

Article 138

Servicemembers' Tool for Redress

By Kathy Gilberd

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Complaints under Article 138 of the UCMJ are among the most powerful means of redress available to servicemembers; they tend to be taken more seriously by commands than other forms of complaint, since they must be reported to service headquarters, and they give servicemembers making the complaint considerable control over the processing of the complaint.

Sometimes the mere mention of an Article 138 complaint is enough to bring command attention to members' problems. Ironically, this is also one of the least known methods of complaint—members are not taught about it in military justice trainings and, indeed, many soldiers and sailors believe that the UCMJ ends at Article 134 (the general punitive article).

Service regulations provide specific requirements for these complaints and their review. These include Army Regulation (AR) 27-10; Manual of the Judge Advocate General (JAGMAN) for the Navy and Marine Corps; and Air Force Instruction (AFI) 51-904. There are both procedural and substantive differences among the regulations, and counselors and attorneys would do well to review the specific service reg at issue before preparing a 138.

Broad Range of Complaints

A complaint under Article 138 can address a broad range of wrongs within a command. There need not be direct violation of a military regulation or law. And while the commanding officer is the one against whom the complaint is brought, the actual wrong may be his or her failure to control subordinates or redress a wrong committed by personnel under his or her authority.

The Army's provisions for Article 138 are found in AR 27-10, Chapter. 19. Sec 19-4.e defines a wrong as:

A discretionary act or omission by a commanding officer, under color of Federal military authority, that adversely affects the complainant personally and that is

- 1) In violation of law or regulation;
- 2) Beyond the legitimate authority of that commanding officer;
- 3) Arbitrary, capricious, or an abuse of discretion; or
- 4) Materially unfair.

For the Navy and Marine Corps, the provisions for Article 138 are contained in JAGMAN, Chapter 3. Section 0303.f defines a wrong as:

Any act, omission, decision or order, except those excluded by subsection 0304 [covering acts not the subject of Art. 138 complaint], taken, caused, or ratified by a "commanding officer," under color of that

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officer's military authority that:

- 1) Results in personal detriment, harm, or injury to a military subordinate;
- 2) Is without substantial basis, unauthorized, arbitrary and capricious, unjust, or discriminatory;
- 3) Is properly capable of redress in command channels.

Air Force provisions are found in AFI 51-904, where Section 2.7 defines a wrong as:

A discretionary act or omission by a commander, that adversely affects the member personally, and that, for example, is:

- 2.7.1 In violation of law or regulation.
- 2.7.2 Beyond the legitimate authority of that commander.
- 2.7.3 Arbitrary, capricious, or an abuse of discretion.
- 2.7.4 Clearly unfair (for example – selective application of administrative standards/action, either in the type of standard/action applied or in the severity of the penalty imposed, which results in a clearly unfair application of the administrative standard/action).

While some of these regs identify specific wrongs not mentioned in the others – e.g., discrimination for the Navy/Marine Corps, or selective application of administrative action for the Air Force – the breadth of the language allows such wrongs to be complained of in any service. The scope of the regulations is impressive – it allows for complaints when, for instance, a commander does not ensure adequate health services for his or her troops; does not prevent senior non-commissioned officers from harassing members; arbitrarily denies leave; or admonishes members for participating in protected political activities.

Some Grievances Excluded

All of the services list grievances that are not appropriate subjects for or do not constitute a 138 complaint. These include, among other things, situations in which other means of appeal or redress are available, such as performance evaluations (where rebuttal may be made), non-judicial punishment (which includes its own appeal process), or administrative discharge (with its own notice and response provisions). Other inappropriate complaints vary slightly from service to service. The JAGMAN, for instance, includes acts that are not final, general policies of the Department of Defense or Department of the Navy, etc.

All of the services include non-judicial punishment and courts-martial, but the Army reg points out that an Art. 138 will lie when a suspended NJP sentence is vacated, there being no other remedy available, and the AFI notes that Art. 138 is appropriate in reviewing deferral of post-trial confinement. However, the Air Force includes in its list of complaints not recognizable under 138 any complaints against the reviewing officer for failure to resolve a 138 complaint properly, though failure to forward a complaint to the Secretary may be the subject of a 138 complaint. In contrast, the other services do not seem to limit members' right to complain against the reviewing officer. Complaints deemed inappropriate should be forwarded to the Office of the Staff Judge Advocate at service headquarters for final action.

The JAGMAN and AFI provisions specifically state that 138 complaints may not request as redress the imposition of disciplinary action against another, or changes in final military records.

Procedure under Art. 138

Article 138 complaints are made in two stages. First, the aggrieved member must bring the matter to the commanding officer in writing, usually in a letter or memo referencing Article 138. Second, if the command fails to provide full relief, the member submits a complaint to the officer exercising general court-martial convening authority (GCMCA) over the commanding officer. The complaint must normally

be made within 90 days of discovery of the wrong, excluding time that the letter requesting redress is in the hands of the commanding officer. In the Air Force there is a 180-day time limit to submit a letter of redress, and then 90 days to submit a complaint after the command acts or fails to act. Late complaints will sometimes be accepted if there is good cause for the delay.

The first step in a complaint, the letter of redress, may be done very informally, but formal, memo-format letters are preferred. The letter must in most cases be submitted via the chain of command, though members are free to “walk” the complaint up the chain of command without revealing its contents to intermediate superiors. (Some commands with “open door” policies allow members to see the commanding officer without going through the entire chain of command.)

The letter should outline the problem complained of, with any documentary evidence showing the problem, and should ask for specific redress. Thus a member who complains about inadequate medical care should describe the problem in detail, might submit as evidence a statement from a co-worker who heard a superior refuse the member access to sick call, and could ask for redress such as an immediate medical appointment, a training for command personnel on the right to medical care, and an apology from the offending superior.

In the Army, commanding officers must respond to the letter of redress in writing within 15 days; in reserve commands, there is a 60-day response time. If a final response is not possible within that time, an interim response must be provided, giving commands an “out” when they are not anxious to respond. In the Navy and Marine Corps, response must be within 30 days, and in the Air Force regulation provides no set time limit. A formal complaint is warranted if the commander fails to reply within the specified time limit (or a reasonable time), denies redress, or denies part of the redress.

Policies for resolution

AR 27-10 emphasizes the Army’s attitude that complaints should be resolved at the lowest possible level (Article 138 being one such method). Section 19-3 also notes that “[i]f conventional measures are unsuccessful, the Soldier may submit a request for redress under UCMJ, Art. 138....Every reasonable measure should be taken to resolve complaints at this level.”

The AR also points out that the right to file a complaint under 138 is statutory, and that “[c]ommanders will not restrict the submission of such complaints or retaliate against a Soldier for submitting a complaint.” This language is not contained in the other regulations. Needless to say, restrictions on submission or refusal to accept a 138 letter or complaint, or retaliation for the submission, constitute grounds for a 138 complaint.

Once a letter of redress is submitted, commands will sometimes seek to negotiate with members, offering or giving some of the relief requested (occasionally all of it) while at the same time finding that relief is not warranted. This allows the command to show that the complaint was without merit, while reducing the members’ incentive to go forward with a complaint.

In the Army, the formal complaint, addressed to the officer with general court-martial convening authority over the commanding officer, is submitted to him or her via “any superior officer;” the Army reg defines this as any officer superior to the complainant. The same reg, however, also states that the complaint should be submitted to the complainant’s immediate superior officer. In the Navy and Marine Corps, the complaint must be submitted via the chain of command, including the respondent. The Air Force allows submission directly to the GCMCA or via any commissioned officer superior to the commanding officer.

The intermediate officer receiving the complaint may, in the Army, Navy and Marine Corps, grant any redress he or she is authorized to give, and must note this in the transmittal memo. The JAGMAN

provisions allow each recipient in the chain of command to take 10 working days to prepare endorsements, which must be provided to the complainant. The Air Force permits the intermediate officer to add pertinent documentary evidence and information about the availability of witnesses or evidence, but not to make any comment on the merits of the complaint.

Military memo format is suggested for complaints in the Army reg, which includes simple examples; the JAGMAN requires that sailors and Marines use the specific format provided in its Appendix A-3-a. The Air Force does not suggest a specific format. In general, as in the Army regulations, the complaint must:

- be in writing and be signed;
- identify the complainant as a member of the armed forces;
- give his or her current military organization and address, as well as the organization at the time of the wrong;
- identify the CO who is the subject of the complaint;
- indicate the date a written request for redress was submitted, along with the fact that the request was refused in whole or in part and the date thereof, or that no response was received within 15 days (or a reasonable time);
- include a statement that it is a complaint pursuant to Article 138 and the appropriate service reg;
- “clearly and concisely describe the specific wrong complained of”; and
- state the specific redress requested.

The letter of redress, command refusal, if any, and supporting documentation should be attached.

Under the Army regulations, complainants may have advice from military attorneys, or JAGs, and JAGs may assist in drafting the complaint, but they will not represent the complainant in subsequent proceedings. The other regs are silent on this, but JAGs will often assist in preparing letters of redress and complaints in all services. Civilian counselors or counsel may be involved throughout, but AR 27-10 states that they may only be present, and may not participate, in any subsequent proceedings (such as investigation of the complaint).

Review of the complaint

The GCMCA may reject a complaint if it is deficient, that is, if it does not substantially meet the requirements of the Article and AR 27-10, although the reg allows that officer to waive some deficiencies. (AR 27-10, Sec. 19-10; JAGMAN section 0307.b.[1] and [2]). However, certain deficiencies may not be waived:

- the complainant was not a member of the armed forces when the complaint was submitted;
- the wrong complained of was not a discretionary act or omission, or was not by the complainant’s commanding officer or was not under color of Federal military authority;
- the alleged wrong did not adversely affect the member personally;
- or the complaint did not adequately identify a respondent or the wrong.

Even when complaints are found deficient, they must be reported to headquarters. The JAGMAN permits the GCMCA to waive any provisions of Chapter 3, except those that provide a benefit to the complainant.

Where the GCMCA finds a complaint deficient, it should be returned to the complainant with an explanation of the deficiency and of any other procedure that may be used to complain about or appeal the wrong. If the GCMCA finds the complaint inappropriate because another avenue of appeal is available, he or she will normally refer members to the other appeal process, though action on the complaint is not prohibited.

Standards of review

In reviewing complaints under Article 138, the Army reg states that GCMCAs are to apply a presumption that the commanding officer acted properly, if the evidence does not establish the complaint's validity, "despite vigorous good faith efforts to obtain the relevant facts." AR 27-10, Sec. 19-3.e. Thus, while the complainant bears the burden of proof in these cases, the GCMCA has an obligation to investigate the case thoroughly and to look for evidence supporting the complaint. The other services, while requiring thorough investigation, do not discuss presumptions or the burden of proof.

The nature and method of the investigation are not specified in the regs and are left to the discretion of the GCMCA. If he or she chooses to delegate the investigation, it must be conducted in accordance with AR 15-6 in the Army; the JAGMAN permits the GCMCA to appoint an investigating officer but provides no guidance for that officer.

For the Navy and Marine Corps, the JAGMAN specifically requires that the GCMCA ensure the complainant has been provided all endorsements and their enclosures, as well as any adverse evidence developed in the convening authority's investigation; the complainant then has an opportunity to rebut any adverse information. Section 0307.e.

An Army GCMCA must make specific findings as to whether the act complained of was in violation of law or regulation or otherwise a wrong as defined in the regulation, and describe the factual reasons for the findings. He or she must act personally on the complaint, as in the Navy and Marine Corps, and must notify the complainant in writing of the action taken on the complaint. The Army GCMCA also must forward the complaint, findings and related documents to the Office of the Judge Advocate General, who will review the file on behalf of the Secretary of the Army. TJAG may return the file for further information, further investigation, or other action.

In the Navy and Marine Corps, the GCMCA reports the results of the complaint to the Secretary of the Navy via the Office of the Judge Advocate General. Similarly, the Air Force GCMCA must forward the final results of his or her action to HQ USAF/JAG for Secretarial review and disposition, actions not discussed in the regulation.

Finally, the complainant, respondent and GCMCA are to be informed of the final disposition of the complaint in the Army, Navy and Marine Corps (presumably this is done in the Air Force as well). In the Navy and Marine Corps, the Secretary reviews the GCMCA's action, using the standard of abuse of discretion. The Secretary may set aside actions favorable to the complainant only if they were beyond the authority of the officer granting the redress. The Secretary may also order further proceedings on a complaint or direct that all or part of the redress be granted.

The JAGMAN notes that action by the Secretary is final (1) when the Secretary approves the GCMCA's action; (2) indicates that review is final; or (3) takes no action within 90 days of receiving notice that the GCMCA returned the complaint to the complainant because it did not allege a wrong that is a proper subject under Article 138, requests improper relief or is otherwise deficient. JAGMAN Sec. 0309.e. The JAGMAN further requires that the GCMCA act on the complaint within 60 days of receipt, with any delay explained in the report to the Secretary. One basis for delay provided in the Manual is the presence of an ongoing court-martial or other inquiry that may shed light on the matters raised in the complaint. Here, the JAGMAN allows a delay of 10 days beyond the conclusion of the court-martial or inquiry, or 90 days from the date the GCMCA receives the complaint, whichever is earlier.

Article 138 complaints may be brought only by one complainant against one respondent; joint 138 complaints are specifically prohibited in the JAGMAN. (If the complainant believes more than one respondent has committed a wrong, he or she must file separate complaints against each.) Some

advocates are concerned that submission of parallel complaints by an aggrieved group of servicemembers might be seen as a violation of the provisions of the military's anti-union regulation, DoD Directive 1354.1.

The Navy, unlike the other services, has a parallel provision for complaints of wrong against officers who are not the complainant's commanding officer. JAGMAN Sec. 0302.b. The JAGMAN provisions for 138 complaints are generally used for these complaints, which are brought under Navy Regulation 1150(4).

Needless to say, commands and GCMCAs may try to use the details of the regulations to defeat Art. 138 complaints, though in most cases these must still be reported to service headquarters. But the regs can also be used to strengthen 138 complaints, to protest against efforts to harass members who use the complaint procedure, and to hold commanding officers and their superiors accountable for wrongs.

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About the Military Law Task Force of the National Lawyers Guild

The NLG Military Law Task Force includes attorneys, legal workers, law students and "Barracks lawyers" interested in draft, military and veterans issues. The Task Force publishes a quarterly newsletter, produces interim mailings on legal and political issues for Task Force members, sponsors seminars and workshops on draft, military and veterans law, produces educational materials on these issues, and provides support for members on particular cases or projects. It sponsors legal and educational work on military dissent, the rights of servicemembers, and challenges to oppressive military policies.