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U.S. MILITARY NEWS

'A floating prison': Civilian mariners say they're stuck on Navy ships while sailors come and go

By KATHERINE HAFNER
THE VIRGINIAN-PILOT | AUG 29, 2020



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The USNS Comfort moors to the pier at Naval Station Norfolk on Saturday, May 2, 2020, returning from their mission in New York City during the COVID-19 outbreak. (Stephen M. Katz)

The seaman knew he needed to see a doctor. Stationed aboard a transport ship in Guam in May, the mariner's blood pressure had been worryingly high for multiple readings and he wanted to get off the ship and to a hospital.

Several times, he would later tell The Virginian-Pilot, those in his chain of command discouraged him from doing so. Because of a "Gangways Up" order issued in March to prevent the spread of the coronavirus, they didn't want to let him ashore unless it was absolutely critical.

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The seaman, who spoke with The Pilot on condition of anonymity for fear of retribution in the maritime industry, eventually left his ship later that month to see a doctor anyway and never returned to his ship — or his job. He decided he wasn't willing to undergo the 14-day, one-room quarantine that his command told him would be necessary.

Talking later with his crewmates, “they were extremely happy I got out,” he said.

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“It's sort of a feeling that I got out of prison.”

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More than 5,000 civilian mariners who work for the Navy's Military Sealift Command are affected by the “Gangways Up” order. With few exceptions, they have been stuck aboard their ships for months. Sometimes they are prevented from going home to their families who live just miles away, like in Hampton Roads.

Meanwhile, they've watched military personnel and contractors come on and off

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“There is growing anger, frustration and despair throughout the fleet,” three unions that represent civilian mariners wrote in a letter last month to Rear Admiral Michael Wettlaufer, who heads the command. “People have a breaking point and many of these crewmembers are nearing it.”

Recently, the command has allowed some leave, though each exception must be individually approved.

The unions are pressing the Navy in arbitration. One mariner took his life earlier this summer, and the unions say the despair among mariners could have contributed.

A Richmond attorney has also filed a complaint with the Equal Employment Opportunity Commission, representing nearly 50 mariners — mostly Virginians — aboard 18 ships.

“This is unprecedented,” attorney Darrin Gibbons said. “I haven’t talked to anyone who isn’t baffled by it.”

In response to questions from The Pilot, Military Sealift Command spokeswoman Jillian Morris sent a two-page statement Friday explaining officials believe the restrictions are crucial to maintain safety.

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“We understand the strain that liberty restrictions put on our Mariners and their families, but we are operating in unprecedented times and these actions are critical to ensuring their safety,” Morris wrote. “The risk from COVID-19 could severely debilitate afloat forces and negatively impact MSC and Fleet missions. As our understanding of COVID-19 improved, so too did our protective posture and counter-COVID tactics.”

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United States Naval Ships — USNS — are different from military ships with a USS designation. They are non-commissioned and primarily operated by civilian crews. There are about 125 worldwide, including the hospital ship Comfort and more than a dozen others based in Norfolk.

Some mariners work for private companies that contract with the Navy.

The command issued the “Gangways Up” order March 21, suspending all liberty and leave for civilian mariners worldwide in an effort to contain the coronavirus.

Morris said in the statement that the decision followed travel restrictions announced by the Department of Defense at the time. Even before the coronavirus took off in the U.S., it was impacting countries where the command made port visits, she said.

The order took mariners by surprise. At the time, some said they were unable to go home to pack bags for the indefinite stay and had cars towed.

Capt. Kevin Tapp, who leads the USNS Trenton — currently off the Sicilian coast — said he'd been on his way to training in San Diego when he was told to proceed to Norfolk and get on board a tanker leaving for the Mediterranean. He parked his car in a storage lot and flew here.

On the Trenton, they started stopping in European ports where COVID-19 cases were few and local authorities were allowing people to come into town. But the Navy's order didn't allow that, so the crew stayed on board, admiring the summer scenes from afar, according to Tapp, the lead complainant in Gibbons' EEOC action.

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More recently, Tapp said, the Navy's allowed his mariners to get off the ship only within military bases. That usually means they can pick up a few items at the commissary and then return.

Some mariners also are struggling because they're months behind their scheduled relief dates. One member of Tapp's crew is 110 days past due, he said. Three

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Tapp believes this is turning into a recruiting problem.

“The word is out that look, if you want to come work at MSC, you can pretty much look forward to a floating prison,” he said. “People go to sea because they want to see the world. They’re not looking forward to embarking on a prison ship and being locked on board.”

The frustration comes from the disparate treatment, mariners say. As federal workers, they’re confined to ships while military personnel are not under the same order.

“We’ve been in ports in Europe where there are U.S. Navy personnel assigned and they’re just walking around,” Tapp said. “They’re living in wonderful apartments in town and coming to work. To know our own commanders are stationed here in Europe and able to go home every night, it’s very frustrating.”

Morris said the civilian mariner workforce is small and highly specialized and that they are “essential critical infrastructure workers.”

“Because our ships are operated by civilians, crewing levels and crew organization aboard our vessels reflect the standards found aboard civilian commercial ships rather than combatant ships,” she said in the statement.

Unlike Navy sailors, the mariners don’t receive permanent change of station orders to ships, she noted. Instead, they are assigned to a vessel for a set amount of time and then rotate ashore for leave and training before returning for ship duty.

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Tapp said officials “need to strike a healthier balance that takes into consideration that we’re humans and not just a piece of infrastructure.”

The seaman on the ship in Guam said he was out of soap for several days because they weren’t allowed to get off and buy more.

“I have seasoned officers who are unable to go buy feminine hygiene products,” said

military counterparts to pick them up tampons. I have elderly captains that can't buy their hemorrhoid cream."

Anybody "that wants to put a big toe on the pier" has to get an exception personally approved by top leadership, she said.

The command has approved nearly 90 exceptions as of this week, Morris said, "that have allowed most mariners afloat to have some leave and liberty."

The exceptions are determined "based on local COVID-19 conditions and mission assurance factors," according to the command. They also consider "a mariner's individual situation in regards to the need for medical appointments and/or picking up prescription medicines, amount of time already assigned to a ship, family visitation opportunities, and pending orders to sail on mission."

After liberty or leave, mariners are usually required to enter a 14-day quarantine.

Ciszewski said the unions are concerned about the mental health impacts of the mariners having to spend long stretches without being able to leave ships.

"They are really suffering," she said.

In July, Third Officer Jonathon Morris, 34, died aboard the cargo ship Amelia Earhart. Sources [told the Navy Times](#) he shot himself.

"The actual cause of this mariner's actions may never be known, however, the ongoing and selective 'Gangways Up' restrictions may have, in some part, contributed to this unnecessary and senseless act," the unions wrote in their joint letter a week later.

Morris said it would be inappropriate to comment on the death while the Naval Criminal Investigative Service is still investigating.

In the federal complaint, Tapp and others argue that the Navy is discriminating based on age.

They note a letter that Steven Cade, the command's executive director, sent earlier this year to U.S. Sen. Maria Cantwell of Washington state. In it, he laid out one line of reasoning for the restrictions.

"Our mariner work force is small (5,400), highly specialized and significantly older on average (47) than their active duty counterparts making them potentially more vulnerable to effects of the COVID-19 virus," Wade wrote.

Gibbons said in the EEOC complaint that the commander's "speculation" about the work force's potential vulnerability "is not an appropriate legal justification to keep thousands of employees locked up. This policy is discriminatory on its face."

Morris said she could not comment on the complaint because it is ongoing.

In arbitration with the Navy, the unions are arguing that if the restrictions go on, employees should at least receive compensation for it under their contract.

In her more than four decades representing mariners, Ciszewski said she's "never felt so helpless."

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The restrictions have also not prevented COVID-19 outbreaks on the naval ships, said Kate Hunt, vice president for the government services division at the Seafarers International Union.

There was one aboard the oiler Leroy Grumman earlier this year. for

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Navy officials said in the statement that while the defense department “does not release the number of infected individuals at the unit, facility or geographic area level due to operational security, we are confident that the order restricting mariner liberty has been effective.”

Hunt said the unions “don't necessarily agree.”

“We understand it's unprecedented times, and the stated purpose of the order is to protect the wellbeing” of civilian mariners, she said. “But right from the beginning the order wasn't implemented in any fair way. ... You can't take the position you're protecting them from COVID with all these other people coming (on board). This isn't right.”

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Katherine Hafner



Katherine Hafner is an enterprise reporter for The Pilot who writes about everything from dinosaurs to day cares to oyster reefs built of coal ash. She's a UCLA alum who joined the paper in 2015.

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Disabled state employees can't sue Virginia for damages under ADA. Some attorneys call the exception 'outrageous.'

By KATHERINE HAFNER
THE VIRGINIAN-PILOT | FEB 05, 2020



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Disabled state employees are barred from suing Virginia for damages under the ADA. Some attorneys say the exception's outrageous. Virginia can claim sovereign immunity in cases where a state employee would sue for an ADA violation - unlike other discrimination cases that apply to race, sex, etc. (Stephen M. Katz)

After several years of investigating child pornography cases, Antonio Passaro, a special agent for the Virginia State Police, had been diagnosed with post-traumatic stress disorder and asked five times to switch to another division.

“It’s a horrible unit to be in,” Passaro, a former state trooper from Virginia Beach, told The Virginian-Pilot. “To endure those images, day in and day out. I told them it was affecting me.”

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His transfer requests were denied. He started getting disciplinary notices for failing to manage his caseload, according to court documents, and learned he was likely to be demoted.

Passaro filed a complaint with the Equal Employment Opportunity Commission, asserting the state police department had failed to make reasonable accommodations for his PTSD. A month later, according to the documents, he was fired. After appealing several times, he turned to the court system, suing the commonwealth under the Americans with Disabilities Act.

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But the court quickly dismissed the claim.

The reason was something even his seasoned attorney hadn't known applied in the case: sovereign immunity, or the government's shield against being sued.

Unlike in other discrimination cases, such as those involving race or sex, the state is

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There are exceptions: You can sue for relief without damages, though many attorneys say they wouldn't take such a case. You can sue under state law, though experts say the commonwealth's law is so weak it's almost moot. Some states have passed laws waiving immunity in discrimination cases. Not Virginia.

“The dirty little secret is you can complain all you want, but if they don't choose to give you any relief, you're out of luck,” said Virginia Beach-based attorney Kevin Martingayle, who represented Passaro. “That's nothing short of outrageous.”

A right that can't be enforced

When Congress passed the ADA in 1990, part of the law declared that states would not be immune from liability.

But in 2001, the Supreme Court found that provision unconstitutional under the Eleventh Amendment. In *Board of Trustees of University of Alabama V. Garrett*, the justices ruled that states could not be sued for monetary damages under Title I of the ADA, which deals with employment. The ruling does not affect anything at the municipal level.

“After it was passed with much fanfare in 1990, almost all states said, ‘Oh, yeah,’” Martingayle said. “But after that (immunity) defense was asserted, they haven't had any rush to be bound by it.”

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Disabled state employees should not waste their time trying to seek remedies they won't be able to get, he said.

“If I knew they were going to do that, I would've just walked away,” Passaro said. “Go into any state building and you will see bulletins and poster boards everywhere that say equal opportunity, equal employment and all that. ... It's false advertising.”

Martingayle emailed Gov. Ralph Northam and Attorney General Mark Herring in August, explaining Passaro's situation, saying he sees the issue as "a classic 'bait and switch.'"

"Employees are falsely assured that they have meaningful protection from various forms of discrimination, including disability discrimination, and yet they are deprived of the right to pursue direct remedies in court when they find themselves victimized by state agencies and actors," he wrote, asking that state officials review their policies on the matter.

He wrote again when he saw Northam had signed [an executive order expanding opportunities for Virginians with disabilities](#) last month and "was angry all over again," he said. He has not heard back.

"Given the impact a statement would have on pending and upcoming litigation, we cannot comment at this time," a spokeswoman for Northam said in an email to The Pilot. "The governor is committed to equity at all levels of state government."

A spokeswoman for Herring said in an email that he's "dedicated to fighting discrimination and promoting justice, equality, and opportunity for all Virginians.

"Each case is handled based on facts and the law, but we generally do not comment on legal strategy outside of court."

Even if Virginia chooses to continue exercising sovereign immunity in these cases, Martingayle said, he would like to see the commonwealth update the materials provided to employees that explicitly says they have those rights.

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"If the state is going to declare itself exempt from federal disability laws, it needs to own it," he said. "They're failing to reveal an important piece of information but also actively misleading people."

Lisa Bertini, a Virginia Beach employment attorney, had not been aware of the loophole either, until hearing of Martingayle's case.

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“I was shocked,” she said. “What good is a right if you can’t enforce it?”

Bertini said she’s represented state employees in similar situations but often works out arrangements with the state before having to file suit. No one ever told her that if it was needed, that route would likely be closed.

It’s unclear how often such a case reaches court in Virginia. Searches through the federal court system’s online database revealed Passaro’s case and another from last year that involved a former auditor who sued the Office of the State Inspector General. The auditor said he was fired in part because of his irritable bowel syndrome.

Tim Schulte, a Richmond-based attorney, represented the employee in that case and nearly a dozen others against the state in recent years.

“I am the lawyer who keeps going up against the attorney general on this,” Schulte said with a laugh.

In the case against the inspector general, Virginia claimed sovereign immunity for some of the claims but ultimately reached a confidential settlement. Schulte got around the exception in part by suing not just the agency but individual employees as arms of the state — a tactic available because of the *ex parte* Young doctrine.

“I plug away and try to fight them within the confines,” Schulte said. “I find it really hard when a private employer violates federal law. ... But when your government does it, that really bothers me. If you can’t change the law, fight with what you’ve got.”

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Suing individuals doesn’t always work, however — often the court will throw out those cases, claiming the individuals are not the employer.

Schulte said his clients are always surprised by the restrictions when it comes to enforcing the ADA.

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“My client will come to me and say of course this applies to me,” he said. “Even though (the state’s) been telling you for 20 years that they won’t discriminate against you because of your illness, when they do, you can’t sue them for damages.”

No day in court

Most states have laws that are “essentially a copy of the ADA,” said Matt Dietz, litigation director for the Disability Independence Group in Miami.

That’s how he avoids issues with ADA immunity — he sues under Florida’s version of the act.

But Schulte said it’s not as easy in Virginia. “That’s great, but our state laws are so weak.”

He’s never tried suing under the Virginia Human Rights Act “because it’s a paper tiger. It just doesn’t have teeth.”

Schulte said state attorneys can see immunity as a favor to the taxpayer, saving them from spending money because of something like a rogue employee.

In the two decades since the Garrett decision, a handful of state legislatures, including Maryland and North Carolina, have passed laws waiving immunity in discrimination cases, most with a cap on the money the state would have to pay.

Richard Seymour, a Washington-based attorney and constitutional scholar with the National Employment Lawyers Association, said it’s common for states in the former Confederacy to have fewer protections for workers.

“The failure to waive sovereign immunity, that’s one area,” he said.

It’s not just the ADA. States can also claim sovereign immunity in cases of age discrimination and under the Family and Medical Leave Act.

Congress to make waiving immunity a condition for receiving federal funding.

Say you're a faculty member at a state university — that institution may not be able to claim immunity if it accepts certain forms of federal financial assistance, said Brian East, an attorney with Disability Rights Texas.

People can also sue for non-monetary relief, like for certain accommodations or reinstatement to a job. But several attorneys said it's just not feasible for them to take on such clients without the possibility of a financial return.

It's tough for even some civil rights lawyers unaware of the exceptions to figure out when suing is possible or worth it, East said, let alone a disabled employee just fired from a job.

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Passaro, the former state trooper, is still pursuing other aspects of his case, but the ADA claim is gone.

“I just want a shot at justice,” he said.

He spent more than a decade testifying in those same courtrooms as a law enforcement officer, he added.

“I want the chance to prove my case, but I can't do that.”

Katherine Hafner, 757-222-5208, katherine.hafner@pilotonline.com

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Family wants military to help a Marine cope with a sex assault. Instead, she's in a Chesapeake brig.

By KATHERINE HAFNER
THE VIRGINIAN-PILOT | JUL 13, 2020



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Marine Thae Ohu, right, and her sister Pan Phyu, left. (Courtesy of Pan Phyu)

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Corporal Thae Ohu has struggled in the five years since she says she was sexually assaulted by a fellow Marine.

The assault changed her, and her mental health progressively worsened, according to her sister Pan Phyu and letters written by Ohu and others. She attempted suicide earlier this year.

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Now she's in the brig.

Ohu's family, friends and advocates specializing in military sexual assault are pushing for her release. They say she's being deprived of adequate medical treatment inside the Navy Consolidated Brig in Chesapeake, where she's been held in pretrial confinement since June 19.

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It's unclear why Ohu's been locked up the past three weeks. Officials with the Marines declined to say, explaining the case was in the pre-referral stage of the military judicial process.

"In interests of preserving the integrity of the judicial process, ensuring her right to

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allegations or what might occur,” they said in a statement.

In a letter to a U.S. senator in Arizona, Ohu — a 26-year-old administrative specialist with the Marine Corps Intelligence Schools aboard Dam Neck Naval Base — said she'd been arrested for assault with a deadly weapon following a psychological break in April. In a separate letter, her boyfriend said he was the victim of the incident and that he believed the case should be dropped.

Ohu has not yet had charges referred against her through an Article 32 hearing. If that happens, the case against her would be publicly laid out.

Ohu was seeking medical retirement earlier this year to get help for PTSD, but the Marines were seeking administrative separation, according to a memo from her defense attorney. That would cause her to lose medical benefits, the lawyer said.

“They are sending me to the brig for pretrial confinement instead of me receiving care,” Ohu wrote in a letter to Arizona Sen. Martha McSally last month. “I haven't been to trial and to focus on legal instead of mental health care is wrong. My attacker should be in the brig instead of me.”

Phyu, a Navy sailor based in San Diego, said her sister needs help.

“Whatever legal (charges) they want to do, they can do while she's able to still get access to medical care,” she said.

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Citing conversations with her sister, Phyu claimed Ohu was being held in heavily restricted solitary confinement.

Lt. Cmdr. Matt Knight, spokesman for Navy Personnel Command which oversees the brig, said that while Ohu was at one point under maximum custody, she is now in medium and was never in isolation. He said Ohu is in a single cell but can move

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As for Ohu's medical status, Knight said he could not comment on specifics, but that Ohu was being seen weekly by Portsmouth Naval Medical Center mental health officials.

Marine officials added that a representative from Ohu's command also speaks with her weekly.

There's been an outpouring of support from Ohu's friends in and out of the service, who have been sharing her story on social media. Phyu has encouraged people to send letters to Ohu in Chesapeake.

A [Facebook page called Justice for Thae Ohu](#) started by Phyu has gained nearly 1,300 followers in a little over a week. An online fundraiser for her legal and medical fees has garnered more than \$3,600.

The online campaign for Ohu has gained traction in recent weeks amid a national conversation over sexual assault in the military. That conversation followed the April 22 disappearance and subsequent death of Army Pfc. Vanessa Guillen.

Phyu said she has also experienced sexual assault while serving, but a helpful man in her chain of command made her experience more bearable.

She's leading the charge from afar for her sister, saying Ohu has asked her to help in any way she can.

"I'm cracking," Ohu told her sister in a phone call earlier this week, according to Phyu.

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"I told her she's a very strong Marine," Phyu said.

Ohu and her sister were born in a Burmese refugee camp in Thailand, Phyu said. The family later settled in Fort Wayne, Indiana, before both sisters joined the military.

"She's my younger sister but I look up to her," Phyu said. "She loves being a Marine"

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health has to come first.”

In 2015, while stationed in Okinawa, Japan, a fellow Marine sexually assaulted Ohu, she told her sister, defense attorney and boyfriend.

“Thae has gone through serious turmoil, pain, and suffering since” the assault, her boyfriend, Michael Edward Hinesley, also a Marine, wrote in an April letter to Ohu’s commanding officer. “She had gone internal and tried to keep her haunting past a secret since she believed that was the only way to hide from the humiliation she faced. Her efforts to hide and keep everything internal didn’t work and that very thing that she didn’t want to affect her personal life or career, did just that.”

The letter was provided to The Virginian-Pilot by Phyu. Hinesley did not respond to requests for an interview.

It’s unclear when exactly Ohu first reported the assault to military officials, but she said in the letter to McSally that she told her command in 2018. She said she was diagnosed with PTSD that year.

“I have continuously expressed my issues and I have mentioned my sexual assault to my leadership since” then, Ohu wrote in the letter. “However, I did not receive the care from my Command that I needed and instead they put me in a more grieving and hostile working environment that was degrading my mental health treatments instead of improving it.”

The Marine Corps declined to discuss Ohu’s allegations her case was mishandled.

“It is inappropriate to publicly comment about sexual assault investigations,” officials said in the statement. “The Marine Corps takes allegations of sexual assault very seriously, conducting independent, thorough, and sensitive investigations of all alleged sexual assault incidents.”

In the letter to McSally, Ohu said she was arrested for the April 5 incident. Hinesley, the boyfriend, wrote Marine officials in mid-April to say that he didn’t think they

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“She is a victim of sexual assault and everything that has happened to her can be easily tied to her service related trauma,” Hinesley wrote. “Taking care of victims of sexual violence is what we do as Marines and we don’t hang them out to dry.”

Ohu’s defense attorney, Capt. Tyler Blair, wrote in an April memo to the Dam Neck detachment’s commanding officer that recent allegations stemmed from “a bad reaction with her prescribed medication that gave her a psychological break.”

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That and other misconduct allegations that Ohu “verbally chastised Marines for doing their work poorly,” Blair wrote, “are not serious enough to warrant the command depriving her of her medical retirement.”

It is unclear what exactly will happen next or when. The Marine Corps’ legal handbook states that a service member must be given an arraignment within 120 days of pretrial restraint.

Ohu wrote that all she wants is access to medical care and a fair trial.

Military officials, she said, “were reactionary instead of helping me in the beginning.”

“Now I’m facing a bigger battle and I

don’t know if I can handle it anymore.”

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Katherine Hafner



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