
12 were denied. In other words, the seven Plaintiffs stand
13 in for those folks, and so it's their -- if you are not
14 seeing the particular thing in a particular plaintiff,
15 it's because we pled it on behalf of the entire class.

16 THE COURT: And as of now, none of these seven
17 potential class representatives fall into this category
18 where they sought to get a vaccine and could not get an
19 FDA-approved vaccine prior to the discharge because the
20 seven, as you've now represented to me -- which is not
21 necessarily clear in the complaint -- all filed
22 religious exemption requests or accommodations.

23 MR. SARAN: No, Your Honor. I would respectfully
24 disagree with that. They were absolutely -- remember,
25 these Plaintiffs who said, okay, if you got license -- I

1 think actually their initial objection was, "Hey, there
2 is no licensed vaccine," and we would point the Court
3 to it would have been illegal for these vaccines to be
4 made available at this point because the manufacturer
5 themselves filed regulatory filings that they would not
6 be making any more Comirnaty, that, in fact, it would
7 have been legally impossible for anybody to get
8 Comirnaty, because it wasn't being made, and the FDA had
9 made clear there would be no label produced or no
10 structured product labels would be produced for that
11 product because it was removed from the market the same
12 day it was approved, Your Honor, and that's included
13 within Plaintiffs' complaint.

14 So it was -- and then what happened was the
15 military said, well, we can substitute it in a EUA, and
16 the mandate went forward on that basis. And so, yes,
17 these Plaintiffs pointed out, absolutely did, and said,
18 "Hey, look, there is no licensed vaccine." The only
19 vaccine available at any of the Coast Guard stations
20 were EUA products. That's absolutely part of our claim.
21 Yes, it certainly is, and others are also --

22 THE COURT: And -- go ahead. Go ahead.

23 MR. SARAN: Okay, and then subsequently, when it
24 was -- when this was rolling out, so that it was that
25 you have got to take it, that, and "Hey, that's not

1 licensed," it became a matter of these rolling things.
2 "Well, I am going to file a religious foundation claim,"
3 and people were point blank told, "Well, they are not
4 get approved anyway, you shouldn't."

5 They were actively discouraged from doing so, and
6 there was a process that it was clear that this was a
7 fraud, it was a sham. There was no process. No one was
8 ever going to get them approved, and they were told
9 that, and the Plaintiffs believe that that will be
10 demonstrated beyond any table, that there was never
11 going to be an approval for this, and people were told
12 that.

13 THE COURT: And turning next to the
14 administrative action, now, I understand that adverse
15 action, letters of reprimand, nonjudicial punishment
16 typically precede and may be the basis for
17 administrative separation, discharge, or transfer, and
18 based upon your earlier representation, I assume that
19 each of or some of the seven named Plaintiffs, separate
20 at least meaning a position of adverse action at some
21 point prior to the separation?

22 MR. SARAN: That's correct, Your Honor. They all
23 received 3307 negative -- which is to say negative
24 counselings in their records, even while they had
25 pending religious accommodation requests.

1 THE COURT: Any reason why that wasn't included
2 in your complaint?

3 MR. SARAN: To be honest with you, Your Honor, I
4 thought it was, but I'll have to look closely and see if
5 I've perhaps missed that, but I thought that was
6 included in there.

7 THE COURT: Okay. Based upon this conversation,
8 the Court continues to have serious factual questions
9 about Plaintiffs' claims with regard to the Coast
10 Guard's alleged violation of 10 USC Section 1107(a).
11 Mr. Saran, I'm allowing this claim to go forward, but
12 you are on notice that you must include more precise
13 facts with regard to these seven Plaintiffs in your
14 complaint, because as I read your current complaint, I
15 was really fuzzy and unclear as to how they fell under
16 this alleged violation of this particular statute. So I
17 will deny that --

18 MR. SARAN: I understand, Your Honor.

19 THE COURT: -- I will deny, without prejudice,
20 Defendant's motion to dismiss Count 2 for failure to
21 state a claim upon which relief can be granted under
22 Rule 12(b)(6) and, again, expect Plaintiffs to be more
23 deliberate in their pleadings, and I get that Rule 8 is
24 a low bar, but a bar nonetheless, Mr. Saran.

25 MR. SARAN: Understood, Your Honor.

1 THE COURT: I want to decide this case on all the
2 facts as they are known.

3 Turning to Count 3, the Religious Freedom
4 Restoration Act, 42 USC Section 2000bb. Read as
5 generously as I can, Plaintiffs in their complaint
6 allege they were unlawfully separated from military
7 service or otherwise harmed by the Defendant for not
8 complying with the vaccine mandate, notwithstanding
9 their pending requests for religious accommodations or
10 other requests.

11 What is unclear, until earlier in this
12 conversation, and I think that there may have been a
13 declaration filed but not outlined in the complaint, is
14 whether each of these named Plaintiffs filed a religious
15 accommodation request or some other request which caused
16 the Court more confusion because the complaint and other
17 documents filed reference medical or administrative
18 exemptions or accommodations.

19 And I have an idea of what a medical
20 accommodation would be, but I have no idea of what this
21 generic administrative exemption or accommodation is or
22 could be understood to be, nor does the complaint have
23 the stated basis for the accommodation or exemption
24 requests and whether or not they were received,
25 processed, denied, or ignored.

1 Mr. Saran, I take your point that it is your firm
2 belief and you have cited other courts that have said
3 that these -- the processing of at least the religious
4 accommodation requests was a sham and that service
5 members were discouraged from filing them as a waste of
6 time and that they were summarily denied using
7 cookie-cutter forms, but that needs to be outlined with
8 a little more precision with regard to each of the
9 Plaintiffs in the complaint.

10 All that said, Plaintiffs' claimed violations of
11 the religious freedom of -- ah, Plaintiffs' claimed
12 violations of the Religious Freedom Reformation Act
13 present too many factual issues to resolve on the record
14 presented at this early stage of the proceedings, and
15 for these reasons I will deny Defendant's motion to
16 dismiss Count 3 for failure to state a claim upon which
17 relief can be granted under Rule 12(b)(6).

18 To continue beating the drum, Mr. Saran, I expect
19 Plaintiff to outline with much more detail the factual
20 basis for each of their claims.

21 MR. SARAN: Understood, Your Honor. Yes.

22 THE COURT: At a minimum, the type of exemption
23 requested, either religious, medical, or administrative;
24 the stated basis, again, at a very high level; the
25 approximate date of submission; and whether Plaintiffs

1 were ever advised of any action taken and, if so, a
2 high-level detail of that action.

3 Turning next to Count 4, and one that I am
4 particularly curious about, this illegal exaction claim,
5 because I will share that this is the first time that I
6 have ever seen an illegal exaction claim filed in the
7 context of a military back pay case, having litigated a
8 number of these 30 years ago and having resolved a few
9 of these and adjudicated them over the last couple of
10 years.

11 So regarding Count 4, the sole allegation in the
12 complaint that the Government took money from any
13 Plaintiff comes from Mr. Powers, and specifically
14 Mr. Powers generally alleges the Coast Guard withheld
15 his final paycheck, suggesting but not stating that it
16 had anything to do with the COVID vaccine, and later
17 sought recoupment, in whole or in part, of his \$13,000
18 re-enlistment bonus.

19 Plaintiffs then more generally allege, without
20 attribution, that the FY 2023 NDAA rescission of the DOD
21 vaccine mandate eliminated any legal basis for the
22 recruitment or withholding -- the recoupment or
23 withholding of any bonuses, post 9/11 GI Bill payments,
24 the costs of training and tuition, and other benefits
25 and special pay.

1 Now, Mr. Saran, to assert a viable illegal
2 exaction claim, a claimant must allege the Government
3 has their money in their pocket illegally. Regarding
4 the recoupment of Mr. Powers' enlistment bonus, in whole
5 or in part, the threat of garnishment or future action,
6 including a letter of indebtedness, is not an actual
7 exaction. What is the factual basis of your client's
8 claim for an illegal exaction?

9 MR. SARAN: That the Government took the money
10 that was due to him as part of his final pay that should
11 have been provided to him as part of -- it seems to me,
12 Your Honor, that if the Government unlawfully discharges
13 someone and, as a result of that, takes money away from
14 them that was due, that that would create the exaction
15 as opposed to just the back pay itself.

16 In other words, in the final accounting, the
17 person didn't even get their final check. Money that
18 was owed to them was kept by the Government. That's the
19 nature of the exaction, the illegal exaction.

20 THE COURT: And is that the \$4,300 total that is
21 included in some filing but not in your complaint?

22 MR. SARAN: Yes, Your Honor.

23 THE COURT: So how is bringing an illegal
24 exaction separate cause of action not otherwise resolved
25 in the regular course of a military back pay case?

1 In other words, if any of -- if Mr. Powers, for
2 example, were found to be -- have been unlawfully
3 separated, they would be entitled to a retroactive
4 reinstatement, a correction of all of their military
5 records, and back pay and related benefits, and
6 presumably that would include the return of his
7 re-enlistment bonus.

8 MR. SARAN: Yes. Your Honor, the reason for it
9 is because Mr. Powers stands in for others who are not
10 in his exact circumstances, who have similar kinds of
11 exactions or illegal keeping of their money under
12 slightly different circumstances than his own, and so
13 the point would be, when we sought to class this up,
14 would be that that would be a viable claim on behalf of
15 other members who have similar, but not identical,
16 exactions from the Coast Guard.

17 THE COURT: And is Mr. Powers claiming that part
18 of his \$13,000 re-enlistment bonus was actually taken by
19 the Government or that they threatened to take it?

20 MR. SARAN: No, that he has had money taken from
21 him, to recoup that bonus.

22 THE COURT: With regard to my earlier point about
23 the FY 2023 NDAA not applicable to this case, how do you
24 get around that?

25 MR. SARAN: Well, Your Honor, the answer would be

Christopher Harkins, et al. v. USA

1 -- to get around it would be simply to replead the
2 applicable DHS memoranda, Commandant of the Coast Guard
3 adoptions of all those same policies, because that's
4 what happened, is the Coast Guard simply -- whatever DOD
5 policy came out, the Coast Guard just followed along.

6 I would also note that the AR 40-562, which was
7 the authority under which the Secretary of Defense
8 placed these COVID-19 shots on the list of required
9 shots, that if we're speaking administratively, that's
10 the actual action that took place, that when he did so,
11 that's an all service publication, and that, by
12 necessity, made it applicable to the Coast Guard.

13 But I could -- that could be pleaded differently
14 to more specifically point to the DHS decisions, but
15 they essentially adopted all those same actions, and so
16 it's our view -- and rescission as well. When the DOD
17 rescinded, DHS turned around and did the same thing.
18 And so it's our view that fundamentally we're talking
19 about the same actions, but it probably should be
20 pleaded under Title 14 rather than rely on the
21 (inaudible), as the Court said.

22 THE COURT: Okay, Mr. Saran, this is what I'm
23 going to do. Because this count is premised upon the FY
24 2023 NDAA, which the Court has already ruled is not
25 directly applicable to the Coast Guard, and due to the

1 Plaintiffs' failure to sufficiently, in my opinion,
2 plead a illegal exaction claim under the law of this
3 Circuit, because the 3 -- or the \$4,300 that was
4 allegedly withheld or taken is not in your complaint
5 but, rather, in a supplemental document, which has not
6 been imputed or imported into your complaint -- nor can
7 it at this point -- and the lack of clarity with regard
8 to the \$13,000 re-enlistment bonus, I am going to
9 dismiss without prejudice Count 3 and grant the
10 Government's motion without prejudice with regard to the
11 12(b)(6), and I will focus and emphasize -- sorry, Count
12 4 -- that the dismissal is without prejudice, and in
13 your amended complaint, you may seek to re-allege a
14 plausible legal exaction claim based upon applicable
15 Coast Guard mandates and orders.

16 And with the other counts, should Mr. Powers or
17 any other Plaintiff plead an illegal exaction claim, the
18 Court will expect a detailed accounting of the moneys
19 actually taken by the Government, either those moneys
20 that were threatened to be taken or -- as well as the
21 asserted basis for the illegality of that action. Is
22 that clear, Mr. Saran?

23 MR. SARAN: Yes, sir, it is. Thank you.

24 THE COURT: Turning to Count 5 and the correction
25 of military records, in this count, Plaintiffs seek

1 ancillary and not stand-alone relief in accordance with
2 10 USC Section 1552, and for this reason I will deny the
3 Defendant's motion to dismiss this count; however,
4 Mr. Saran, I would encourage you -- and strongly so --
5 to plead the correction of Plaintiffs' military records
6 in the relief section of your amended complaint rather
7 than a stand-alone basis or a stand-alone count, because
8 this is ancillary to everything else and not a separate
9 cause of action.

10 MR. SARAN: Understood, Your Honor.

11 THE COURT: Next I want to turn to address the
12 reservists in Counts 2 and 3; more specifically Carrie
13 Lee Gagnon and Dan Morrissey. The Military Pay Act, 37
14 USC Sections 204 and 206, mandate payment of money to
15 service members in only four circumstances: those that
16 are on active duty; a reservist who actually performs
17 full-time duties; a reservist on inactive status who
18 actually performs duties; and a reservist on inactive
19 status who would have performed duties but for
20 disability, disease, or illness. And here, Ms. Gagnon
21 and Mr. Morrissey allege that they would have performed
22 duties but for their vaccination status.

23 Mr. Saran, I don't understand how I have
24 jurisdiction over their claims, and with that, there is
25 no money-mandating statute here.

1 MR. SARAN: Sir, I believe Ms. Gagnon was on
2 full-time active status.

3 THE COURT: And Mr. Morrisey?

4 MR. SARAN: I'm double-checking that right now as
5 we speak to make sure.

6 THE COURT: I thought we were working with five
7 and two, five active duty and two pure reservists.

8 MR. SARAN: My understanding, Your Honor, is that
9 Ms. Gagnon was a reservist who was on active orders at
10 the time.

11 THE COURT: I'm sorry? That say that again?

12 MR. SARAN: My understanding was that Ms. Gagnon
13 was coming up on her 20-year retirement, was on active
14 status.

15 THE COURT: And Mr. Morrisey?

16 MR. SARAN: I'm checking right now, Your Honor.

17 THE COURT: Take your time. It's important.

18 MR. SARAN: He was a drilling reservist, Your
19 Honor.

20 THE COURT: And to ensure that I do not simply
21 have a name wrong versus my numbers, were the other five
22 individuals on active duty to the best of your
23 knowledge? And if you can check --

24 MR. SARAN: Yes, sir, they were. The lead
25 Plaintiff, Christopher Harkins, was on active duty.

Christopher Harkins, et al. v. USA

1 Mr. Gutierrez was on active duty. Mr. Mark Byrd was on
2 active duty. Let me double-check here. Mr. Allen was
3 also on active duty.

4 So I believe you have it correct, Your Honor, but
5 I just thought that Ms. Gagnon was on active orders at
6 the time of her being let go. That was my only
7 disagreement.

8 THE COURT: Mr. Saran, if I'm reading your
9 complaint -- and I'm looking at page 6, paragraph 18 --
10 Ms. Gagnon had reached an extension -- had requested an
11 extension to her contract because it expired on August
12 22nd, 2022, with her 20-year anniversary 12 days later.

13 MR. SARAN: Yes, Your Honor.

14 THE COURT: So how do I get that she was on
15 active duty at the time that she was involuntarily
16 separated from the reservists?

17 MR. SARAN: Because subsequently it turned out
18 that her Command did not actually process the paperwork
19 until December, and so it's our view that she continued
20 on duty until she was properly discharged, even though
21 her -- her -- and took her key fob and would no longer
22 let her come in, that that was not a proper discharge.

23 The paperwork itself, it was not signed or acted
24 upon until December of 2022 when she crossed the 20-year
25 threshold. There is, of course, also the issue of the

1 applicable regulations regarding when somebody between
2 18 and 20 are in sanctuary and when they can be
3 discharged, Your Honor.

4 THE COURT: I am familiar with the sanctuary and
5 safe harbor provisions. With regard to Ms. Gagnon, I
6 will leave her in for now, but have every expectation
7 that the information that you are now sharing with me,
8 which is notably absent from your complaint, will be
9 remedied in the next iteration of your complaint.

10 MR. SARAN: Indeed it will, sir.

11 THE COURT: With regard to Mr. Morrisey, I don't
12 know how I have jurisdiction over his claims, and so I
13 will offer you another opportunity to come up with
14 something to prevent me from dismissing him under
15 12(h)(3) of the rules of this Court, because I am now
16 questioning my jurisdiction over his claim, and perhaps
17 between -- if you don't have anything offhand, perhaps
18 in your amended complaint, if you come up with something
19 between now and then, he can be added back in.

20 MR. SARAN: Understood, Your Honor.

21 THE COURT: Okay. So for those reasons, under
22 Rule 12(h)(3), the Court will dismiss Mr. Morrisey
23 without prejudice from this matter and giving Mr. Saran
24 the opportunity to further investigate and review his
25 status and the applicable law to find out whether or not

1 this service member or former service member can be
2 brought back in with this umbrella of new complaints.

3 Any questions on that, Mr. Saran?

4 MR. SARAN: No, sir.

5 THE COURT: Counsel, I am going to take a
6 two-minute recess. I have to look something up. Please
7 stand by. Do not hang up. And I can still hear you. I
8 will be muted, but please keep that in mind. If you
9 decide to have communications, you might want to mute
10 yourselves.

11 MR. SARAN: Understood, Your Honor.

12 (A brief recess was taken.)

13 THE COURT: Okay, Counsel, I'm back. Thank you
14 for your indulgence.

15 Mr. Saran, still with us?

16 MR. SARAN: Yes, sir.

17 THE COURT: Mr. Beckrich?

18 MR. BECKRICH: Yes, Your Honor. I'm here.

19 THE COURT: Sorry, I have not allowed you to say
20 much. I will get to that in a few minutes.

21 Finally, I want to talk about Plaintiffs' general
22 allegations that they were involuntarily separated, in
23 some cases within a week's time, and based upon my
24 review of the complaint, each of the Plaintiffs have
25 served or had served for more than eight years and,

1 therefore, presumptively entitled to an Administrative
2 Separation Board, but neither the complaints nor the
3 parties' briefing helps me understand the basis for
4 timeline or process or lack of process by which each of
5 the Plaintiffs were administratively separated from the
6 Coast Guard.

7 And so, Mr. Saran, again, I'm putting you on
8 notice that if you are going to allege violations of
9 procedures and the lack of a Administrative Separation
10 Board to which your clients were entitled, I expect some
11 more specificity with regard to what took place and what
12 did not take place, so that way the Government can
13 either counter your arguments or concede to them -- or
14 concede them.

15 So with regard to each of the remaining
16 Plaintiffs, my expectation is that in an amended
17 complaint, you will walk through at a very high level
18 what their specific claims are, what their claimed
19 entitlements to an Administrative Separation Board were,
20 and the basis therefor, and what they were deprived of
21 and whether or not they have any information as to why
22 they were deprived of those rights.

23 Any questions on that?

24 MR. SARAN: Understood, Your Honor. No, Your
25 Honor, not at all.

1 THE COURT: All right. With regard to the issue
2 of scheduling, Mr. Saran, I have given you a lot to
3 think about and a lot to do. When do you think you'd be
4 prepared to file an amended complaint in accordance with
5 this Court's rulings and requirements or additional
6 information to meet my standard of Rule 8?

7 MR. SARAN: Your Honor, given -- as you know, the
8 Plaintiffs have some homework to do, and we have got in
9 related cases some oral argument coming up at the Court
10 of Federal Claims in the first week of March. I would
11 like to talk to my co-counsel, but I would think by late
12 March we should be able to have an amended complaint.

13 THE COURT: Is there a particular date in late
14 March you have in mind?

15 MR. SARAN: Let me pull my calendar. I would say
16 March 29th, Your Honor.

17 THE COURT: Okay, March 29th it is.

18 Mr. Beckrich, any questions on anything that
19 we've discussed so far?

20 MR. BECKRICH: No, Your Honor. I think you've
21 been clear on everything so far.

22 THE COURT: And so the next phase of this,
23 following Plaintiffs' filing of an amended complaint on
24 or before March 29th of 2024 would be the Government's
25 filing of the Administrative Record in this case, and,

1 Mr. Beckrich, when do you think, following that filing
2 date, the Government will be in a position to gather,
3 certify, and file the Administrative Record, keeping in
4 mind that my expectation is that, to the extent you have
5 not already done so, you and the Coast Guard will be
6 assembling and preparing to certify that Administrative
7 Record, obviously subject to amendment depending upon
8 whether or not Mr. Saran comes forward with additional
9 clients or additional claims.

10 MR. BECKRICH: Your Honor, I think I'd need to
11 confer with the Coast Guard on that. I know that
12 they've already done quite a bit of work in terms of
13 compiling records.

14 Brian, I welcome your input if you know
15 something -- if you have a timeline offhand. Otherwise,
16 I would just respectfully request that we can confer and
17 get back to you, you know, as soon as possible.

18 Brian, do you have thoughts on that?

19 MR. JUDGE: This is Brian Judge. So we have
20 like -- we have compiled the administrative records for
21 the actual accommodation requests for the Plaintiffs
22 involved and with their actual discharge paperwork, but
23 it won't be clear to me, I think, until we see the
24 amended complaint, exactly what the allegations are and
25 in terms of what other record needs to be compiled to

1 support that. So it would -- at least 45 days after we
2 see the complaint, I think.

3 THE COURT: I am loathe to give more 30 unless
4 there's a specific reason why.

5 MR. BECKRICH: I think we could do it in 30 days,
6 then, Your Honor.

7 THE COURT: So April the 29th, 2024, will be the
8 filing of the complete Administrative Record in this
9 case. If there are hiccups, if there are concerns, if
10 there are new allegations raised, I can schedule a
11 status conference, but, Counsel, I do not want to get a
12 motion for a continuance or an enlargement on April the
13 29th asking for another 60 days to file this.

14 So if there are problems before that or if the
15 complaint comes in and Mr. Saran hands you something
16 that you are not completely comfortable with, please
17 jointly reach out to chambers, and we can schedule a
18 quick status conference and address any outstanding
19 issues. Otherwise, I will expect an amended complaint
20 on March the 29th and a complete Administrative Record
21 on April the 29th.

22 If, in fact, we are 90 percent there on the
23 Administrative Record, my expectation is the Government
24 will file the 90 percent and then file the balance
25 consistent with a supplemental court order that they

1 have sought with plenty of time to spare.

2 MR. BECKRICH: Understood, Your Honor.

3 THE COURT: I assume, but will ask counsel,
4 Mr. Beckrich, that the Government will want to go first
5 with regard to a motion for judgment upon the
6 Administrative Record since you are on the defense of
7 defending the Coast Guard's actions in dismissing and/or
8 transferring these Plaintiffs.

9 MR. BECKRICH: Your Honor, I think we would defer
10 to your preference in terms of order. I've done it both
11 ways, where we've gone first and where we've gone
12 second, so I think we would defer to Your Honor on that
13 point.

14 THE COURT: And so I will ask Mr. Saran if he has
15 any strong views, but here's my concern. In reviewing
16 the motion to dismiss and the response and the reply, I
17 walked away as -- with the distinct feeling that both
18 parties are speaking past each other, which is why I
19 scheduled this conference and am making every effort to
20 get everyone on the same page as to what I view as
21 potential claims that have merits and where I see the
22 claims lacking factually at this point.

23 I have seen Plaintiffs file first to bring the
24 issues that they are alleging, and I have seen the
25 Government seek to defend by going first. Mr. Saran, do

1 you have any thoughts as to whether or not you would
2 like to move for judgment upon the Administrative Record
3 first?

4 MR. SARAN: I don't have a preference, Your Honor.

5 THE COURT: And, Mr. Beckrich, I'm sensing from
6 your last response you do have somewhat of a preference
7 in that you would like to go second.

8 MR. BECKRICH: Your Honor, again, we would defer
9 to you. Somewhat as a practical matter, I will be out
10 of the office for a period of time on parental leave
11 beginning in March, and so going second would afford me
12 a little bit more time, but we will -- if you have a
13 preference, obviously we will handle it and make sure
14 that we comply with the deadline that Your Honor
15 provides, just was a practical concern with going
16 second, that it may be easier to address those concerns.

17 THE COURT: Mr. Saran, after you receive the
18 Administrative Record on April 29th, 2024, how does 30
19 days to file a motion for judgment on the Administrative
20 Record sound to you?

21 MR. SARAN: That's perfectly acceptable, Your
22 Honor.

23 THE COURT: All right. We will go with May 29th
24 of 2024 for Plaintiff.

25 Mr. Beckrich, taking into account your leave --

1 which is the number one priority here, seriously -- and
2 the time for you to get back in to work, is 30 days
3 thereafter sufficient for you to respond and cross-move?

4 MR. BECKRICH: So roughly --

5 THE COURT: That's roughly the end of June.

6 MR. BECKRICH: Your Honor, if it would be
7 possible, I would respectfully request that we give
8 Plaintiffs 40 days, and if you gave us 40 days as well,
9 I think that would -- that would give me plenty of time.
10 I -- my expectation is I will be back sometime early to
11 mid June.

12 THE COURT: Okay, so --

13 MR. BECKRICH: Also, Your Honor, I apologize. I
14 have been under the weather all week, and I'm losing my
15 voice.

16 THE COURT: I can understand you perfectly well.
17 I was looking at a calendar here. Mr. Saran, moving
18 your date out -- let's see, how about June 14th -- is
19 that right? March, April -- Mr. Saran, moving your
20 date, if this works for you, to June 14th, 2024?

21 MR. SARAN: That's perfectly fine, Your Honor.

22 THE COURT: Mr. Beckrich, that would put you out
23 to July 31st of 2024.

24 MR. BECKRICH: That sounds great, Your Honor.

25 THE COURT: Mr. Saran, to do a consolidated

1 response to the Government's cross motion and reply to
2 your original motion, giving you another 30 days or
3 thereabouts, how about August 30th, 2024?

4 MR. SARAN: Yes, Your Honor.

5 THE COURT: Mr. Beckrich, since you're only
6 filing then a reply brief, 14 days thereafter would be
7 September 13th of 2024.

8 MR. BECKRICH: Got it. That will work.

9 THE COURT: I will issue a short order, likely a
10 page, maybe a page and a half, just summarily adopting
11 my rulings for the reasons stated on the record, and
12 then the only specificity will be which counts have been
13 dismissed with or without prejudice and setting forth
14 the briefing schedule.

15 If any of these dates have to shift -- which I
16 hope they don't because we've already stretched briefing
17 out for a number of months -- but to the extent that any
18 dates shift, please keep in mind that it is a cascading
19 effect and try to submit proposed new deadlines for the
20 Court's consideration.

21 And my ask -- and I hope that, if nothing else,
22 this status conference set a tone -- I do not appreciate
23 when I get motions for an extension of time the day that
24 something is due or the day before it is due because it
25 wreaks havoc on my calendar, and it doesn't really

1 afford me the opportunity to deny any motion or to pick
2 my own deadlines, and it seems as if the parties are
3 dictating what does and does not happen, which the Court
4 does not appreciate, and it makes Rule 1 of this Court's
5 rules inefficient to adhere to.

6 Anything else this Court needs to address at this
7 time, Mr. Saran?

8 MR. SARAN: Not from the Plaintiffs, Your Honor.

9 THE COURT: Mr. Beckrich?

10 MR. BECKRICH: Nothing from the Government, Your
11 Honor.

12 THE COURT: Counsel, thank you very much for
13 meeting with me this afternoon to discuss these issues.
14 I look forward to amended filings and new filings in
15 this case, and, Mr. Beckrich, I wish you and your family
16 the absolute best and enjoy the new addition to your
17 family.

18 MR. BECKRICH: Thank you, Your Honor.

19 THE COURT: Now we stand adjourned. Thank you,
20 Counsel.

21 MR. SARAN: Thank you, Your Honor.

22 MR. BECKRICH: Thank you, Your Honor.

23 (Whereupon, at 4:54 p.m., the hearing was
24 adjourned.)

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATION OF TRANSCRIBER

I, Susanne Bergling, court-approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-titled matter.

DATED: 2/28/2024 s/Susanne Bergling
SUSANNE BERGLING, RMR-CRR-CLR