

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

JEREMIAH BOTELLO, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	No. 23-174C
)	(Judge Dietz)
THE UNITED STATES,)	
)	
Defendant.)	

DEFENDANT’S MOTION FOR A VOLUNTARY REMAND AND FOR A STAY OF COURT PROCEEDINGS PENDING THE REMAND RESULTS

Pursuant to Rule 52.2(a) of the Rules of the United States Court of Federal Claims (RCFC), defendant, the United States, respectfully requests that the Court stay the current proceedings and remand this matter to the Army Board for Correction of Military Records (ABMCR) and Air Force Board for Correction of Military Records (AFBCMR) (collectively, BCMRs), as applicable to each plaintiff.¹ Counsel for plaintiffs has indicated that plaintiffs oppose this motion.

STATEMENT OF THE CASE

Plaintiffs are a group of five current or former Army and Air National Guard members. Plaintiffs allege they were either removed from Full-Time National Guard Duty or discharged from service as a result of their failure to comply with the COVID-19 vaccine mandate issued by the Secretary of Defense. After the Department of Defense rescinded its vaccination requirement in January 2023 pursuant to Congress’s instruction in the Fiscal Year 2023 National Defense Authorization Act (NDAA), the Army and Air Force likewise rescinded their COVID-19 vaccination requirements. Plaintiffs filed this class-action complaint alleging that the curtailment

¹ The case would be remanded to the ABCMR for the following plaintiffs: Jeremiah Botello, Benjamin Konie, and Victor Santos. The case would be remanded to the AFBMCR for the following plaintiffs: Charles Hood and Justin Phillips.

of their orders violated the Militia Clauses of the Constitution, the NDAA, 10 U.S.C. § 1107a, and the Religious Freedom Restoration Act (RFRA), and seek backpay and other monetary relief for the alleged adverse actions. After the Court’s ruling on our motion to dismiss, only the Militia Clauses claims, the 10 U.S.C. § 1107a claims, and the RFRA claims for two Army National Guard plaintiffs – Konie and Santos – survive.

The parties subsequently agreed to a briefing schedule for cross-motions for judgment on the administrative record, and plaintiffs filed their opening brief. After plaintiffs filed their opening brief, on January 23, 2025, this Court issued a decision in *Harkins v. United States* on January 23, 2025. 174 Fed. Cl. 592 (2025). *Harkins*, which involves members of the Coast Guard who were discharged after they failed to receive the COVID-19 vaccination, involve the same issues as two of those raised in this case: (1) whether the vaccination requirement violated 10 U.S.C. § 1107a; and (2) whether the failure to grant religious accommodation requests violated RFRA. In *Harkins*, the Court ultimately held that the plaintiffs’ discharges did not violate section 1107a because plaintiffs’ administrative separations “were ultimately prompted by [their] COVID-19 immunization status as opposed to their refusal to be administered an [emergency use authorization (EUA)] vaccine.” *Id.* at 606. However, the Court held that any determination that plaintiffs violated Articles 90 and 92(2) of the Uniform Code of Military Justice “are in error” because the Coast Guard could not compel a member to receive an EUA vaccine, even if medically interchangeable with a fully-licensed vaccine, absent a presidential waiver of informed consent. *Id.* at 605. The Court also held that the Coast Guard’s denials of the plaintiffs’ religious accommodation requests violated RFRA and remanded the claims to the Coast Guard to reassess the plaintiffs’ requests. *Id.* at 608-09.

Four days later, on January 27, 2025, the President signed an Executive Order instructing the Secretary of Defense or the Secretary of Homeland Security to:

- (a) make reinstatement available to all members of the military (active and reserve) who were discharged solely for refusal to receive the COVID-19 vaccine and who request to be reinstated;
- (b) enable those service members reinstated under this section to revert to their former rank and receive full back pay, benefits, bonus payments, or compensation; and
- (c) allow any service members who provide a written and sworn attestation that they voluntarily left the service or allowed their service to lapse according to appropriate procedures, rather than be vaccinated under the vaccine mandate, to return to service with no impact on their service status, rank, or pay.

Exec. Order, *Reinstating Service Members Discharged Under the Military's COVID-19 Vaccination Mandate* (Jan. 27, 2025) (available at <https://www.whitehouse.gov/presidential-actions/2025/01/reinstating-service-members-discharged-under-the-militarys-covid-19-vaccination-mandate/>).

In response to the Executive Order, we requested and the Court granted a 60-day stay of proceedings “while the Department of Defense determines how to implement the Executive Order pertaining to the reinstatement of service members discharged under the military’s COVID-19 vaccination mandate.” ECF No. 47 at 1.

On February 7, 2025, the Department of Defense (DoD) issued a policy that, in general, requires identification and outreach to all former Service members voluntarily or involuntarily discharged solely for refusal to comply with the COVID-19 vaccination mandate. *See* ECF No. 48-1 at 1-11. The voluntarily separated Service members would be invited to return to service. *Id.* at 7. The involuntarily separated Service members would be provided the opportunity to seek reinstatement, which would require a return to active service for at least two years and ordinarily

for four years.² *Id.* at 4. In order to seek reinstatement, the Service member should submit a DD Form 149 application to the relevant BCM/NR, which must in turn give COVID-19 reinstatement cases priority consideration. *Id.* at 4-5. For those members seeking reinstatement, the BCM/NRs are instructed to:

exercise their broad discretion to order all appropriate retroactive corrections of the Service member's record and should normally grant requests to correct the record to reflect continued service with no separation (i.e., reinstatement with no break in service), restoration of the Service member's previous grade and rank (normally the grade and rank held immediately prior to separation unless the Service member's pay grade was reduced prior to separation for misconduct relating solely to refusal to comply with the vaccination requirement), and credit for lost service time due to separation or credit for qualifying years of service for a non-regular retirement (i.e., credit for 50 retirement non-pay points), as appropriate and consistent with applicable laws.

Id. at 10.

For those members who remained in service, voluntarily left service, or are unwilling or unable to return to active service for at least two years, DoD's instructions to the BCM/NRs regarding the correction of records do not apply. *Id.* at 11. However, those members are still encouraged to apply to the BCM/NRs for all appropriate relief based on an alleged error or injustice. *Id.* at 11. Currently, DoD is at the outreach stage of implementing its policy.

We request that the Court voluntarily remand the case in light of the Executive Order and DoD policy.

² On April 1, 2025, DoD issued new guidance. *See* Attachment 1 – April 1, 2025 Guidance. Under the new guidance, a two-year minimum service obligation is available for individuals who would have become eligible for a regular or non-regular retirement in two years or less from the date of their separation. *Att.* at 8. Outside of that context, reinstatement is available to those who commit to return to service for at least four years. *Id.*

ARGUMENT

I. Standard Of Review

“The Tucker Act gives the Court of Federal Claims the authority ‘to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just.’” *Wolfing v. United States*, 144 Fed. Cl. 516, 521 (2019) (quoting 28 U.S.C. § 1491(a)(2)). The Act does not define the phrase “proper and just,” and no bright line rule dictates this Court’s consideration whether to remand. Instead, the Court engages in an inquiry guided by existing precedents. *See Byron v. Shinseki*, 670 F.3d 1202, 1206 (Fed. Cir. 2012) (“When there are facts that remain to be found in the first instance, a remand is the proper course.”). The Government may request a remand because of “intervening events outside of [its] control, for example, a new legal decision or the passage of new legislation,” or simply to “reconsider its previous position” without admitting error. *SKF USA Inc. v. United States*, 254 F.3d 1022, 1028–29 (Fed. Cir. 2011). When the Government requests a remand because of intervening events such as a new legal decision or the passage of new legislation, “[a] remand is generally required if the intervening event may affect the validity of the agency action.” *Id.* at 1028. When the Government requests a remand to reconsider its previous position, a remand is usually appropriate if the Government’s concerns about its previous decision are “substantial and legitimate.” *Id.* at 1029; *see Rahman v. United States*, 149 Fed. Cl. 685, 689 (2020) (“[T]he Federal Circuit instructed that ‘a remand is usually appropriate’ when the agency’s concern is ‘substantial and legitimate.’”). In this context, a remand request “may be refused if [it] is frivolous or in bad faith.” *SKF USA*, 254 F.3d at 1029.

Once the Court determines that a remand is appropriate, the Court then issues an order pursuant to RCFC 52.2. Rule 52.2(a) provides that “[i]n any case within its jurisdiction, the

court, on motion or on its own, may order the remand of appropriate matters to an administrative or executive body or official.”

II. Remand Is Appropriate And Serves The Interests Of Justice

The Court should remand this case to the relevant BCMRs due to intervening events that may affect the validity of the agency actions at issue in this case. Specifically, two intervening events have taken place potentially affecting the validity of the agency actions in this case. First, this Court issued a decision in *Harkins* that addresses specific issues raised in this case. To be sure, *Harkins* is not binding on this Court, but a remand is justified and “generally required if the intervening event *may* affect the validity of the agency action.” *SKF USA*, 254 F.3d at 1028 (emphasis added). Second, the President issued an Executive Order that calls into question the validity of the agency actions at issue in this case. Indeed, according to plaintiffs, the Executive Order is “authoritative” and compels the result in this case that the agency action was illegal. ECF No. 48 at 10-11. Although we do not, for the purposes of this motion, take a position as to whether the Executive Order invalidates the agency actions at issue in this case, we need not make that concession to justify a remand. The change in the law “may affect the validity of the agency action,” and thus a remand is required. *SKF USA*, 254 F.3d at 1028.

Even if the Court were to consider our remand request as a request simply “to reconsider its previous position” without confessing error, remand would still be appropriate because we have “substantial and legitimate” reasons for requesting remand. *Id.* at 1029. First, the Executive Order and subsequent DoD policy provide an avenue for members who were involuntarily discharged to receive the exact relief plaintiffs seek in this case. If those plaintiffs who were involuntarily separated are willing and able to be reinstated under the policy, then they would receive full relief from the BCMRs with no need for further judicial proceedings. In order

to receive that relief, the plaintiffs would need to submit an application to their relevant BCMR, and thus a remand is appropriate to provide that opportunity.

Second, even if a plaintiff is not eligible for or willing to seek reinstatement, plaintiffs could still receive all of the relief they seek during a remand. BCMRs have uniquely broad authority to consider not only the legal errors alleged, but the broader “interests of justice,” and, regardless of the grounds, to order full relief. Indeed, DoD’s policy encourages those members who would not seek reinstatement to apply for all appropriate relief based on an alleged error or injustice. ECF No. 48-1 at 11. Plaintiffs are plainly wrong that the Executive Order or DoD’s policy “prohibits” the BCMRs from granting the relief that plaintiffs seek. *See* ECF No. 48 at 8. To be sure, the policy does not guarantee relief for members not seeking reinstatement, but the policy expressly “does not address situations where a BCM/NR determines the facts of a particular case warrant a different or additional finding of an error or injustice.” ECF No. 48-1 at 11. “In those instances, the BCM/NRs should fashion the remedy they find necessary and appropriate within applicable legal limits.” *Id.* Plaintiffs have never presented their claims to the BCMRs and certainly not since the President issued the Executive Order or DoD issued its policy. The Army and Air Force wish the BCMRs to consider plaintiffs’ claims in light of the Executive Order and subsequent DoD policy, and in particular, to consider whether a legal error or injustice should be corrected in light of the Executive Order and DoD policy.

Third, there is no prejudice to plaintiffs that might outweigh the advantages of a remand. Indeed, if the BCMRs do not grant relief, plaintiffs may return to the Court to seek judicial review of any denied claims and advance the arguments presently before this Court and any other arguments they may present to the board. Moreover, plaintiffs state that they wish to address the effect of the Executive Order and DoD’s policy on plaintiffs’ claims. ECF No. 48 at

10-11. They specifically ask the Court to supplement the record administrative record with the Executive Order and DoD policy, and then treat those documents as dispositive of their claims. *Id.* But the administrative record is comprised of “information [that] would have been before the deciding official.” *Bateson v. United States*, 48 Fed. Cl. 162, 165 (2000). Accordingly, if plaintiffs wish to include the Executive Order and DoD policy in the administrative record, a remand would be necessary so that plaintiffs could make those arguments to the BCMRs in the first instance and thus have those documents included in any subsequent administrative record (to the extent further proceedings prove necessary).

To be sure, we are mindful that we seek this voluntary remand after the parties have agreed to a briefing schedule and plaintiffs have filed their opening brief. But the timing of our motion is not grounds alone to deny a remand when “there is nothing in the record” suggesting “that the government’s request is made in bad faith.” *Culpepper v. United States*, No. 22-420, 2023 WL 124864, at *3 (Fed. Cl. Jan. 6, 2023). Here, the grounds for the remand motion were not known until, at the earliest, January 27, 2025, when the President signed the Executive Order. At that point, we immediately asked the Court to stay the case to see if the Executive Order would result in plaintiffs receiving all the relief they seek in this case. As it turns out, the answer is that the Executive Order might result in plaintiffs receiving the relief they seek, but plaintiffs will need to submit applications to the BCMRs for the process to bare out.

Finally, remand is appropriate notwithstanding the plaintiffs’ desire to bring a class action. *See, e.g., Wolfing v. United States*, 144 Fed. Cl. 516, 522 (2019) (granting motion for voluntary remand even when plaintiffs filed a class action complaint). It is unclear, at this stage, whether a class action is appropriate. But even were a class action appropriate, a remand would still serve the interests of justice. If the current plaintiffs are representative of all of the

purported classes (as the plaintiffs contend), then the results of a remand of these five plaintiffs' claims would be instructive in subsequent proceedings before the BCMRs or this Court.

In short, the Court should grant our request for a voluntary remand based on intervening events that may affect the validity of the challenged agency action. In these circumstances, a remand is "generally required." *SKF USA*, 254 F.3d at 1028. Even if the Court were to consider our request as a request to allow the Services to reconsider their previous positions without confessing error, "substantial and legitimate" grounds justify a remand. *Id.* at 1029.

Specifically, the BCMRs may determine that a legal error or injustice requires plaintiffs to be granted the relief they seek in this case based on the Executive Order and subsequent DoD policy. And even if relief is not granted, allowing the BCMRs to consider that question in the first instance would better position the Court and the parties to address these issues in subsequent proceedings.

For these reasons, we respectfully request that the Court (1) remand this matter pursuant to RCFC 52.2; (2) order plaintiffs to file, within 30 days of the Court's order remanding this matter, an application for correction of his military record with their relevant BCMR; (3) establish the initial duration of the remand for 120 days, which may be extended by the Court upon request if necessary; (4) stay further proceedings in this action pending the completion of the remand; (5) order defendant to file status reports concerning the progress of the remand proceedings every 60 days, starting from the date of the Court's order remanding the case until the BCMRs issue a decision for each plaintiff's claim; (6) direct the BCMRs to promptly forward by email their decisions to plaintiffs' counsel of record and to counsel of record for the United States, and to forward two copies to the Clerk of the Court as provided by RCFC 52.2(d), which it may do through defendant's counsel; and (7) direct each party to file a notice, within 30

days of the final BCMR decision, indicating their respective positions on “(A) whether the [BCMRs’ decisions] affords a satisfactory basis for disposition of the case; or (B) whether further proceedings before the court are required and, if so, the nature of such proceedings,” *see* RCFC 52.2(e)(1).

CONCLUSION

For these reasons, we respectfully request that the Court grant this motion, remand each plaintiff’s claim to their relevant BCMR, and stay all deadlines in this action pending the conclusion of the remand proceedings and further order of the Court.

Respectfully submitted,

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