

## Information Paper

SUBJECT: Processing Article 138 Complaints

1. PURPOSE. To provide information concerning Article 138 procedures.

2. FACTS.

a. AR 27-10, Chapter 20, implements Article 138, UCMJ.

b. When forwarding a complaint to OTJAG for final action on behalf of the Secretary of the Army, the GCMCA must fully explain the basis for the action on the complaint.

(1) AR 27-10, paragraph 20-11a, requires the GCMCA to investigate the complaint personally or to appoint an investigating officer under AR 15-6. Intervening commanders and the SJA can provide information to the GCMCA to assist in the investigation. Depending on the complexity of the complaint, such information may preclude the necessity to appoint an investigating officer. Sufficient information, however, must be obtained to provide a reasonable basis for the GCMCA's action. AR 27-10, paragraphs 20-11d(2) and d(4)(b), require the GCMCA, after taking action on the complaint, to forward the complaint to OTJAG with the "results of the examination into the complaint" and an endorsement or letter of transmittal "describing the GCMCA's action and the reasons" for that action.

(2) The GCMCA must describe the factual basis for his or her conclusions. It is not sufficient merely to state that the GCMCA found the alleged wrongful action not to be in violation of law and regulation; not to be beyond the legitimate authority of the commanding officer against whom the complaint was made; not to be arbitrary, capricious, or an abuse of discretion; and not to be materially unfair. Under AR 27-10, paragraph 20-4e, these are the factors to be considered in determining whether a commander's act or omission was wrongful. The mere recitation of these factors in a document describing the GCMCA's action on a complaint does not adequately describe the basis for the action; they are merely conclusions.

(3) If an investigating officer has been appointed, the SJA should 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 SJA should ensure that all of the issues presented in the complaint are addressed by the GCMCA, that there is a sufficient factual basis for the GCMCA's action, that the GCMCA's action comports with applicable law and regulation, and that these matters are addressed clearly and specifically in the document forwarding the complaint and allied papers to OTJAG.

c. There is an important distinction between deficient complaints and complaints that are inappropriate for review under Article 138.

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(1) A deficient complaint does not substantially meet the requirements of Article 138 and no determination of the merits is required. AR 27-10, paragraph 20-10a provides guidance for determining whether a complaint is deficient. The GCMCA may waive some deficiencies for “good cause.” Paragraph 20-10b identifies which deficiencies may be waived and which may not. For example, a complaint submitted by a former soldier after separation is deficient and the deficiency cannot be waived; however, a complaint submitted before the complainant requests redress from the commander involved is deficient, but the deficiency may be waived. Deficient complaints, when there is no waiver, should not be forwarded to OTJAG but should be returned to the complainant with an explanation of the deficiency.

(2) Complaints about matters that have specific appeal channels are normally inappropriate for review under Article 138. AR 27-10, paragraph 20-5, lists examples of actions that are normally inappropriate for review under Article 138. Generally, if a soldier has an opportunity to submit information on his or her behalf and the action will be reviewed by an authority superior to the commander initiating the action, the action is inappropriate for review under Article 138. For example, complaints relating to the imposition of nonjudicial punishment are inappropriate for review; however, a complaint concerning the vacation of suspended nonjudicial punishment is reviewable under Article 138 because no review exists by an authority superior to the officer vacating the punishment. Complaints determined to be inappropriate for review must be forwarded to OTJAG for final action.

d. In many cases, GCMCAs are providing some or all of the relief requested by complainants. When this happens, the complainant should be given the opportunity to withdraw the complaint. Once the complaint has reached the GCMCA, withdrawal must be in writing. Withdrawn complaints are not forwarded to OTJAG.

e. If the complainant requests only 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. If, however, the complainant requests additional redress, such as reinstatement, the complaint must be reviewed on the merits. Commanders have broad discretion when deciding to relieve a subordinate. Generally, if there is a sufficient basis for the commander to lose confidence in the subordinate, the relief action will be upheld. Caution should be taken to ensure that, if the relief is based on an investigation under AR 15-6, the complainant was provided a copy of relevant portions of the report of investigation and an opportunity to submit a rebuttal prior to relief, as required by AR 15-6, paragraph 1-9, AR 623-3, paragraph 2-19, for officers, and AR 623-3, paragraph 3-59, for enlisted soldiers. Similarly, a review of the relief of a commander should ensure that the written approval of the first general officer in the chain of command was obtained prior to relief, as required by AR 600-20, paragraph 2-17. This does not preclude a suspension of a commander pending action on the relief.

3. POC is the Military Law & Ethics Division, 4-7414/4668.

Chief, Military Law & Ethics Division