

TOPIC

Article 138 Complaint requesting the documents used by Command for basis of discharge action.

TEXT OF THE DECISION

We have reviewed this case and for the reasons outlined below, find the evidence and legal analysis of the relevant law and regulatory guidance supports denial of redress.

BACKGROUND

On 10 December 20XX, Petitioner's Commander served Petitioner with nonjudicial punishment under Article 15, UCMJ, for wrongfully smoking botanical incense on divers occasions between on or about 1 August 20XX and 21 September 20XX in violation of a lawful general order. Petitioner filed a written response in which he admitted the wrongful use on two occasions. Subsequently on 4 January 20XX, Petitioner's Commander notified Petitioner of his intent to recommend Petitioner be discharged with a under honorable conditions (general) characterization for drug abuse under AFPD 36-32 and AFI 36-3208, paragraph 5.54.

Petitioner responded to the notification discharge on 7 January 20XX by filing this complaint under Article 138, UCMJ, with the Squadron Commander. He attached two letters from his civilian defense attorney – one addressed to his Commander and one addressed to the special court-martial convening authority (SPCMCA) – to his complaint. In his complaint, Petitioner requested redress for several alleged wrongs committed by his commander. Specifically, Petitioner requested copies of statements made by three individuals regarding his drug allegations, the police report or investigation relevant to the drug allegations, and the medical/mental health evaluation completed as a result of the discharge action. Petitioner also alleged his commander should have granted him a delay of seven days to submit his response to the discharge action.

Petitioner's civilian defense attorney reiterated Petitioner's request for the evidence and delay in his letter to Petitioner's Commander. The defense attorney's letter to the SPCMCA, on the other hand, responded to the notification discharge package. In this letter, he provided a detailed discussion of the seven retention criteria relevant to a drug abuse case under AFI 36-3208, paragraph 5.55.2.

Upon receiving the Article 138 package from Petitioner's Wing Commander for action, the NAF/CC denied the request finding Petitioner's Commander acted within his discretion and authority. He additionally determined the evidence failed to show Petitioner's Commander went beyond the legitimate authority of his command, violated a law or regulation, or that his actions were arbitrary, capricious, or an abuse of discretion.

GUIDANCE

Article 138, UCMJ, states that “[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.” A wrong is defined in AFI 51-904, paragraph 2.7, 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).

DISCUSSION

Petitioner’s Commander did not violate law or regulation in denying Petitioner access to the requested documents and in denying the delay to respond to the notification discharge action. These actions were within Petitioner’s Commander’s authority as commander; were not arbitrary, capricious, or an abuse of discretion; and were not clearly unfair. Petitioner’s Commander properly determined that the requested evidence was not relevant to the basis for the discharge action. The nonjudicial punishment action for drug abuse formed the basis for Petitioner’s discharge. In Petitioner’s response to the nonjudicial punishment, he admitted to the drug abuse. Since Petitioner admitted the allegations, the statements of these other witnesses and the police report are of little, if any, relevance to the case. Furthermore, AFI 36-3208 contains no requirement that the medical evaluation be completed prior to receiving a written response to the discharge action. Finally, the case file is devoid of evidence indicating Petitioner’s Commander acted improperly in denying the delay request. The Petitioner’s reason for the delay was to permit him more time to review the requested additional evidence prior to responding. As Petitioner’s Commander properly denied Petitioner access to that evidence, there was no need for further delay. Additionally, Petitioner’s civilian defense counsel submitted a timely response to the notification discharge analyzing, in great detail, the seven retention criteria for a drug case; further indicating there was no need for a delay to respond.

CONCLUSION

For the aforementioned reasons, the evidence and legal analysis of the relevant law and regulatory guidance supports denial of redress.

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