

**TOPIC**

Petitioner seeking redress for Letter of Reprimand being placed into his Officer Selection Record alleging the district attorney's election to not prosecute him demonstrates that the allegation is unsubstantiated.

**TEXT OF THE DECISION**

We have reviewed the below case and for the following reasons, we find that there was no violation of law or regulation, nor actions outside the legitimate authority of petitioner's commanders.

**BACKGROUND**

On 26 Jun 17, civilian law enforcement responded to an early morning domestic dispute call at an off-base hotel. Upon arrival, law enforcement personnel spoke to Petitioner's wife. Petitioner's wife stated she and her husband went to dinner the night before and later to a strip club, where she became upset when she learned Petitioner kissed a stripper.

When questioned by law enforcement, Petitioner stated after leaving the strip club, he and his wife returned to their hotel room. Petitioner stated that he tried to go to bed, but his wife pulled the blankets off of him and began scratching his back. He further stated that he attempted to defend himself and pushed her down to stop the assault. Petitioner then left the room.

Petitioner's wife did not recall the altercation; she only remembered trying to contact Petitioner by telephone and text message because she did not know where he was. She also notified him via text message that her eye was swollen. Petitioner's wife never stated directly that Petitioner hit her in the eye.

Law enforcement confirmed both the presence of scratches on Petitioner's back and his wife's swollen eye. Witnesses at the hotel stated to law enforcement they heard a noise that sounded like somebody getting struck, followed by a woman yelling that she had been hit and saying "why would you do that?" As the woman was yelling, they heard somebody exit the room. Law enforcement made an on-the-scene determination that Petitioner was the aggressor and arrested him for "battery domestic violence" and transported him from the scene.

On 17 Jul 17, the District Attorney's Office elected not to file charges for domestic battery against Petitioner. However, the District Attorney's Office also stated, they "retain the right to file [domestic battery] charges at a later time if facts and circumstances warrant it."

On 10 Aug 17, Petitioner's Commander issued Petitioner a Letter of Reprimand (LOR), dated 5 Aug 17, for assault consummated by battery. Petitioner provided a written response contesting the domestic abuse allegation. Petitioner's Commander found the written response unpersuasive and the LOR remained in effect. On 10 Sep 17, Petitioner's Group Commander placed the LOR in Petitioner's Office Selection Record (OSR).

On 29 Sep 17, Petitioner requested redress by way of rescission of the LOR and its placement in his OSR, as well as rescission of the UIF and referral Officer Performance Report (OPR). He argued the evidence contained in the police report was insufficient to support the LOR for domestic assault, and therefore, the underlying issuance of the LOR was arbitrary and capricious. Specifically, he argued that his command never interviewed him to obtain his version of events; further, that he was not in the hotel room when the neighboring hotel guests heard his wife yell; and that the district attorney's election to not prosecute him demonstrates the allegation is unsubstantiated. Neither Petitioner's Commander nor Group Commander granted relief.

On 18 Nov 17, via e-mail, Petitioner formally submitted an Article 138, UCMJ, complaint to the Commander's GCMCA requesting rescission of the LOR and its placement in his OSR.

On 8 Dec 17, the GCMCA denied all relief, concluding the actions of Petitioner's commanders were not arbitrary, capricious, or an abuse of discretion.

### ***GUIDANCE***

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, *Complaints of Wrongs under Article 138, Uniform Code of Military Justice*, 6 March 2018, provides, “a petitioner may submit matters under Article 138 for discretionary acts or omissions by a commander that adversely affect the member personally and allegedly are a violation of law or regulation; beyond the legitimate authority of that commander; arbitrary, capricious, or an abuse of discretion; or clearly unfair or unjust.” Paragraph 1.3.1.1.

Matters that are not reviewed under Article 138, UCMJ, include, but are not limited to, submissions related to acts or omissions that were not initiated, carried out, or approved by the member's commander; submissions seeking reversal or modification of non-discretionary command actions. “For example, mandatory filings of adverse information in an unfavorable information file (UIF) are not reviewed under Article 138, UCMJ; or submissions challenging the actions of the commander complained against which addressed an Article 138 application for redress, or actions by the GCMCA on an Article 138 complaint.” Paragraph 1.3.2.

The Article 138, UCMJ, complaint resolution process is administrative in nature; the standard of proof that applies is proof by a preponderance of the evidence. Paragraph 1.2.6.

### ***DISCUSSION***

Petitioner's commanders did not act in an arbitrary, capricious, or unfair manner, or otherwise abuse their authority. They properly considered the available evidence, memorialized in a police report prepared by law enforcement officers who had a duty to prepare accurate reports. Petitioner's commanders reviewed the report, which included a statement Petitioner made to the

responding officers, wherein he admitted to pushing his wife down. It is true that Petitioner's wife, likely due to alcohol consumption, only remembers waking up and texting Petitioner to ask him where he was, and telling him she had a swollen eye. However, neighboring hotel guests, whose credibility is not in dispute, heard an altercation before Petitioner left the room, during which they heard what sounded like somebody being struck, and a woman yelling that she was hit. Petitioner admitted to police officers that he pushed his wife down, and officers observed her swollen eye. Petitioner's commanders' decisions are supported by a preponderance of the evidence.

The local district attorney's office election to not prosecute Petitioner does not establish that he did not assault his wife. Such decisions are frequently driven by considerations such as litigation costs, over-crowded dockets, the standard of proof, and the expressed desires of the victim. These considerations are different from those of commanders who must determine whether to officially censure an officer.

The Article 138, UCMJ, action was also processed appropriately. Petitioner's commander properly considered the request for redress, and explained the basis for his decision to serve the LOR. He notified Petitioner, accurately, that placement of the LOR in a UIF was beyond the scope of his authority, but since the OSR filing decision was determined by Petitioner's senior rater, the matter would be forwarded to the senior rater. Subsequently, the senior rater also properly considered the matters raised by Petitioner, and determined inclusion of the matter in his OSR was appropriate.

We find there was no violation of law or regulation, nor actions outside the legitimate authority of petitioner's commanders.

### ***CONCLUSION***

For the aforementioned reasons, the evidence and legal analysis of the relevant authorities supports denial of redress.

OpJAGAF 2018-38 21 August 2018