

TOPIC

Complaints of Wrongs Under Article 138, Uniform Code of Military Justice, when the commander issued a Letter of Reprimand (LOR) and allegedly prevented the Petitioner from receiving an end-of-tour medal.

Text of the decision

We were asked to review the complaint Petitioner submitted in accordance with AFI 51-904, *Complaints of Wrongs Under Article 138, Uniform Code of Military Justice (UCMJ)*, 6 March 2018. We conclude the General Court-Martial Convening Authority's (GCMCA) denial of redress of Petitioner's complaints was legally sufficient.

Background

Petitioner is a Regular Air Force member. He received a permanent change of station in late July 2018. Prior to this, he belonged to the Squadron. He complains of two actions that occurred shortly before he changed station: (1) his then-squadron commander allegedly prevented the creation/nomination of a permanent change of station decoration for him; and (2) the commander issued him an unjust LOR.

On 17 June 2018, Petitioner met with the commander to discuss his permanent change of station decoration. The squadron superintendent was also present. Petitioner opened the meeting telling the commander that he "initially anticipated earning a meritorious service medal through this assignment." Petitioner conceded during the meeting an Air Force commendation medal was the more appropriate recognition for his achievements during his tour. Petitioner then asked the commander for his thoughts on Petitioner's decoration, and the commander said Petitioner was "not eligible for a PCS decoration because [*sic*] an EPR markdown." When Petitioner asked for clarification on the specific markdown, the superintendent said the markdown was from the period when Petitioner was re-assigned for "poor performance" as a Flight Chief.

On 19 July 2018, the commander issued Petitioner an LOR for violating Article 92, Uniform Code of Military Justice, for failing to obey a lawful order to turn over his government motor vehicle to the interim flight chief. He was also alleged to be derelict in his duties by failing to provide a clean and functional workplace for his newest subordinates.

In his response to the LOR, Petitioner stated he tried to ensure a smooth transition for the new members in his flight. He admits he forgot to leave the keys to the vehicle in his office. In his attachment to his LOR he stated: "I planned to have the GOV's oil changed and to make sure the car was cleaned out – which I forgot to do after I got back to the office from a TDY the Saturday before." He also apologized for "standing ... up" the interim flight chief.

Petitioner's Article 138 Complaint

On 14 August 2018, Petitioner filed his informal complaint with the commander. Petitioner asserted the commander prevented the creation/nomination of his permanent change of station decoration and issued an unjustified LOR. He requested the commander create and assign the DÉCOR 6 at his supervisor's level and remove and set aside the LOR.

The commander denied the complaint in whole. In response, he referred to Petitioner's admissions in his LOR response. He also noted he did not, and could not, prevent the creation of the decoration, because Petitioner's supervisor never nominated him for a decoration in the first place. Additionally, the commander said Petitioner had several markdowns on his EPRs.¹

On 13 November 2018, Petitioner filed his formal complaint with the GCMCA. Petitioner again asserted the commander prevented the creation/nomination of his permanent change of station decoration and issued an unjustified LOR. He also requested the GCMCA create and assign the DÉCOR 6 at his supervisor's level and remove and set aside the LOR. On 18 December 2018, the GCMCA denied the request for relief. The GCMCA found the commander did not improperly prevent Petitioner from receiving a decoration, and the decision to issue a LOR was not arbitrary, capricious, nor an abuse of authority. Additionally, the GCMCA concluded the LOR was not unfair or unjust.

Legal Standard

Article 138, UCMJ, states “[a]ny 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.” AFI 51-904 defines “wrong” as “[a] discretionary act or omission by a commander, that adversely affects the member personally, and that, for example: (1) is in violation of law or regulation; (2) beyond the legitimate authority of that commander; (3) arbitrary, capricious, or an abuse of discretion; or (4) clearly unfair or unjust.”²

Since the Article 138 complaint-resolution process is administrative in nature, the standard of proof that applies is proof by a preponderance of the evidence. AFI 51-904, paragraph 1.2.6. Furthermore, the Petitioner has the burden of persuasion, and the evidence provided must establish a valid basis for a complaint. AFI 51-904, paragraph 2.4.

¹ On one EPR, Petitioner “Exceeded some, but not all expectations” for Task Knowledge/Proficiency; he “Exceeded some, but not all expectations” for “Followership/Leadership”; he “Exceed[ed] most, if not all expectations” on “Whole Airman Concept”; he “exceeded some, but not all expectations” in his “Overall Performance Assessment.” Petitioner’s commander (not the respondent commander) concurred with this assessment. On another EPR, Petitioner “Exceed[ed] most, if not all expectations” for “Task Knowledge/Proficiency”; he “Met all expectations” on “Followership/Leadership”; he “Exceed[ed] most, if not all expectations” on the “Whole Airman Concept”; and his supervisor determined he “Exceed[ed] most, if not all expectations” on his “Overall Performance Assessment.” Petitioner’s commander (not the respondent commander) also concurred with this assessment.

² See AFI 51-904, Attachment 1, Terms.

Discussion

Members must submit initial applications for redress within 90 days of discovery of the wrong or the application is considered untimely. Untimely applications for redress will be denied without determination of the merits unless the commander waives the time requirement for good cause. AFI 51-904, paragraph 2.2. Petitioner received the LOR on 19 July 2018. He filed his informal complaint on 14 August 2018, which is within the 90-day window to submit the complaint. The commander responded on 11 September 2018, which is within the required 30 days to respond. Petitioner filed his formal complaint on 13 November 2018. On 18 December 2018, the GCMCA denied the request, which was also well within the 60-day requirement under AFI 51-904, paragraph 6.6. Accordingly, the procedural requirements have been met.

There are no facts that the commander prevented the creation of a decoration. Petitioner's supervisor was responsible for initiating the DÉCOR 6 nomination action, but never took this action. It is unclear why this occurred, although Petitioner's own matters indicate his supervisor was unclear how the process worked.³

As provided in AFI 36-2803, *The Air Force Military Awards and Decorations Program*, 18 December 2013, Incorporating Change 1, 22 June 2015, paragraph 1.2, individuals considered for decorations must clearly demonstrate sustained and superior performance. Petitioner's commander also mentioned "markdowns" in Petitioner's EPRs. Specifically, he discussed one EPR in which the assessment of Petitioner's Followership/Leadership performance "Met all expectations," and the two sections of his another EPR in which he "Exceeded some, but not all expectations." He claims these "mark downs ... alone are sufficient justification enough to not recommend a decoration due to a lack of clearly demonstrated sustained and superior performance." This statement seems to evince a lack of understanding on the commander's part of the culture shift intended with the current version of the enlisted performance report. The move from numbers to words was intended to provide a more accurate assessment of one's performance, with the expectation being that few Airmen would always "Exceed most, if not all expectations." Accordingly, stating someone "Met all expectations" or "Exceeded some, but not all expectations," is no longer supposed to be considered a "markdown" in the same way a "3" or a "4" on an EPR was considered a "markdown." The package does not include a historical analysis of whether the commander only authorized decorations for Airmen who only "Exceed most, if not all expectations," so it is unclear whether this justification is arbitrary or capricious.

Regardless, Petitioner did receive a LOR for failing to follow orders and for dereliction of duty occurring in March, April, and June 2018. This conduct alone justifies the decision not to award an end-of-tour medal to Petitioner.

Petitioner claimed the violations in the LOR were misrepresented, embellished, not progressively addressed, and issued in reaction to him confronting the commander about not receiving an end-of-tour decoration. However, the allegations contained in the LOR are supported by the facts, to include Petitioner's own admissions. Moreover, there is no requirement for the commander to issue a counseling or admonishment prior to issuing a reprimand. Although the commander did

³ According to Petitioner, his supervisor was "waiting on the DÉCOR 6 site to be loaded in VPC to submit my decoration."

issue the LOR a month after the meeting about the decoration, it does not appear he issued the LOR in response to the decoration discussion. Petitioner engaged in additional misconduct after the 17 June 2018 meeting about his decoration. Accordingly, the LOR was not arbitrary or capricious, or unjust or unfair, and was within the respondent commander's authority.

Conclusion

The evidence and legal analysis of the relevant law and regulatory guidance supports denial of redress. The commander's actions complied with applicable law and regulations, were not arbitrary or capricious, or unjust or unfair and were within his authority.

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