



The Newsletter of the
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the National Lawyers Guild

ON WATCH

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Military Whistleblower

Protection Act

BY BECCA VON BEHREN

What is the Military Whistleblower Protection Act?

The MWPA was created by Congress in 1989. The Act does two important things:

- 1) it states that no person may restrict a member of the Armed Forces from lawfully communicating with a Member of Congress or an Inspector General (IG), and
- 2) it protects military members who make disclosures of wrongdoing to Members of Congress or an IG from retaliation by other military members. (10 USC § 1034.)

In response to the MWPA, the Department of Defense (DoD) issued DoD Directive 7050.06 making the Act official DoD policy.

What kind of communication is “protected” under the Act?

“Protected communication” is “any lawful communication” made to one of the people listed in the Act. (DoDD § 7050.06.) Enclosure 2 of the Directive defines “protected communication” further by stating that the communication must be:

- 1) made to a Member of Congress; an IG; a member of a DoD audit, inspection, or investigation; a law enforcement organization; any person or organization in the chain of command; or any other person designated pursuant to regulations or other established administrative procedures to receive such communication, and
- 2) the member of the Armed Forces must reasonably believe the infor-

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END OF YEAR
REMINDER

MLTF

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Article 138: Servicemembers’ tool for redress

BY KATHY GILBERD

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

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mation communicated evidences a violation of law or regulation, including a law or regulation prohibiting sexual harassment or unlawful discrimination, gross mismanagement, a gross waste of funds or other resources, an abuse of authority, a substantial and specific danger to public health or safety, or a threat by another member of the Armed Forces or employee of the Federal Government that indicates a determination or intent to kill or cause serious bodily injury to members of the armed forces or civilians or damage to military, federal, or civilian property.

It is assumed that the term “lawful” means that the communication must be lawful under the Uniform Code of Military Justice (UCMJ) and lawful within the civilian meaning of the term. Examples of unlawful speech under the UCMJ are provoking or reproachful words; words that express an intent to wrongfully injure a person, property, or the reputation of another person; and disrespectful words toward a superior commissioned officer. Examples of civilian unlawful speech would be threats against the President, threatening terrorism against the United States, and defamation.

Why is the Military Whistleblower Protection Act Important?

People in the military do not have the same First Amendment rights as civilians do. DoD Directive 1325.06 addresses dissent and protest among members of the Armed Forces. It states that a “service member’s right of expression should be preserved to the maximum extent possible”. However, this is limited in the sense that the service member’s speech must be “consistent with good order and discipline” and must not conflict

with “national security”. The Directive also states that no commander should be indifferent to speech that “if allowed to proceed unchecked, would destroy the effectiveness of his or her unit”. The Directive leaves it in the hands of the “calm and prudent” commander to determine what speech does, or does not, conflict with “national security”, and what speech would harm the effectiveness of a unit.

Essentially, DoDD 1325.06 leaves the question of what free speech rights a service member has entirely up to his or her individual command. The Directive results in command determinations that are inconsistent, often based on preference, and sometimes prejudice. While some service members are able to speak more freely because Directive 1325.06 gives so much power to command discretion, others are subjected to higher levels of punishment and retaliation for speech that should be protected.

The following is an example of how a service member’s speech could be curtailed under DoDD 1325.06, and how the MWPA can provide protection: if a service member writes on a social media outlet that he or she believes the military is deploying service members with severe psychiatric impairments in violation of DoD regulations, and therefore such service members are not legally obligated to deploy, his or her command might find such speech inconsistent “with good order and discipline”, or perhaps even decide that it may encourage others to refuse to deploy (which would violate Article 82 of the UCMJ). As a result, the service member could face retaliation without protection, disciplinary action, or even administrative action including separation. However, under the MWPA, the same service member is given a powerful outlet for this same speech. He or she may communicate this same belief to a Member of

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Congress, openly or privately, and be protected from reprisal.

What kind of retaliation does the Act protect me from?

Under DoD Directive 7050.06 no person is allowed to take any unfavorable personnel action, or withhold any favorable personnel action, because a service member lawfully communicated with a person named in the MWPA (i.e. a Member of Congress) or prepared to lawfully communicate with a person named in the MWPA. In fact, no person is even allowed to make threats to take unfavorable personnel actions or withhold favorable personnel actions.

The Directive defines personnel actions as any action that “affects, or has the potential to affect, that military member’s current position or career”. The Directive lists the following actions as examples: refusal to give a promotion; a disciplinary or other corrective action; a transfer or re-assignment; a bad performance evaluation; a decision on pay, benefits, awards or training; referring someone for a mental health evaluation; and assigning any significant changes in duties or responsibilities that are inconsistent with the military member’s grade.

What should I do if I am retaliated against for whistleblowing?

Although the MWPA states that “members of the Armed Forces shall be free from reprisal for making or preparing to make a protected communication”, the Act standing alone does not prevent your command from retaliating. What the Act does do is establish a complaint and investigation process for a service member who is retaliated against after whistleblowing. Complaints should be made within 60 days from the time you became aware of the retaliation. However, if you miss the deadline, you have an opportunity to explain why.

If you are retaliated against for whistleblowing, there are several ways you can file a complaint. But first, you must be able to show evidence that you:

- 1) made a “protected communication” to someone named in the MWPA, and
- 2) that the management official who engaged in the retaliatory act against you knew of your protected communication, and
- 3) that there was an actual adverse or unfavorable personnel action taken or threatened, or that a positive personnel action was withheld, after the management official became aware of your protected communication.

Once you are prepared to prove all three elements, you have several options for reporting. First, you should get the PDF titled “Guide to Filing a Military Whistleblower Reprisal Complaint” on the Office of the IG website: www.dodig.mil/HOTLINE/reprisalmil.html. This guide provides step-by-step directions for preparing a whistleblower reprisal complaint. Once you have all the necessary documentation, you can either 1) mail your complaint packet to Defense Hotline, The Pentagon, Washington, DC 20301-1900; 2) fax it to 703-604-8567, DSN 664-8567; 3) file it online at www.dodig.mil/HOTLINE/reprisalmil.html if the complaint is not classified, or www.dodig.mil/HOTLINE/classifiedcomplaint.html if the complaint is classified; or, 4) email the information to hotline@dodig.mil. Submission by email is not recommended since unencrypted email messages are vulnerable to eavesdropping.

Another good resource for service members facing retaliation for whistleblowing, or even for a service member who is considering exercising his or her rights under the MWPA and wants advice ahead of time, is the Whistleblower Protection Ombudsman (WHPO) for the Department of Defense. In 2012 the Whistleblower Protection Enhancement Act was passed which requires IGs to designate WHPOs.

WHPOs

- 1) educate agency employees about prohibitions on retaliation for protected disclosures, and
- 2) educate service members who have made, or are contemplating making, a protected disclosure about the rights and remedies against retaliation for protected disclosures.

You can email the WHPO directly from this webpage: <http://www.dodig.mil/programs/whistleblower/>.

What happens after I file a reprisal complaint?

Once you have filed a complaint, you will be contacted by a member of the office of the IG who will tell you that an investigation will be conducted, and who will conduct it. The purpose of the investigation will be to determine whether the evidence proves four key questions. The first three questions are the questions you had to answer in your complaint. The fourth question is, “does the evidence establish that the personnel action would have been taken, withheld, or threatened if the protected communication had not been made?”.

The investigator will research all pertinent laws, rules, and regulations that apply to the retaliatory action under review, and collect as many relevant documents as possible. The investigator will also identify and interview all key witnesses, usually beginning by interviewing the service

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member who initiated the complaint. During this interview, you will have the opportunity to help identify witnesses and answer any questions the investigator may have. You may be interviewed again later if the investigator has further questions.

Once the investigator has examined all laws, documentation and witness testimony, he or she will write a report analyzing the evidence. All conclusions will be based on the evidentiary standard of “preponderance of the evidence”. This means the investigator will give greater weight to evidence he or she finds most credible, and will use that evidence to determine whether it is “more probable than not” that the four components of the reprisal complaint are true. The report will usually conclude with recommendations for resolution.

Once the investigator has completed the report, you will receive a copy. This copy may be redacted. Another copy of the report will be submitted to the IG. If you believe the investigation was inadequate or biased, you may request a review by the Board for Correction of Military Records (BCMR). The BCMR may allow a hearing to examine and cross-examine witnesses, take depositions, and – if necessary – conduct a hearing. Under certain circumstances, you may be represented by outside counsel or a judge advocate.

If the investigation is considered competent, the Secretary (which is the Secretary of Defense for all branches except the Coast Guard in which case it is the Secretary of Homeland Security) will issue a final decision based on your complaint and the investigation report.

What happens if the Secretary agrees that I was retaliated against?

The Secretary will correct whatever effects the retaliatory action had on your personnel record. The Secretary may also take disciplinary action against the individual who committed the retaliatory action. However, disciplinary action is not required. If you are not satisfied with how the matter was handled, you may submit a request for review to the Secretary of Defense. The Secretary of Defense will make a decision to either uphold or overturn the decision and actions of the Secretary of the respective military department within 90 days after you requested a review. The Secretary of Defense’s decision is final. 

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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).

Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.

– Article 138, Uniform Code of Military Justice

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 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 inappro-

priate 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

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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, how-

ever, 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.

Regional Newswire

Chicago

Since coming together over the summer, setting up an email account and a phone number, the Chicago Chapter of the Military Law Task Force has slowly begun to advertise our existence. To date, we have been contacted by six people: three for discharge upgrades; three for benefits and related questions. That's just over the course of a few months. It illustrates the tremendous need there is for people who can assist veterans in navigating the VA bureaucracy and in upgrading discharges. Our group is small, and we are always looking for

more volunteers. Prior experience is not necessary; we are learning as we go. Fortunately there are experienced professionals available who can answer questions and provide training when requested. If interested, contact us at ChicagoMLTF@gmail.com.

Bay Area

On November 18, the Bay Area Military Law Panel (BAMLP) hosted a lecture by Elizabeth Hillman of UC Hastings, entitled "Sexual Assault in Militaries of the World." Professor and Academic Dean Hillman discussed the prosecution of military sexual assault crimes in the US military and abroad. She recently completed extensive research comparing international treatments of military sexual assault.

BAMLP will do its second round of training law student GI Rights counselors in late January. Meanwhile, the rest of us continue to assist active duty military and veterans with legal issues, ranging from command harassment to negotiation of discharges.

BAMLP continues to win discharges for minors. If a recruit has properly enlisted as a 17 year old, now wants out, and is still 17, experience has shown that a disaffirmation of the enlistment contract signed by the mother, submitted with a withdrawal of consent to the enlistment by the parent(s) or guardian(s), has to date always led to discharge. No JAG lawyer, to date, has recommended any outcome other than discharge. Part of our argument centers on the reality that minors lack impulse control and are unable to make important life decisions. Ironically, this was highlighted when a 17 year old enlistee, already being processed for discharge after requesting our help, changed his mind yet again and vigorously fought to remain in the Army. Request granted. Please feel free to contact BAMLP at militarylawpanel@gmail.com if a minor enlistee seeks a discharge.

BAMLP's Jane Kaplan reports, "I'm working on an Air Reserve National Guard disability case at March AFB. March has rejected VA reports multiple times, requiring the client to repeatedly request revisions by his VA doctors. Command contends there are no regulations or forms for reports, but that the VA reports are inadequate. The VA contends it complies with standard reporting practice. As a result, client has spent months trying to schedule VA appointments to get his records in order. The client also wants to apply for retroactive pay covering the period that his medical continuation orders were improperly terminated. If anyone has dealt with that issue, please contact me: jkaplan@att.net."

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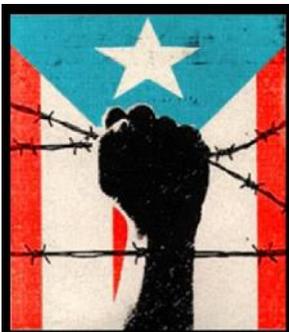
The JAGMAN further requires that the GCMCA act on the complaint within 60 days of receipt, with any delay explained in the report to the Secretary. One basis for delay provided in the Manual is the presence of an ongoing court-martial or other inquiry that may shed light on the matters raised in the 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. [f](#)

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Convention in Puerto Rico deepens NLG relationship with island's bar

BY DAVID GESPASS AND KATHLEEN GILBERD

For the first time in its history, the Guild held a convention outside the continental United States. Our relationship with the Colegio de Abogado/as de Puerto Rico, the Puerto Rican bar association, has been deepening. For the past two years, NLG presidents have been guests at the Colegio's annual assembly and its presidents have participated in our convention. It was a logical step for us to visit one of the last remaining US colonies to support its people's demand for self-determination. It was both an added benefit and a distraction to have lovely tropical weather, three pools and a beach just outside the doors.

Puerto Rico is of particular interest to the MLTF because of the US Navy's infamous use of Vieques for bombing practice from the 1940s until 2003 (see article in On Watch XXIV.3). What now remains is a polluted island with unexploded ordnance that, while cleanup drags on, continues to threaten the lives and health of its population.

We were honored with a keynote from Rafael Cancel Miranda, one of the five Puerto Rican nationalists who staged an armed attack on the US House of Representatives in 1954. The next night, his son taught many of us salsa dancing at the Colegio. He started by expressing his gratitude to the NLG, saying he would not have been there but for the Guild's work in helping to secure his father's release from prison.

Several of the workshops and panels focused on US imperial domination of Puerto Rico, but they included the broad range of work that the Guild does. The MLTF helped organize a hot topic workshop on combating racism and sexism in the courtroom, with our co-chair, Dan Mayfield, one of the presenters.

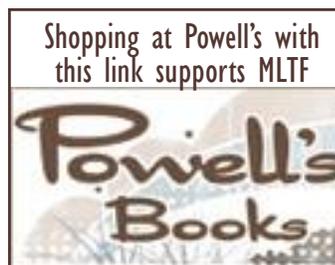
The Guild made legal workers full members in 1971, but their de jure status has not been translated into full equality in the organization. A plenary organized and presented by legal workers was devoted to addressing their concerns and our organizational shortcomings. This coincided with a proposed constitutional amendment to make the legal worker VP a member of the executive council of the

national executive committee. (The vote on this amendment will be conducted online; members can vote at www.nlg.org/survey.)

The Task Force held its annual membership meeting on the opening day of the convention. After some discussion of the current military situation and our work in the last year, the meeting chose three priority areas for work in the coming year: military sexual assault; On Watch and our website; and the national GI Rights Network. The steering committee will flesh out work in each of these areas, but welcomes suggestions and volunteers for work on each priority.

The meeting also addressed the question of steering committee elections. These are normally held at membership meetings, but the small size of some meetings means that votes aren't always representative. This year's meeting proposed an alternative method: nominations will be conducted before and during annual meetings; each meeting will decide if it is large enough to vote; and if not, it can decide to hold on-line elections after the convention.

Given our small size this year – about eight people attended – meeting attendees voted to hold online elections but gave their endorsement for re-election to Kathy Johnson (of Birmingham, AL) and Dan Mayfield (of San Jose, CA), and for election to Alex Bacon (of Lakewood, WA's Coffee Strong) and Jim Klimaski (of Washington, DC). This change in the voting process represents a by-law change, and therefore requires a steering committee vote, so the matter has been referred to the next steering committee meeting. ■



Pentagon, Congress announce proposals to curb sexual assault in the military

Problem endemic to military culture; are proposed solutions mere Band-Aids?

BY JEFF LAKE

On August 14, 2013, the Pentagon announced several new procedures designed to reduce the number of sexual assaults in the military. The issuance of these procedures is among several new developments regarding the issue of sexual assault in the military at the Pentagon, Congress and the courts. The new procedures include:

- A special victim's advocacy program that is supposed to provide legal advice and representation to the victim throughout the justice process;
- Amend the Manual for Courts Martial to provide victims of crime the opportunity to provide input to the post-trial action phase of courts-martial;
- Establish a policy allowing the administrative reassignment or transfer of a servicemember who is accused of committing a sexual assault;
- Provide consistency across the Services regarding inappropriate relations between trainers and trainees and recruiters and recruits;
- Develop policy to speed up sexual assault reporting;
- Mandate that judge advocates serve as investigating officers for all Article 32 hearings on sexual assault offense charges;
- The Department of Defense Inspector General is to evaluate the adequacy of closed sexual assault investigations on a recurring basis.

Legal representation for victims

Perhaps the most significant of these proposals is to set up a program to assist sexual assault victims by assigning them a legal representative. The Air Force currently has such a program. If the representatives are allowed to provide true representation, this could be a major step forward in helping servicemembers who face harassment or retaliation for making complaints.

The policy changes announced by the Pentagon come in response to legislation currently pending in Congress that would make many of these same changes. For example, the policy to provide victims with legal counsel is part of a bill now in the Senate sponsored by Senators Murray and Ayotte.

The main debate in Congress is whether to strip commanders of their authority over sexual assault prosecutions. The idea to bypass commanders, proposed by Senator Gillibrand, is backed by SWAN and other organizations.

Senator McCaskill is leading the opposition. The bill was hotly debated and voted down in the Senate Armed Services Committee. However, at the time On Watch is going to press, 53 Senators had endorsed the proposal. A vote in the Senate is expected shortly.

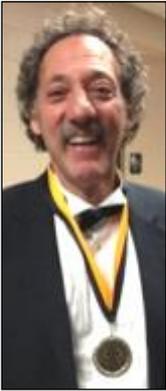
In addition, there are bills in both the House and Senate to change the way Article 32 hearings are conducted. The proposals include requiring that the judge be of equal or higher rank than defense counsel and that the proceedings to be recorded and limited to probable cause determinations only. The victim would have a right not to testify, but his/her sworn statements could be introduced as evidence.

Sexual Assault Problems Persist

Meanwhile, the problem of sexual assault in the military continues unabated. In July, the Department of Defense admitted that a review of sexual assault investigations in 2010 found problems in 72 percent of the cases. All of the service investigative agencies were found to have problems.

Also in July, USA Today reported (1) an Army general at Fort Jackson was suspended after an alleged physical altercation with his mistress; (2) a member of Fort Hood's Sexual Assault Response Team was accused of running a prostitution ring; (3) the head of the Air Force's Sexual Assault Prevention and Response Team was arrested for allegedly approaching a woman in a parking lot and grabbing her breasts; and (4) a West Point rugby team was benched for sexist emails. The Air Force officer recently was acquitted.

Moreover, a report from the Pentagon issued on November 6, 2013, stated that there were 3,553 sexual assaults reported to the military from October 2012 to June 2013. This figure includes cases that occurred before the victim entered the military. The August edition of Women's Health Issues published a study showing that those in "combat-like" deployments are much more likely to report being sexually assaulted or harassed.



Congratulations. Congrats to MLTF steering committee member David Gespass, who recently received the Birmingham Branch NAACP Golden Jurist Award for his commitment to equal justice. David's response: "More than the award itself, receiving it in the pres-

ence of others, who stood tall at a time when resistance risked one's life, impressed upon me how much more I have to do to be worthy of it."

Counselor/attorney training. GI Voice/Coffee Strong, in Lakewood, WA, will hold a GI rights training on December 14 and 15, and a discharge upgrade training on December 16, with MLTF's David Miner and Kathleen Gilbert. For information, contact Andrew Wright at 253-581-1565.

Immigrants tied to military get reprieve. On November 15, 2013, the Obama administration issued a long-awaited policy memo to allow immigrants in the US illegally who are closely related to military members or

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veterans to stay and move towards permanent residence. Spouses, children and parents of servicemembers and vets will be eligible for "parole in place" under the new policy, which can be found [here](#) (PDF).

JROTC memo. NLG law students, working with MLTF attorney Reber Boulton and San Diego's Project on Youth and Non-Military Opportunities, have produced a concise legal memo on the requirement that high schools must disestablish under-enrolled JROTC units under federal law. Copies of the memo are available from the MLTF office at nlgmtf@gmail.com.

New report on ASVAB. The Constitutional Rights and International Human Rights Clinic at Rutgers, with assistance from San Diego's [Project on Youth and Non-Military Opportunities](#), has published a report on the use of the military's aptitude test in high schools, making a strong case that

school counselors have a legal and professional responsibility to ensure that student test information is not automatically released to recruiters. The report can be found [here](#) (PDF).

State penalties for non-registration. The Center on Conscience and War has prepared a state-by-state listing of "Solomon Amendment"-type legislation denying aid or benefits to non-registrants or coercing registration. The listing can be found [here](#), and an accompanying article [here](#). (centeronconscience.org)

Adjustment disorder benefits. DoD has recently changed its Instruction on disability discharge/retirement, DoD 1332.38, to include chronic adjustment disorder among the conditions that may be line of duty and warrant disability compensation. Non-chronic adjustment disorder is a common basis for administrative discharge under Other Designated Physical and Mental Conditions. This change may be a basis for discharge review for veterans whose adjustment disorders proved chronic.

Compiled by Kathy Gilbert. Send items for possible inclusion to nlgmtf@gmail.com.

Sexual assault reform (Continued from page 10)

On the other hand, Army opened a sexual assault response center at Joint Base Lewis-McChord in November. This center is supposed to bring together in one building all aspects of sexual assault reporting, medical and advocacy services for victims. This is the first and only such center in the U.S. military.

Band-Aid solutions?

Finally, the President in May of this year stated that those in the military who commit sexual assault should be "prosecuted, stripped of their positions, court-martialed, fired, dishonorably discharged." This statement, of course, had led to numerous filings across the military by those representing servicemembers accused of sexual assault claiming "unlawful command influence" due to the Presidential remarks.

The Pentagon has been scrambling to downplay the effect of the President's remarks. On August 6, Defense Secretary Hagel was forced to issue a memorandum to all the services stating, "There are no expected or required dispositions, outcomes or sentences in any military justice case" and pointing instead to "the fundamentals of due process of law."

The military continues to grapple with the problem of sexual assault, which is endemic to its culture. The policy changes and proposed legislation show an increasing appreciation of the magnitude of the problem, but in the end may be only Band-Aids on the festering wound that is sexual assault in the military. The military "justice" system definitely needs reform, but the piecemeal approach that Congress is taking will almost certainly prove to be ineffective. ■

Jeff Lake is an attorney in San Jose, California, and co-chair of the Military Law Task Force.

ABOUT THE MILITARY LAW TASK FORCE

The National Lawyers Guild's Military Law Task Force includes attorneys, legal workers, law students and "barracks lawyers" interested in draft, military and veterans issues. The Task Force publishes *ON WATCH* as well as a range of legal memoranda and other educational material; maintains a listserv for discussion among its members and a website for members, others in the legal community and the public; sponsors seminars and workshops on military law; and provides support for members on individual cases and projects.

The MLTF defends the rights of servicemembers in the United States and overseas. It supports dissent, anti-war efforts and resistance within the military, offering legal and political assistance to those who challenge oppressive military policies. Like its parent organization, the NLG, it is committed to the precept that human rights are more sacred than property rights.

The Task Force encourages comments, criticism, assistance, subscriptions and membership from Guild members and others interested in military, draft or veterans law. To join, or for more information, please check our website at www.nlgmltf.org or contact the Task Force at:

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