

TOPIC

Denial for redress for Article 138 complaint based on lack of timeliness.

TEXT OF THE DECISION

This opinion is in response to an Article 138 complaint regarding an LOR issued to Petitioner. The evidence and legal analysis do not support reversal of command's determination that the complaint was not filed in a timely manner.

BACKGROUND

Following the acquittal, Petitioner received a Letter of Reprimand (LOR) from the wing commander for misconduct. After Petitioner responded, he was notified the LOR was final and filed in his Unfavorable Information File (UIF). Petitioner filed a complaint under Article 138, UCMJ, against the wing commander 93 days after being informed of the final outcome of his LOR. He requested waiver of the 90-day limit because his ADC was out of the country for a substantial portion of the preparation period.

In his complaint, Petitioner requested that the LOR be removed or downgraded to a Letter of Admonishment (LOA) with no associated Unfavorable Information File (UIF). The wing commander denied Petitioner's complaint on the basis of timeliness, and further indicated that, "[a]lthough I did not consider your request on the merits, had I considered the request I would have denied it on the merits."

Petitioner submitted his complaint to the appropriate General Court-Martial Convening Authority (GCMCA). Accompanying this application, Petitioner's ADC (Capt A) provided a signed memo explaining that she had improperly advised Petitioner on Article 138, by omitting the filing deadlines. She further noted that Petitioner filed within a single day of being notified of the error, and that Petitioner's submission was only 3 days beyond the suspense. The ADC requested that an extension be granted for good cause. The GCMCA also denied Petitioner's complaint on the basis of timeliness, but stated further that he would have also denied the application for redress if considered on the merits.

Timeliness

As noted above, the initial Article 138 complaint to Petitioner's commander was dismissed by that commander for failure of timely submission. In turn, the GCMCA concurred with the commander that Petitioner warranted denial for failure to timely file. AFI 51-904, *Complaints of Wrongs under Article 138, Uniform Code of Military Justice*, 6 Mar 18, paragraph 4.3.2, indicates that the member must submit their initial application for redress within 90 days. It continues, "Untimely formal complaints under Article 138 should be dismissed without a determination on the merits of

the submission...**unless the general court-martial convening authority waives the time requirements for good cause.**”

Along with denial for timeliness, both commanders provided an alternate basis for denial, in contravention to the instructions of paragraph 4.3.2. The wing commander said, “Although I did not consider your request on the merits, had I considered the request I would have denied it ...,” and then continued to provide further details of his analysis. The GCMCA did not even purport to “not consider” the substance of the application for redress, but rather presents denial for timeliness and denial on the merits as alternatives.

The first question, therefore, is whether the repeated provision of details on how the application would be denied on the merits, both the immediate commander and the GMCA, constitutes an express or implied waiver of the timeliness provision of AFI 51-904.¹ Implied waiver is a general principle, and is described in 28 Am Jur 2d *Estoppel and Waiver* § 195 as follows.

An implied waiver can be established by acts and conduct from which an intention to waive may reasonably be inferred, or it may arise when the conduct of the person against whom waiver is asserted is inconsistent with any intention other than to waive it. An implied waiver may also arise where neglect to insist upon a right results in prejudice to another party or where a party fails to assert a statutory or constitutional right in a trial court. Waiver may also be inferred from conduct of such a nature as to mislead the opposite party into an honest belief that a waiver was intended or assented to. [footnotes omitted]

Under none of the bases described above can an implied waiver be attributed to either the wing commander or the GCMCA, as each of them explicitly retains, and in fact exercises, the right to deny the application for redress on the basis of timeliness.²

While there is no express or implied waiver of timeliness in this case, the attempt to provide dual justifications in violation of paragraph 4.3.2 is ineffective. While it may, in the abstract, be possible to both deny an application on timeliness and on the merits, the action in the instant case fails to do so. The wing commander’s discussion of the merits of the case is immediately preceded by the express statement, “...I did not consider your request on the merits...” Petitioner is therefore entitled to take the commander at his word, and may conclude from this qualifier that what follows is the nature of a discussion of the issues and a recitation of preliminary thoughts, not a full consideration of the appeal on the merits. Since Petitioner’s application to GCMCA is predicated on the substance of the wing commander’s denial, reversal of the commander’s determination to deny for timeliness might require subsequent submission of the Article 138 to the wing commander for consideration on the merits, despite the apparent desire of the commanders involved to avoid this result.

¹ The military doctrine of constructive waiver is inapplicable, as it arises in cases where estoppel principles are applied to ensure equitable results in cases where an otherwise existent implied waiver is barred by the Air Force’s independence from the *ultra vires* acts of its agents. See OpJAGAF 1970-109.

² Waiver can be implied from particular facts and circumstances; however, those facts and circumstances must still indicate that an intelligent decision to waive the right in question has been made. 28 Am Jur 2d *Estoppel and Waiver* § 195, citing *In re Sutton*, 470 B.R. 462 (Bankr. W.D. Mich. 2012).

However, as a practical matter, return of the file for reconsideration solely to require the relevant commander to reiterate the position previously stated seems superfluous, particularly considering the recommendation of this legal review to return the file to the GCMCA for reconsideration in light of the equities.

GUIDANCE

“Any 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. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.” Article 138, Uniform Code of Military Justice.

AFI 51-904, *Complaints of Wrongs under Article 138, Uniform Code of Military Justice*, 6 Mar 15, paragraph 1.3.1 provides;

1.3.1.1. A petitioner may submit matters under Article 138 for discretionary acts or omissions by a commander that adversely affect the petitioner personally and allegedly are:

- 1.3.1.1.1. A violation of law or regulation;
- 1.3.1.1.2. Beyond the legitimate authority of that commander;
- 1.3.1.1.3. Arbitrary, capricious, or an abuse of discretion; or
- 1.3.1.1.4. Clearly unfair or unjust.

AFI 51-904, *Complaints of Wrongs under Article 138, Uniform Code of Military Justice*, 6 Mar 18, paragraph 4.3.2, indicates that the member must submit their initial application for redress within 90 days. It continues, “**Untimely formal complaints under Article 138 should be dismissed without a determination on the merits of the submission...unless the general court-martial convening authority waives the time requirements for good cause.**”

DISCUSSION

In this case, Petitioner was three days late in filing his complaint. Command had the discretion to deny the complaint without determining the merits of the case. If command wanted to do so, he should not have then addressed the merits. Instead, both the wing commander and the General Court-Martial Convening Authority discussed why the petition failed on the merits. We therefore reviewed the merits as well. As a matter of law, the commander’s actions in presenting and subsequently upholding the LOR appear defensible. The wing commander’s current views on the nature of Petitioner’s misconduct are defensible based on the evidence in the case.

CONCLUSION

Based on the foregoing, we conclude the evidence and legal analysis do not support reversal of command's determination that redress should be denied based on the merits. However, in this case, the more appropriate command response, if the denial of redress is based upon not submitting the complaint in a timely manner, is to dismiss the complaint based in lack of timeliness without a determination on the merits of the submission (IAW AFI 51-904, paragraph 4.3.2.).

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