

Clarifying the Article 138 Complaint Process

Major Robert W. Ayers*

Introduction

Article 138, Uniform Code of Military Justice (UCMJ), provides a Soldier with an avenue to complain about the decisions of his commanding officer. This complaint procedure is available to both active duty Soldiers and reserve component Soldiers when in a Title 10 duty status.¹ The language of Article 138 is as follows:

Art. 138. Complaints of wrongs

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 complaints are not often sought as a remedy for a perceived wrong.² As such, many junior Judge Advocates (JAs) are unaware of how to properly counsel a Soldier on submitting an Article 138 complaint or how to advise a commander on how to respond to one. In fact, the procedures for submitting and disposing of an Article 138 complaint are likely frustrating to many and may easily be confused with the more prevalent Article 139 request that seeks payment from a Soldier for his willful damage or theft of another's property.³ This article is written to clarify Article 138 complaint procedure and provides an overview of its provisions to assist in disposing of these complaints in an efficient manner.

Request for Redress

Before filing an Article 138 complaint, a Soldier must submit an initial request for redress.⁴ A request for redress gives the commanding officer the opportunity to respond to the Soldier's allegations and perhaps resolve issues at a much lower level.⁵ Defense counsel or legal assistance attorneys can point Soldiers to an example request for redress in Army Regulation (AR) 27-10 and can assist in the preparation of requests for redress.⁶ Requests for redress may be as short as a one-page memorandum but must "identify the commanding officer against whom it is made, the date and nature of the alleged wrong, and if possible, the specific redress desired."⁷

The Soldier's commanding officer has fifteen days in which to respond to a Soldier's request for redress.⁸ If a commander will not be able to complete his response in fifteen days, he must provide the Soldier with an interim response containing the estimated date of when the final response will be completed.⁹ This commander should seek the advice of his

* Student, 56th Graduate Course, Charlottesville, Va.

¹ U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 20-2 (16 Nov. 2005) [hereinafter AR 27-10].

² This assertion is based on the author's professional experience as an Administrative Law Attorney, Fort Carson, Colorado, completing only four Article 138 complaints from 1 June 2003 to 15 June 2005.

³ UCMJ art. 139 (2008).

⁴ AR 27-10, *supra* note 1, para. 20-6a.

⁵ *Id.* para. 20-3a. Department of Army policy is to resolve complaints at the lowest level of command. *Id.* Common sense also dictates that a Soldier should speak informally to his commanding officer or the commander's senior enlisted advisor before placing anything on paper.

⁶ *Id.* fig.20-2.

⁷ *Id.* para. 20-6a(2).

⁸ *Id.* para. 20-6b.

⁹ *Id.*

servicing JA as soon as he receives a request for redress. A JA may provide a recommendation regarding whether any relief should be granted, give advice on the possible need to initiate an investigation into a Soldier's allegation(s), or assist in drafting a response. During the request for redress stage, a JA should ensure a respondent-commander meets the above timelines so that a Soldier does not have further reason to complain. The JA should also collect any counseling or other documentation that may be needed for a subsequent Article 138 complaint.

Making a Complaint

A Soldier who requests redress and has been refused a remedy or did not receive a response within fifteen days may submit an Article 138 complaint.¹⁰ As with the request for redress, AR 27-10 contains example Article 138 complaints that may be used by the Soldier and his counsel.¹¹ The complaint should be in writing and include all pertinent information such as the identity of the commanding officer being complained against, the dates a written request for redress was submitted and denied, a concise description of the wrong, and any remedy sought.¹² The Soldier has ninety days from the time of the perceived wrong to submit an Article 138 complaint.¹³ The complaint should be submitted to the respondent-commander's immediate superior commissioned officer.¹⁴ Therefore, if the respondent-commander is the Soldier's company commander, the Soldier should submit the Article 138 complaint to his battalion commander. This superior commissioned officer has the duty to forward the complaint to the general court-martial convening authority (GCMCA), which is normally the installation commanding general.¹⁵ As with the request for redress, the superior commissioned officer should seek the aid of his servicing JA. The JA may assist the superior commander in drafting a memorandum to the GCMCA that provides additional information regarding the circumstances of the complaint and recommends any grants of redress within the GCMA's authority.¹⁶ Judge Advocates at all levels should ensure that commanders do not restrict the submission of Article 138 complaints and should ensure that no retaliation measures are taken against the Soldiers who submit them.¹⁷

Installation Staff Judge Advocate's Office

Prior to the GCMCA taking action on an Article 138 complaint, the Administrative Law Division of the Installation Office of the Staff Judge Advocate reviews the file. Typically, each installation informally designates one administrative law attorney to prepare the memorandum of review and the final action by the GCMCA. This JA is responsible for ensuring each complaint is factually sufficient, is appropriate for Article 138 review, or is referred to alternate channels as appropriate.¹⁸

There is an important distinction between deficient complaints and complaints that are inappropriate for review under Article 138. A deficient complaint "does not substantially meet the requirements of Article 138" and therefore no decision by the GCMCA is required.¹⁹ Examples of deficient complaints include those that were submitted prior to a request for redress, those that were filed outside the ninety-day window, or those that were essentially the same as an earlier complaint.²⁰ The GCMCA has discretion to waive the above deficiencies upon "good cause" and act upon the Article 138 complaint; however, some deficiencies may not be waived.²¹ Examples of these include Article 138 complaints by a Soldier who was

¹⁰ *Id.* para. 20-7.

¹¹ *Id.* figs.20-3, 20-4.

¹² *Id.* para. 20-7a (identifying ten elements to an Article 138 complaint).

¹³ *Id.* para. 20-7b (indicating that any period in which a request for redress was with the respondent-commander will not be included in the ninety-day time limit).

¹⁴ *Id.* para. 20-7b(1).

¹⁵ *Id.* para. 20-9a.

¹⁶ *Id.* para. 20-9b.

¹⁷ *Id.* para. 20-3b.

¹⁸ *See generally id.* para. 20-11.

¹⁹ *Id.* para. 20-10a.

²⁰ *Id.* para. 20-10b(2).

²¹ *Id.* para. 20-10b(3).

not on active duty or by a reserve component Soldier who was not in a Title 10 status when the complaint was submitted (lacks standing to complain), the wrong complained of was an act taken by someone other than the Soldier's commanding officer, or the complaint did not adequately identify the respondent-commander.²² If a deficient complaint is not waived or cannot be waived, then the complaint will be returned to the Soldier with an explanation of the deficiency.²³

On the other hand, complaints that are generally inappropriate for Article 138 review are those based upon adverse actions against a Soldier. These actions are inappropriate for review because Soldiers are already entitled to due process with "more specific channels and procedures to ensure the Soldier has an adequate opportunity to be heard."²⁴ Article 138 complaints provide Soldiers an avenue for redress when there is no other remedy available.

Matters that are inappropriate for Article 138 review include courts-martial, nonjudicial punishment, officer elimination actions, enlisted separation actions, findings of financial liability, and appeals of officer or enlisted evaluation reports.²⁵ The JA reviewing an Article 138 complaint must be careful, however, to ensure that a matter is truly inappropriate as an Article 138 submission. For example, an Article 138 complaint relating to the imposition of nonjudicial punishment is inappropriate for review but a complaint concerning the vacation of suspended nonjudicial punishment is reviewable because no other review or due process exists.²⁶ Further, if a Soldier requests that a relief for cause evaluation report be withdrawn or revised, the complaint is inappropriate for review under Article 138 because there are specific procedures available to Soldiers to appeal evaluation reports.²⁷ If a Soldier requests an additional remedy such as reinstatement, however, the complaint must be reviewed and action taken on the merits.

General Court-Martial Convening Authority Action

The GCMCA is required to make an examination into each Article 138 complaint.²⁸ He may examine the complaint personally or appoint an officer to conduct an AR 15-6 investigation.²⁹ Intervening commanders and the staff judge advocate (SJA) can provide information to the GCMCA. Therefore, depending on the complexity of the complaint, available information may preclude the necessity of an AR 15-6 investigation. The SJA will have to make a determination on whether to recommend an AR 15-6 investigation to the GCMCA when the complaint is initially received by the administrative law division. If an AR 15-6 investigation is initiated, the investigating officer may contact the complainant-Soldier for more information but he is not entitled to be a participant in the process.³⁰ When an investigating officer has been appointed, the SJA is ultimately responsible to ensure that the investigation is complete, that there is a sufficient basis for the findings and recommendations of the investigating officer, and that the GCMCA clearly indicates which of the findings and recommendations are approved.

The GCMCA must personally act on Article 138 complaints;³¹ his authority may not be delegated to another officer such as the installation chief of staff. The SJA should ensure that all of the issues presented in the complaint are addressed by the GCMCA and that the GCMCA's actions comport with applicable law and regulations. The GCMCA's action includes notifying Soldiers when complaints are deficient, are inappropriate for review, or will be referred to a more appropriate

²² *Id.*

²³ *Id.* para. 20-10a.

²⁴ *Id.* para. 20-5a.

²⁵ *Id.* para. 20-5b.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* para. 20-11a.

²⁹ *Id.*; see U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (2 Oct. 2006).

³⁰ AR 27-10, *supra* note 1, para. 20-3d.

³¹ *Id.* para. 20-11b.

official channel. An example referral is forwarding allegations of whistleblower reprisal to the inspector general.³² Finally, the GCMCA will respond to complaints that are appropriate for review, whether by granting the requested relief or by providing reasons for his denial.³³

If a remedy is denied, the GCMCA (with the aid of his SJA) should fully explain the factual basis for his denial even though the presumption is that commanding officers act appropriately.³⁴ Factors that a GCMCA must consider include whether: the commanding officer's perceived "wrong" violated law or regulation; was beyond his legitimate authority; was arbitrary, capricious, or an abuse of discretion; or was materially unfair.³⁵ A practice tip is to ensure that the GCMCA's response to the complainant-Soldier does more than merely recite any of these factors but adequately describes the basis for the denial of a remedy. The response must be more than mere conclusions without substance.

Withdrawal of a Complaint

After action by the GCMCA, the Article 138 complaint is forwarded to the Office of the Judge Advocate General (OTJAG) for review. In many cases the complaint may not have to be forwarded to OTJAG but may be resolved at the local installation level. For instance, commanding officers may provide some or all of the relief requested by Soldiers who submit requests for redress or Article 138 complaints; a Soldier may decide it is no longer necessary to file an Article 138 complaint after receiving his commander's response or action on a request for redress; or a Soldier may voluntarily choose to withdraw an Article 138 complaint that has already been submitted.³⁶ An Article 138 complaint that has not been forwarded to the GCMCA may be withdrawn based on a Soldier's verbal request.³⁷ If the GCMCA has already received the complaint, the Soldier must submit a written request to withdraw it.³⁸ Complaints that have been properly withdrawn are not forwarded to OTJAG.

Deficient complaints are also not forwarded to OTJAG but are returned to the Soldier.³⁹ The Soldier will be instructed as to why his complaint is deficient and ways to correct such deficiency.⁴⁰ Unlike withdrawn and deficient complaints, complaints that are inappropriate for review must still be forwarded to OTJAG for final action.⁴¹

Office of the Judge Advocate General

The OTJAG, Administrative Law Division, receives the Article 138 complaint at the Headquarters Department of Army (HQDA) level. A JA in the Ethics, Legislation, and Freedom of Information Act (FOIA) Branch of the Administrative Law Division (HQDA Judge Advocate) will complete a further legal review of the complaint and may coordinate to clarify information with the installation point of contact. This is usually the JA who prepared the action for the GCMCA. This interaction usually pertains to questions that arise that were not fully answered by a reading of the action, and should not be viewed as a problem with the disposition of the Article 138 complaint. The circumstances are rare in which the action has to be returned for additional information or further investigation.⁴²

³² U.S. DEP'T OF ARMY, REG. 20-1, INSPECTOR GENERAL ACTIVITIES AND PROCEDURES para. 1-4a(9)(c) (1 Feb. 2007). The IG is responsible for processing DOD whistleblower reprisal cases that relate to Army activities. *Id.*

³³ AR 27-10, *supra* note 1, para. 20-11b.

³⁴ *Id.* para. 20-3e.

³⁵ *Id.* para. 20-4e.

³⁶ *Id.* para. 20-7c.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* para. 20-10a.

⁴⁰ *Id.*

⁴¹ *Id.* para. 20-5d.

⁴² *Id.* para. 20-12a (noting that a file may be returned based upon a need for further information to conduct a sufficient review at HQDA).

The HQDA JA prepares a memorandum of review for final action by the Assistant Judge Advocate General for Military Law and Operations (AJAG (ML&O)). The current AJAG (ML&O) is Brigadier General Malinda Dunn, and she takes final action on Article 138 complaints on behalf of the Secretary of the Army. Once final action is taken, the complainant, the respondent commander, and the GCMCA are informed of the final disposition of the Article 138 complaint.⁴³

Conclusion

Although Article 138 complaints are infrequently submitted, JAs should be prepared to efficiently process these actions when they arise. If such processing stalls, it frustrates the Soldier filing the complaint, it frustrates the command forwarding the complaint, and it frustrates the SJA office handling the complaint. A familiarization with the basic provisions of Article 138 complaints makes them a manageable action.

⁴³ *Id.* para. 20-12b.