

## ARTICLE 138, UCMJ, COMPLAINT

### Administrative Discharge Board – Timing of Unconditional Waiver Submission

I have reviewed the complaint submitted by the complainant, pursuant to AFI 51-904, *Complaints of Wrongs Under Article 138, Uniform Code of Military Justice (UCMJ)*, 28 July 2015, and find that NAF/CC's denial of relief is legally sufficient. I concur with the decision and recommend you take final action and sustain the denial.

### **Background**

On 23 May 2016, complainant's commander notified complainant that he was recommending she be discharged from the Air Force. The basis for the discharge was AFI 36-3208, *Administrative Separation of Airman*, paragraph 5.49, minor disciplinary actions. Specifically, complainant was being processed for discharge for: leaving her place of work without permission and without providing proof of payment of a delinquent Government Travel Card (GTC); being arrested by civilian authorities and charged with burglary and trespassing; creating a false PCS order for the purpose of breaking her apartment lease without penalty; and misusing her GTC. This misconduct formed the basis for a letter of counseling, a letter of reprimand, and two nonjudicial punishments pursuant to Article 15, UCMJ.

Complainant was required to submit her response by 1 June 2016. In an undated memorandum, complainant responded to the notification for discharge by exercising her right to an administrative discharge board. The parties initially anticipated the discharge board would be held in October 2016. However, in early July, complainant's area defense counsel's (ADC) schedule for the week of 19 July 2016 cleared. The servicing legal office contacted her attorney and discussed moving the board to July 2016. Subsequently, on 11 July 2016, the staff judge advocate (SJA), acting for the wing commander, signed Special Order AA-3 convening the discharge board for 21 July 2016.

On Friday, 15 July 2016, complainant submitted a conditional waiver in which she offered to waive her right to a discharge board in exchange for no less than an honorable service characterization. On 19 July 2016, the wing commander rejected the conditional waiver, advising complainant she could submit an unconditional waiver or the board would proceed as scheduled on 21 July 2016. That same day the SJA, acting for the wing commander, signed Special Order AA-4 convening the board.

On 20 July 2016, complainant's ADC filed an objection with the legal advisor detailed to the discharge board regarding the admissibility of evidence, arguing that complainant was entitled to a three workday waiting period IAW AFI 36-3208, paragraphs 6.26.1.1 and 6.28.1 following the denial of her conditional waiver, and accordingly, the board should either be delayed or the government precluded from admitting its evidence against her. The board proceeded as scheduled wherein the legal advisor ruled against the complainant.

After considering the evidence, the board members found that complainant had not left her place of duty without permission and/or failed to provide proof of payment of her delinquent GTC, but substantiated all three of the remaining allegations. The board members recommended complainant be discharged with an under honorable conditions (general) service characterization but also recommended she be offered a period of probation and rehabilitation (P&R) with a conditional suspension of the discharge.

On 27 July 2016, complainant submitted an application for redress to the wing commander, alleging that she “willful[ly] fail[ed] to follow the requirements set out in Air Force Instruction 36-3208, *Administrative Separation of Airmen*, dated 9 July 2004 . . . specifically paragraph 6.26.1.1 and 6.28.1.” Complainant alleged she was “adversely affected personally” by the wing commander’s “discretionary act” of failing to comply with AFI 36-3208. Complainant requested that the wing commander: “(1) disapprove the findings and recommendations of [her] discharge board, and direct a new board hearing to take place now that three (3) workdays have passed, and (2) ensure that any further legal advice related to [her] case comes from attorneys unaffiliated with any of the prior processing of [her] case.”

The wing commander denied the application for redress on 10 August 2016, concluding that the requested relief was not warranted. Complainant submitted her Article 138, UCMJ, complaint to the general court-martial convening authority (GCMCA) the next day.

### **Authorities**

Article 138, UCMJ, provides, “[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*, 28 July 2015, provides, “matters reviewed under Article 138, UCMJ, include 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 3.1

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 (e.g., mandatory filings of adverse information in an unfavorable information file (UIF)); submissions challenging the actions of the commander complained against which addressed an Article 138, UCMJ, application for redress, or actions by the GCMCA on an Article 138 complaint. Paragraph 3.2.

Because 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 2.5.

## Analysis

The wing commander's actions in convening the board on 21 July 2016 did not violate AFI 36-3208, paragraphs 6.26.1.1 and 6.28.1. Even assuming they did, complainant failed to establish she was adversely affected.

Complaint argues that paragraphs 6.26.1.1 and 6.28.1 establish an absolute right to a three workday period between denial of a conditional waiver and the day a board is convened regardless of the timing and the procedural posture of the case. Paragraphs 6.26.1.1 and 6.28.1 collectively provide that after a conditional waiver is rejected, the convening authority is to convene a board if the member has not submitted an unconditional waiver or requested a board within three workdays of the waiver's rejection. In isolation, the text of these paragraphs suggest that a three workday waiting period is required; however, such an interpretation is inconsistent with the structure of the AFI, and also leads to an imprudent result.

When discharge is initiated, a board-entitled member is served a notification and afforded seven workdays to respond. Paragraph 6.15.4. By the end of the seventh workday response period, the member may request a discharge board (paragraph 6.13.1.4); waive the discharge board (paragraph 6.13.1.8); or submit a conditional waiver of the right to a discharge board (paragraph 6.15.4). Failure by the member to respond within seven workdays or an approved extension, constitutes a waiver of the member's rights (paragraph 6.15.4).

Initiating commanders are instructed to obtain a waiver from the member, if requested (paragraph 6.14.9), and submit the same to the servicing Military Personnel Flight (MPF) (paragraph 6.14.12.5) for consideration by the convening authority. Convening authorities are directed to convene a board if they deny a waiver (Paragraph 6.13.2). In an effort to further explain conditional waivers, paragraph 6.15.4 (Section 6C) directs the reader to Section 6D (paragraphs 6.24-6.29). Thus, these paragraphs must be read together.

Taken together, the AFI contemplates that the member be served notice and provided seven workdays to make an election, to include whether to submit a conditional waiver. The conditional waiver option and associated three-day response period apply at the *beginning* of the process, not at some later undetermined point in time, with the concomitant effect of creating an additional unanticipated procedural right. This result is consistent with the AFI's structure establishing a comprehensive due process scheme during the notification phase. As described above, a member entitled to a discharge board has seven workdays to decide whether to request a board, waive it, or submit a conditional waiver. If the member fails to respond at all during those seven workdays, the member *waives* the right to a board. A member who submits a conditional waiver at the end of the response period, however, is entitled to have the convening authority consider it. By the time the convening authority considers the waiver, the seven workday response period will likely have lapsed and a new response period will be necessary for the member to consider her options if the waiver is denied. The three additional workday response period established in paragraphs 6.26.1.1 and 6.28.1 provides such a period and flows logically from the initial seven day response period. The AFI establishes a supplemental response time for the member

to request a board in the event the convening authority rejects the conditional waiver; again, envisioned to have been submitted within the initial seven workdays.

Additional reasons support this conclusion. First, the AFI directs the initiating commander to obtain the waiver from the member (paragraph 6.14.9) and submit it to the servicing MPF (paragraph 6.14.12.5) during the initial processing of the notification, yet provides no guidance whatsoever on obtaining, submitting or otherwise processing such waivers after this initial stage. If the three workday right was intended to apply beyond this initial stage, the AFI would include additional processing instructions. Second, the explicit choice presented to the member during the three workday response period (i.e., request a board or unconditional waiver) is not operative in cases such as this, where the member has already requested a board. It's illogical to offer the member the choice of requesting a board when she has already done so. The choice makes sense, however, when presented to the member following denial of her conditional waiver following the initial seven day response period.

Once the initial seven days lapsed (in this case, 30 May 2106), and the respondent requested a board, there is no explicit requirement that the convening authority consider a conditional waiver. That the convening authority entertained the out-of-date waiver in this case, did not generate a new three day waiting period with the attendant right to then submit an unconditional waiver. Complainant's proposed reading of paragraphs 6.26.1.1 and 6.28.1 would enable and perhaps incentivize a member to request a conditional waiver on the eve of a scheduled board, potentially delaying the board significantly and frustrating the purpose of the AFI to move these cases forward to adjudication or discharge by a board.

Assuming the plausibility of complainant's position, she has failed to demonstrate she was personally adversely affected. Though not specifically articulated by complainant, presumably she advances the position that she required the three workday period to finish preparing for the discharge board. Yet, neither complainant nor her ADC make such a claim. Second, the timing of the conditional waiver indicates that complainant expected the board to go forward as scheduled. On 11 July 2016, the board was convened for 21 July 2016. The conditional waiver was submitted on Friday afternoon, 15 July 2016. Had the wing commander been able to deny the conditional waiver that same day or by early Monday, 18 July 2016, the board would have been held without delay even with a three workday waiting period. It is difficult to see how complainant was adversely affected by a discharge board that was held on the day she expected it to begin. Finally, the result of the board indicates that preparation was a non-issue. The board found in complainant's favor on one of the four allegations. Additionally, while recommending a general discharge, the board further recommended that she be offered P&R with a conditional suspension of the discharge.

Finally, it could conceivably be argued that complainant was adversely affected by being deprived of the opportunity to submit an unconditional waiver within three workdays of the denial of the conditional waiver. See paragraphs 6.26.1.1 and 6.28.1. However, complainant did not raise this in her complaint, and indeed, such a request would contradict her request for and subsequent participation in a board.



### **Conclusion and Recommendation**

Complainant's commander did not act arbitrarily, capriciously, or abuse his authority. While the applicable AFI could be clearer, its interpretation by command was not only reasonable, but correct. I therefore recommend that you concur with the commander's decision and sustain the denial.

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9 November 2016