

**BY ORDER OF THE
SECRETARY OF THE AIR FORCE**

AIR FORCE INSTRUCTION 51-904

6 MARCH 2018



Law

**COMPLAINTS OF WRONGS UNDER
ARTICLE 138, UNIFORM CODE OF
MILITARY JUSTICE**

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This document has been produced under the Secretary of the Air Force's 11 August 2017 guidance to make all directive publications current by 1 September 2018. Although published, it will be reviewed again prior to 1 September 1 2019, to ensure it is clear, concise and consistent in accordance with the Secretary's Directive Publication Reduction Initiative.

This instruction implements Air Force Policy Directive 51-9, Civil Law for Individuals. It explains how to prepare, submit, and review both the informal complaint under Article 138, Uniform Code of Military Justice, and the subsequent formal complaint under Article 138. This AFI applies to all Regular Air Force military personnel, members of the United States Air Force Reserve while in federal service on active duty and in federal service on inactive-duty training, and members of the Air National Guard when activated under Title 10 active duty in the Air National Guard of the United States status. This Air Force Instruction may be supplemented at any level, but all supplements that directly implement this instruction must be routed to AF/JAA for coordination prior to certification and approval. Refer recommended changes and questions about this publication to the Office of Primary Responsibility using Air Force Form 847, Recommendation for Change of Publication; route Air Force Forms 847 from the field through major command publications/forms managers. The authorities to waive wing/unit level requirements in this publication are identified with a Tier ("T-0, T-1, T-2, T-3") number following the compliance statement. See Air Force Instruction 33-360, Publications and Forms Management, Table 1.1, for a description of the authorities associated with the Tier numbers. Submit requests for waivers through the chain of command to the appropriate Tier waiver approval authority, or alternatively, to the Publication Office of Primary Responsibility for non-

tiered compliance items. This instruction requires the collection and maintenance of information protected by the Privacy Act of 1974. The authority to collect and maintain this information is set forth in the applicable Privacy Act system notice, F051 AF JA I, Military Justice and Magistrate Court Records. Ensure all records created as a result of processes prescribed in this publication are maintained in accordance with Air Force Manual 33-363, Management of Records, and disposed of in accordance with the Air Force Records Disposition Schedule in the Air Force Records Information Management System.

SUMMARY OF CHANGES

This document has been substantially revised and must be completely reviewed. Major changes were made to clarify procedures for processing complaints under Article 138, Uniform Code of Military Justice. The revised instruction simplifies the title of the “initial application for redress” to “informal complaint.” It further clarifies the scope of Article 138 and provides clear criteria for determining how to process an informal complaint and any subsequent formal complaint under Article 138. It reorganizes the responsibilities of each party involved in processing the informal complaint and any subsequent formal complaints under Article 138. Finally, it explains how to properly identify the appropriate general court-martial convening authority.

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Chapter 1

1.1. Authority. This instruction implements Title 10 United States Code, Section 938 (Article 138), which states: “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.”

1.2. Policy and Guidance.

1.2.1. A member seeking relief under Article 138 is referred to as the “petitioner” throughout this Instruction. The commander or commanding officer who is alleged to have committed a wrong against the petitioner is referred to as the “respondent commander” throughout this Instruction.

1.2.2. A member of the armed forces (as defined in Attachment 1) has a statutory right to submit a formal complaint under Article 138 to the appropriate general court-martial convening authority after:

1.2.2.1. The petitioner first submits a timely initial application for redress under Article 138 requesting relief from the commander who has allegedly committed the wrong against the petitioner as outlined in Chapter 2 of this Instruction. This initial application for redress is referred to as the “informal complaint” throughout this Instruction; and

1.2.2.2. The respondent commander, after reviewing the petitioner’s informal complaint under Article 138 complaint, dismisses or denies it, in whole or in part, or has failed to respond to petitioner in the required timeframe.

1.2.3. Respondent commanders must personally act on informal complaints under Article 138 and a general court-martial convening authority must personally act on any subsequent formal complaints under Article 138.

1.2.4. Submission of informal complaints under Article 138 or subsequent formal complaints under Article 138 shall not be restricted in any manner, nor shall any action be taken in retaliation or reprisal against members for such submissions.

1.2.5. The petitioner may voluntarily withdraw his or her submission under Article 138 at any time before either the respondent commander takes final action or the general court-martial convening authority takes final action, by making a written request to the officer in possession of the submission.

1.2.6. The Article 138 complaint resolution process is administrative in nature. The standard of proof that applies is proof by a preponderance of the evidence. The commander against whom a complaint is made is presumed to have acted lawfully.

1.2.7. The availability of review by the Air Force Board for Correction of Military Records does not render a complaint improper under this Instruction.

1.3. Scope. For many adverse actions, there exists a specific forum and procedure to ensure a member has an adequate opportunity to be heard. Those specific procedures are generally more effective and efficient for resolving such matters. The procedures outlined in this Instruction should not be applied to substitute or duplicate them.

1.3.1. Submissions within the Scope of Article 138.

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.

1.3.1.2. Notwithstanding the examples used in paragraph 1.3.2, the following matters are expressly included within the scope of Article 138:

- 1.3.1.2.1. Unlawful pre-trial confinement;
- 1.3.1.2.2. Deferral of post-trial confinement;
- 1.3.1.2.3. Administrative actions taken in lieu of court-martial or nonjudicial punishment under Article 15; and
- 1.3.1.2.4. Vacation of suspended nonjudicial punishment actions under Article 15.

1.3.2. Submissions outside the Scope of Article 138. Matters that are not reviewed under Article 138 include, but are not limited to:

- 1.3.2.1. Submissions related to acts or omissions that were not initiated, carried out, or approved by the petitioner's commander;
- 1.3.2.2. Submissions seeking reversal or modification of non-discretionary command actions. For example, mandatory filings of adverse information in an unfavorable information file are not reviewed under Article 138;
- 1.3.2.3. Submissions challenging the respondent commander's or general court-martial convening authority's action on an Article 138 complaint. However, a submission alleging that the commander or general court-martial convening authority failed to act on or forward a formal complaint, will be considered under Article 138 as a new informal complaint against the commander or general court-martial convening authority, as appropriate;
- 1.3.2.4. Submissions filed on behalf of another person;
- 1.3.2.5. Submissions requesting disciplinary action against another person;
- 1.3.2.6. Submissions challenging actions taken pursuant to the recommendation of a board authorized by Air Force instructions, including, but not limited to, administrative discharge boards or boards of inquiry;

1.3.2.7. Submissions which may be redressed through other forums which provide the petitioner notice, opportunity to be heard, and review by an appellate authority superior to the commander taking action. Questions regarding whether this provision applies should be directed to AF/JAA through the base legal office. Examples for these submissions include, but are not limited to:

1.3.2.7.1. Submissions related to disciplinary action under the Uniform Code of Military Justice, including nonjudicial punishment under Article 15;

1.3.2.7.2. Submissions challenging any evaluation report required by Air Force Instruction, which affects a member's military career (e.g., Officer Performance Reports, Enlisted Performance Reports, Reenlistment Recommendation Forms, Promotion Recommendation Forms, etc.) such submissions are addressed by the Evaluation Reports and Appeals Board;

1.3.2.7.3. Submissions requesting relief from an assessment for pecuniary liability such submissions are addressed by the Secretary of the Air Force Remissions Board; and,

1.3.2.7.4. Submissions challenging a suspension from flying status such submissions are addressed by a Flying Evaluation Board.

1.3.2.8. Submissions challenging actions which by their nature are not final, such as a respondent commander's recommendation or initiation of an adverse action authorized by an Air Force Instruction.

Chapter 2

PETITIONER RESPONSIBILITIES IN INITIATING THE ARTICLE 138 PROCESS

2.1. Informal complaint. To begin the Article 138 process, an Air Force member must submit an informal complaint to the commander who allegedly wronged the petitioner.

2.1.1. If the respondent commander is no longer in command of the petitioner, the petitioner must still submit the informal complaint to that commander, regardless of the commander's or petitioner's current position or duty location.

2.1.2. If the respondent commander is no longer in the service, e.g., separated or retired, then the petitioner must submit the informal complaint to the successor commander occupying the original commander's billet at the time the informal complaint is submitted.

2.2. Timeliness of the Informal Complaint. The deadline for the petitioner to submit the informal complaint to the respondent commander is 90 calendar days from the petitioner's discovery of the alleged wrong, unless the respondent commander waives the time requirement for good cause shown. It is the petitioner's responsibility to establish good cause for untimely submissions. Informal complaints found to be untimely should be dismissed without a decision on the merits of the informal complaint and returned to the petitioner in accordance with paragraph 3.2.2.

2.3. Form of the Informal Complaint. When submitting the informal complaint, the petitioner must state the informal complaint is being submitted pursuant to Article 138. (T-2) For guidance, Attachment 2 contains a sample format for the informal complaint. The informal complaint must be submitted in writing. (T-1) E-mail submissions are preferred, however hard-copy submissions will also be accepted. Submissions should contain the following information:

2.3.1. The petitioner's current military unit and the petitioner's military unit at the time of the alleged wrong, if different. If the informal complaint is from a member of the Air National Guard or Air Force Reserve, include information to establish the alleged wrong was done in connection with a period of federal service on active duty or federal service on inactive-duty training, or when activated under Title 10 active duty in the Air National Guard of the United States status;

2.3.2. The petitioner's current personal mailing address. The petitioner should notify the respondent commander of any changes in his or her unit of assignment or personal mailing address while the informal complaint is pending;

2.3.3. The name and grade of the respondent commander;

2.3.4. The name and contact information for any counsel representing the petitioner (see notice requirements in paragraph 2.5);

2.3.5. A description of the facts and circumstances of the alleged wrong;

2.3.6. A statement of the relief sought to correct the alleged wrong; and

2.3.7. All supporting evidence.

2.4. Proof Requirements. It is the petitioner's responsibility to establish a valid basis for a complaint. A valid basis for a complaint is one which alleges facts, if true, would constitute a

wrong within the scope of Article 138 and provides sufficient evidence to properly review the petitioner's allegation against the respondent commander.

2.4.1. The petitioner should include all relevant facts and supporting evidence reasonably available with the submission. For example, a petitioner alleging a respondent commander violated a law should state which law or regulation he or she believes was violated, the actions the respondent commander took which allegedly constitute the violation, and provide any evidence available to the member, such as providing relevant documents and/or the names of individuals with knowledge of the wrong alleged.

2.4.2. The responsibility to establish a valid basis for a complaint should not be considered a burden to prove that relief is warranted. While the petitioner must provide enough information to review the complaint, it is the general court-martial convening authority's duty to resolve whether relief is warranted under Article 138.

2.5. Legal Assistance. The petitioner may consult a military defense counsel or special victims' counsel for advice and assistance in drafting submissions under Article 138. The petitioner may also consult civilian legal counsel at no expense to the Government. If the petitioner is represented by counsel, and has provided written notice of representation, all notices provided to the petitioner will also be served on petitioner's counsel. (NOTE: See Air Force Instruction 51 504, Legal Assistance, Notary, and Preventive Law Programs, for scope of representation from military counsel.)

Chapter 3

PROCESSING THE INFORMAL COMPLAINT UNDER ARTICLE 138

3.1. Consultation Required. The respondent commander must consult with the servicing staff judge advocate before taking action on the petitioner's informal complaint. (T-1) However, a formal legal review of an informal complaint is not required.

3.2. Determining whether Dismissal or Transfer is Appropriate.

3.2.1. If an informal complaint raises a matter outside the scope of Article 138 as outlined in paragraph 1.3.2, the informal complaint should be dismissed and the submission should be returned to the petitioner without a decision on the merits of the wrong alleged. The petitioner must be notified of the specific reason the informal complaint fails to meet the scope of Article 138. (T-1) If the informal complaint is found to be outside the scope of Article 138 because there is an alternate forum to address the alleged wrong, the respondent commander should dismiss the informal complaint and return the submission (including any supporting evidence) to the petitioner and direct the petitioner to the appropriate forum for reviewing the matter.

3.2.2. If an informal complaint fails to meet the time requirements outlined in paragraph 2.2, the informal complaint should be dismissed and the submission should be returned to the petitioner without a decision on the merits of the wrong alleged. The petitioner must be notified that the petition was dismissed because it was untimely and, if appropriate, whether a requested waiver of the time requirement for good cause was considered. (T-2)

3.2.3. If the materials submitted are deficient in meeting the requirements for an informal complaint outlined in paragraph 2.3 or if the petitioner fails to establish a valid basis for a complaint as outlined in paragraph 2.4, the informal complaint should be dismissed and the materials should be returned to the petitioner without a decision on the merits of the wrong alleged. The petitioner must be notified of the specific reasons the materials were returned and what steps, if any, may be taken to correct the deficiencies. (T-2) The petitioner will receive an additional 10 days from the date of receipt to correct the noted deficiencies. Extension requests must be submitted prior to the expiration of the 10 days and will be granted for good cause shown.

3.2.4. If a commander who receives an informal complaint is not the commander who allegedly wronged the petitioner, the commander in receipt of the informal complaint should forward the petitioner's matters to the respondent commander; and the petitioner should be notified in writing that the informal complaint has been forwarded to the commander who allegedly wronged the petitioner. The petitioner may be asked to furnish additional information to assist in identifying the commander who allegedly wronged the petitioner.

3.2.5. If the requested redress can only be resolved through the Air Force Board of Correction of Military Records, the respondent commander should inform the petitioner of his or her right to file an application with the Board, in accordance with Air Force Instruction 36-2603, Air Force Board for Correction of Military Records, and Air Force Pamphlet 36-2607, Petitioners' Guide to the Air Force Board for Correction of Military Records.

3.3. Inquiry.

3.3.1. The respondent commander may initiate any inquiries necessary to evaluate an informal complaint. The petitioner may be asked to provide a statement, furnish additional information, or otherwise assist in resolving the matter.

3.3.2. The respondent commander may consider evidence in addition to matters attached to the informal complaint before responding to the petitioner. If the respondent commander considers additional evidence, it will be attached to the file and provided to the petitioner.

3.4. Respondent Commander's Notice to the Petitioner. Within 30 days after receipt of the informal complaint, the respondent commander must provide written notice to the petitioner or petitioner's counsel, if any, that, as applicable (T-1):

3.4.1. A decision regarding the requested relief has been deferred to allow for the completion of further fact gathering. (T-1) Such notice of a deferral shall be sent every 30 days until such fact gathering is completed. (T-1) Such notice prohibits the petitioner from requesting general court-martial convening authority review, as provided in paragraph 4.1.3, until 90 days have elapsed from the date petitioner submitted the informal complaint;

3.4.2. The informal complaint is dismissed because:

3.4.2.1. The submission is outside the scope of Article 138 (see paragraphs 1.3.2 and 3.2.1);

3.4.2.2. The submission is untimely (see paragraphs 2.2 and 3.2.2);

3.4.2.3. The submission is deficient (see paragraphs 2.3 and 3.2.3); or,

3.4.2.4. The submission fails to establish a valid basis for a complaint (see paragraphs 2.4 and 3.2.3).

3.4.3. The requested relief is granted; or

3.4.4. The requested relief is denied, in whole or in part, because the requested relief is not warranted.

3.4.5. If the respondent commander to whom the informal complaint was submitted is a major command, direct reporting unit, or field operating agency commander, that commander's notice to the petitioner shall identify for the petitioner the appropriate general court-martial convening authority over the commander. (T-1).

3.5. Forwarding. The respondent commander may, but is not required to, forward a copy of the Notice to the Petitioner, along with any evidence obtained during the respondent commander's review, to the respondent commander's general court-martial convening authority. Forwarding matters to the general court-martial convening authority does not constitute the filing of a formal complaint under Chapter 4 of this Instruction.

Chapter 4

PROCEDURES FOR FILING A FORMAL COMPLAINT UNDER ARTICLE 138

4.1. Eligibility and Time Requirements for Filing a Formal Complaint.

4.1.1. If the respondent commander dismisses or denies, in whole or in part, an informal complaint under Article 138 the deadline for petitioner to request general court-martial convening authority review is 30 days after receiving the respondent commander's written response dismissing or denying, in whole or in part, the informal complaint. (See paragraph 4.3.2.)

4.1.2. If the petitioner has received no response from the respondent commander after 30 days from the submission of the informal complaint, the deadline for petitioner to request general court-martial convening authority review is 60 days from the date the informal complaint was submitted. (See paragraph 4.3.2.)

4.1.3. If the respondent commander has notified the petitioner that a decision regarding the requested relief has been deferred (paragraph 3.4.1), the petitioner may only request general court-martial convening authority review after 90 days from receipt of the informal complaint. (See paragraph 4.3.2.)

4.2. Formal Complaint Requirements and Limitations.

4.2.1. When submitting a formal complaint, the petitioner must state that the formal complaint is being submitted pursuant to Article 138. (T-2) For guidance, Attachment 3 contains a sample format of a formal complaint under Article 138. The formal complaint must be submitted in writing. (T-1) E-mail submissions are preferred; however, hard-copy submissions will also be accepted. Submissions should contain the following information:

4.2.1.1. The petitioner's current military unit and the petitioner's military unit at the time of the alleged wrong, if different. The petitioner shall notify the general court-martial convening authority, of any changes in his or her unit of assignment or personal mailing address while the complaint is pending. If the complaint is from a member of the Air National Guard or Air Force Reserve, include information to establish the alleged wrong was done in connection with a period of the petitioner's federal service on active duty or federal service on inactive-duty training.

4.2.1.2. The petitioner's current personal mailing address;

4.2.1.3. The name and contact information for any counsel representing the petitioner (see notice requirements in paragraph 2.5);

4.2.1.4. The name and grade of the commander who committed the alleged wrong;

4.2.1.5. A description of the facts and circumstances of the alleged wrong;

4.2.1.6. A statement of the relief sought;

4.2.1.7. The date on which the informal complaint under Article 138 was submitted to the petitioner's commander;

4.2.1.8. The date on which the requested relief was dismissed or denied, in whole or in part, or a statement that the commander failed to respond within the required timeframe,

or a statement that the commander has deferred decision and more than 90 days have passed since receipt of the informal complaint; and

4.2.2. The petitioner may not add new allegations of wrongdoing or submit additional evidence without first submitting the new allegation(s) or evidence to the commander who allegedly wronged the petitioner.

4.3. Petitioner's Submission of the Formal Complaint.

4.3.1. The petitioner may submit the formal Article 138 complaint directly to the general court-martial convening authority exercising jurisdiction over the commander against whom the informal complaint was made, or through any superior commissioned officer.

4.3.2. Untimely formal complaints under Article 138 should be dismissed without a determination on the merits of the submission and returned to the petitioner in accordance with paragraph 6.3.2, unless the general court-martial convening authority waives the time requirement for good cause. It is the petitioner's responsibility to establish good cause for untimely submissions.

4.3.3. If the respondent commander is a general court-martial convening authority, the petitioner should submit the subsequent formal complaint to the general court-martial convening authority exercising jurisdiction over the general court-martial convening authority respondent commander.

Chapter 5

FORWARDING THE FORMAL COMPLAINT UNDER ARTICLE 138

5.1. Duty to Forward Complaint. If an intermediate commander or superior commissioned officer receives a formal complaint, where the requested relief has been dismissed or denied, in whole or in part, he or she must forward the submission to the general court-martial convening authority who currently exercises general court-martial convening authority jurisdiction over the respondent commander. (T-0). The petitioner's submission constitutes the filing of a formal complaint under Article 138 even if the format and content have not changed from the informal complaint under Article 138.

5.2. Determining Appropriate Respondent Commander. If an intermediate commander or superior commissioned officer receives a formal complaint, but determines the petitioner has not submitted an informal complaint to the appropriate respondent commander, the intermediate commander or superior commissioned officer will forward the petitioner's matters to the appropriate commander (T-1); and the petitioner will be notified in writing that his or her complaint under Article 138 has been forwarded to the respondent commander. (T-1) The petitioner may be asked to furnish additional information to assist in identifying the appropriate respondent commander.

5.3. Determining Appropriate General Court-Martial Convening Authority. The principal responsibility for acting on a formal complaint lies with the officer exercising general court-martial jurisdiction over the respondent commander. Identifying the appropriate general court-martial convening authority helps to correct wrongs committed under command authority while providing the general court-martial convening authority with oversight over subordinate commanders. The appropriate general court-martial convening authority may be determined by consulting the servicing Air Force legal office, or referring to Air Force Instruction 51-201, Administration of Military Justice, Chapter 2. If the commander who allegedly wronged the petitioner is assigned to a unit commanded by an officer senior in grade to the general court-martial convening authority for the installation, then the complaint should be forwarded to the next senior general court-martial convening authority in the chain of command.

Chapter 6

PROCESSING THE FORMAL COMPLAINT UNDER ARTICLE 138

6.1. Personal Action Required. A general court-martial convening authority who receives a written submission to correct an alleged wrong committed by a subordinate commander may rely on his or her staff for assistance to investigate and/or document findings, but shall not delegate authority to act on formal complaints filed pursuant to Article 138 or to respond to petitioners. (T-0)

6.2. Consultation Required. The general court-martial convening authority must obtain a written legal review from the servicing staff judge advocate before responding to the petitioner's formal complaint. (T-1). The legal review should include a summary of the relevant facts, a determination of the legal sufficiency of the proceedings, and a recommended action. The servicing staff judge advocate should also ensure that all underlying evidence relevant to the complaint is attached to the file. (The staff judge advocate legal review is privileged attorney work product and is not releasable to the petitioner or other individuals under the Freedom of Information Act and should be marked accordingly.)

6.3. Determining whether Dismissal or Transfer is Appropriate.

6.3.1. If a complaint raises a matter outside the scope of Article 138 as outlined in paragraph 1.3.3, the complaint should be dismissed and returned to the petitioner without a decision on the merits of the wrong alleged. The petitioner must be notified of the specific reason the complaint fails to meet the scope of Article 138. (T-1) If the complaint is found to be outside the scope of Article 138 because there is a specific forum to address the matter complained of, the general court-martial convening authority should dismiss the complaint and return the submission (including any supporting evidence) to the petitioner and petitioner's counsel, if any, and direct the petitioner to the appropriate forum to review the matter.

6.3.2. If a complaint fails to meet the time requirements outlined in paragraph 4.1, the complaint should be dismissed and returned to the petitioner without a decision on the merits of the wrong alleged. The petitioner must be notified of the specific reasons the complaint was dismissed because it was untimely and, if appropriate, whether a requested waiver of the time requirement for good cause was considered. (T-1)

6.3.3. If a complaint is deficient in meeting the requirements outlined in paragraph 4.2 or fails to establish a valid basis for a complaint as outlined in paragraph 2.4, the complaint should be dismissed and returned to the petitioner without a decision on the merits of the wrong alleged. The petitioner and petitioner's counsel, if any, must be notified of the specific reasons the complaint was dismissed and what steps, if any, may be taken to correct the deficiencies. (T-1) The petitioner will receive an additional 10 days from the date of receipt to correct the noted deficiencies. Extension requests will be submitted prior to the expiration of the 10 days and will be granted for good cause shown. (T-2)

6.3.4. If the petitioner submits a formal complaint under Article 138 to the general court-martial convening authority without first submitting an informal complaint to the respondent commander, the general court-martial convening authority will forward the submission to the

respondent commander, and notify the petitioner and petitioner's counsel, if any, accordingly.

6.3.5. If the petitioner submitted an informal complaint to the respondent commander, but adds new allegations of wrongdoing or new evidence (which has not been submitted to the subordinate commander) in their formal complaint to the general court-martial convening authority, those new allegations or evidence will be returned to the respondent commander for initial review and appropriate action. (T-0) The general court-martial convening authority may defer final action on the complaint until all allegations have been dealt with by the respondent commander.

6.3.6. If the requested redress can only be resolved through the Air Force Board of Correction of Military Records, the general court-martial convening authority should inform the petitioner of his or her right to file an application with the Board, in accordance with Air Force Instruction 36-2603 and Air Force Pamphlet 36-2607.

6.4. Inquiry. The general court-martial convening authority may conduct or direct any inquiry, including an investigation, necessary to respond to the submission. The petitioner may be asked to provide a statement, furnish additional information, or otherwise assist in resolving the matter.

6.5. Consideration of Collateral Matters. If a matter collateral to the formal complaint has been reviewed or is pending review by another authority (for example, Inspector General or Military Equal Opportunity programs), the general court-martial convening authority may consider that authority's findings and action to determine whether overlap exists with the Article 138 process before taking action. If overlap does exist, the general court-martial convening authority may defer action on the formal complaint under Article 138 until the related collateral inquiry has been resolved to avoid duplicative processing. The general court-martial convening authority may take into account such collateral inquiries in evaluating, acting on, and responding to a formal complaint, unless otherwise prohibited by law or policy.

6.6. General Court-Martial Convening Authority's Notice to the Member. Within 60 days after receipt of the formal complaint, the general court-martial convening authority must provide written notice to the petitioner and petitioner's counsel, if any, that, as applicable (T-1):

6.6.1. A decision regarding the requested relief has been deferred to allow for the completion of an inquiry (as provided in paragraph 6.4), or completion of a review by another authority (as provided in paragraph 6.5.). Such notice should be sent every 60 days until such inquiry, or review is completed. Once the inquiry, or review is completed, the general court-martial convening authority must notify the petitioner of his or her decision within 60 days (T-1);

6.6.2. The complaint is dismissed because:

6.6.2.1. The submission is outside the scope of Article 138 (see paragraphs 1.3.2 and 6.3.1);

6.6.2.2. The submission is untimely (see paragraphs 4.1 and 6.3.2);

6.6.2.3. The submission is deficient (see paragraphs 4.2 and 6.3.3); or

6.6.2.4. The submission fails to establish a valid basis for a complaint (see paragraphs 2.2 and 6.3.3).

6.6.3. The requested relief is granted;

6.6.4. The requested relief is warranted, but the authority to grant the relief requested resides with another general court-martial convening authority, major command, or the Secretary of the Air Force. In such instances, the general court-martial convening authority must also forward the complaint and the recommendation to grant the requested relief to the appropriate authority (T-1); or,

6.6.5. The requested relief is denied, in whole or in part, because the requested relief is not warranted.

Chapter 7

FORWARDING THE FINAL ACTION FOR SECRETARY OF THE AIR FORCE REVIEW

7.1. Forwarding the Case File to AF/JAA.

7.1.1. After taking final action and notifying the petitioner, the general court-martial convening authority will send a complete copy of the file to AF/JAA. (T-1) The general court-martial convening authority will send a copy of the file to AF/JAA in all cases where the general court-martial convening authority has acted on a formal complaint, including dismissal for failure to timely file or deficient contents, as well as where the relief requested has been granted in full. Forward the complete file via e-mail to the civilian paralegal identified on the AF/JAA, Administrative Law Directorate, FLITE Roster.

7.1.2. When forwarding the file to AF/JAA for review, the general court-martial convening authority includes the petitioner's personal mailing address.

7.2. Secretary of the Air Force Review. AF/JAA is designated to exercise Secretarial authority for final review of formal complaints under Article 138.

7.3. Final Notice to the Member. AF/JAA will provide the petitioner and petitioner's counsel, if any, written notification of the completion of the review process, any further action taken on the formal complaint, and, if applicable, the reasons for that action. AF/JAA sends a copy of the final action memorandum to the petitioner via his or her personal mailing address as well as to the general court-martial convening authority and the general court-martial convening authority's legal office.

Chapter 8

MISCELLANEOUS MATTERS

8.1. Other Reporting Requirements. When a submission pursuant to Article 138 involves allegations against a commissioned officer, reporting both the allegation of wrongdoing and the resolution of a complaint may be required. Refer to Air Force Instruction 90-301, Inspector General Complaints Resolution, for specific reporting requirements.

8.2. Record Management. Any information released outside of official channels must comply with the provisions of Department of Defense Manual 5400.07-R_Air Force Manual 33-302, DoD Freedom of Information Act (FOIA) Program and Air Force Instruction 33-332, Air Force Privacy and Civil Liberties Program. (T 0).

CHRISTOPHER F. BURNE
Lieutenant General, USAF
The Judge Advocate General

Attachment 1

GLOSSARY OF REFERENCES AND SUPPORTING INFORMATION

References

Title 10, United States Code, Section 101

Title 10, United States Code, Section 938

Title 10, United States Code, Section 8062

AFPD 51-9, Civil Law for Individuals, 30 July 2015

AFI 33-332, Air Force Privacy and Civil Liberties Program, 12 January 2015

AFI 36-2603, Air Force Board for Correction of Military Records, 5 March 2012

AFI 51-201, Administration of Military Justice, 6 June 2013

AFI 51-504, Legal Assistance, Notary, and Preventive Law Programs, 27 October 2003

AFI 51-604, Appointment to and Assumption of Command, 11 February 2016

AFI 90-301, Inspector General Complaints Resolution, 27 August 2015

AFMAN 33-363, Management of Records, 1 March 2008

AFPAM 36-2607, Applicants' Guide to the Air Force Board for Correction of Military Records, 3 November 1994

DoD 5400.07-R_AFMAN 33-302, DoD Freedom of Information Act (FOIA) Program, 21 October 2010

Prescribed Forms

None

Adopted Forms

Air Force IMT 847, Recommendation for Change of Publication

Terms

Application for Redress under Article 138, Uniform Code of Military Justice. A member's written submission to the commander who allegedly wronged the petitioner, requesting redress. This application is also referred to as the informal complaint. An informal complaint (initial application for redress) under Article 138 begins the Article 138 process. Before submitting a formal complaint under Article 138 the petitioner must submit the informal complaint (initial application for redress) to the commander who allegedly committed the wrong.

Arbitrary and Capricious. An act that is outside the authority granted under applicable regulations, law or policy or does not appear to be based on consideration of relevant data and factors.

Commander or Commanding Officer. A commissioned officer occupying a command billet as defined by Air Force Instruction 51-604, Appointment to and Assumption of Command, paragraph 3.2. Officers occupying "command-like" staff positions are not commanders.

Officers occupying “command-like” staff positions are not commanders. Likewise, civilian directors and leaders of Air Force organizations are not commanders.

Days. The term “days” as used in this Instruction shall refer to calendar days.

Formal Complaint under Article 138, Uniform Code of Military Justice. A member’s written formal complaint under Article 138 which can be submitted to the general court-martial convening authority only after the respondent commander dismisses or denies, in whole or in part, the petitioner’s informal complaint (initial application for redress) under Article 138 or fails to respond within 30 days.

Good Cause. A substantial reason or excuse for failing to perform a required act. A finding of “good cause” is largely dependent on the facts of a particular case. As used in this Instruction, “good cause” may be shown, for example, when the reason for noncompliance was outside the petitioner’s control.

General Court-Martial Convening Authority. The officer currently exercising general court-martial convening authority over the respondent commander.

Informal Complaint under Article 138, Uniform Code of Military Justice. A member’s written submission to the commander who allegedly wronged the petitioner, requesting redress. This informal complaint is also referred to as the initial application for redress. An informal complaint (initial application for redress) under Article 138 begins the Article 138 process. Before submitting a formal complaint under Article 138 the petitioner must submit the informal complaint (initial application for redress) to the commander who allegedly committed the wrong.

Member of the Armed Forces. A member of the United States Army, Navy, Air Force, Marine Corps, or Coast Guard, as defined in Title 10 United States Code, Section 101(a)(4). The Air Force is further defined in Title 10 United States Code, Section as members of the Regular Air Force, the Air National Guard of the United States, the Air National Guard while in service of the United States, and the Air Force Reserve.

Notice of Representation. A Notice of Representation shall include the counsel’s full name; grade and duty title (as applicable); office phone number; e-mail and mailing address; and the jurisdiction(s) in which the counsel is admitted to practice.

Petitioner. A member of the Armed Forces (as defined above) who has filed an informal complaint (initial application for redress) under Article 138. Submissions from members of the Air National Guard and Air Force Reserve are limited to allegations arising from a discretionary act or omission by a commander that was done in connection with a period of the petitioner’s federal service on active duty as well as the period of federal service on inactive-duty training. (NOTE: The Air Force Board of Correction of Military Record identifies members seeking redress as “Applicants.”)

Preponderance of the Evidence. The standard of proof used in Article 138 complaints.

A preponderance of evidence is that evidence which, when fairly considered, produces the stronger impression, has the greater weight, and is more convincing as to its truth when weighed against any evidence in opposition to it.

Redress. Any lawful action which restores to the petitioner any rights, privileges, property, or status to which the petitioner would have been entitled had the alleged wrong not occurred, unless the petitioner requests less than full restoration.

Respondent Commander. The commander or commanding officer (as defined above) who is alleged to have wronged a member of his command. The respondent commander should be identified in a petitioner's informal complaint (initial application for redress) under Article 138.

Valid Basis. As used in this Instruction, a valid basis is one which: 1) alleges facts, if true, would constitute a wrong within the scope of Article 138; and 2) provides sufficient evidence to properly conduct a complaint analysis of the alleged wrong.

Wrong. A discretionary act or omission by a commander that adversely affects the petitioner personally, and that, for example is: (1) 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.

Attachment 2**SAMPLE INFORMAL COMPLAINT UNDER ARTICLE 138, UNIFORM CODE OF
MILITARY JUSTICE**

(Date)

MEMORANDUM FOR 123 ABW/CC

FROM: 1st Lt John Doe
(Current Personal Mailing Address)

SUBJECT: Informal complaint under Article 138, Uniform Code of Military Justice

1. I, (name), am currently assigned to (unit). On 1 Jan XX, while assigned to (unit), you committed the following wrong(s) against me:

a. Describe the alleged wrong. Include:

- (1) What the commander did or did not do that constitutes the alleged wrong;
- (2) Any alleged violations of law or regulation; or
- (3) Why you believe the action was arbitrary, capricious, or an abuse of discretion; beyond the legitimate authority of the commander; or clearly unfair; and
- (4) What the adverse impact was on you.

b. Continue if there is more than one alleged wrong.

c. Members of the Air National Guard or Air Force Reserve include information to establish the alleged wrong was done in connection with a period of the petitioner's federal service on active duty or federal service on inactive-duty training.

2. I have attached all the evidence available to me. (For example, memoranda for record, e mails, or any documentary materials relevant to the complaint.)

3. I request the following relief under Article 138, Uniform Code of Military Justice:

a. Describe the relief requested.

b. Continue if more than one form of relief is requested.

JOHN E. DOE, 1st Lt, USAF

Attachment(s):
Supporting evidence

Attachment 3**SAMPLE FORMAL COMPLAINT UNDER ARTICLE 138, UNIFORM CODE OF MILITARY JUSTICE**

(Date)

MEMORANDUM FOR 64 AF/CC (the general court-martial convening authority)

FROM: 1st Lt John Doe
(Current Personal Mailing Address)

SUBJECT: Formal Article 138, Uniform Code of Military Justice, Complaint

1. I, (name), am currently assigned to (unit). On 1 Jan XX, 123 ABW/CC, committed the following wrong(s) against me:

a. Describe the alleged wrong. Include:

- (1) The name and grade of the respondent commander;
- (2) What the commander did or did not do that constitutes the alleged wrong;
- (3) Any alleged violations of law or regulation; or
- (4) Why you believe the action was arbitrary, capricious, or an abuse of discretion; beyond the legitimate authority of the commander; or clearly unfair; and
- (5) What the adverse impact was on you.

b. Continue if there is more than one alleged wrong.

c. Members of the Air National Guard or Air Force Reserve include information to establish the alleged wrong was done in connection with a period of the petitioner's federal service on active duty or federal service on inactive-duty training, and members of the Air National Guard when activated under Title 10 active duty in the Air National Guard of the United States status.

d. If the respondent commander has been reassigned, then insert: 123 ABW/CC is now a member of (insert unit) for which you are the general court-martial convening authority.

2. I submitted my informal complaint under Article 138, Uniform Code of Military Justice, on (date), but my commander did not grant the requested relief in that (specify why the respondent commander's response was unsatisfactory).

3. I therefore respectfully request that you (insert relief requested to correct the alleged wrong).

4. I have attached all the supporting evidence available to me. (For example, memoranda for record, e-mails, or any documentary materials relevant to the complaint.)

JOHN E. DOE, 1st Lt, USAF

Attachments:

1. Informal Complaint under Article 138, Uniform Code of Military Justice (with all attachments)
2. Respondent Commander's Response to the Informal Complaint under Article 138, Uniform Code of Military Justice (with all attachments)