

Claims Report

United States Army Claims Service

Personnel Claims Notes

The Effect of Disciplinary Action on Article 139 Claims

Several field claims offices have asked whether disciplinary action against a soldier can affect a claim against the soldier under Article 139 of the Uniform Code of Military Justice (UCMJ)¹ when the claim and the disciplinary action arise out of the same incident. Sometimes, the Article 139 investigating officer² waits for the findings of a criminal investigation or court-martial before recommending pecuniary liability against a soldier for wrongfully taking or willfully destroying the claimant's property. This practice, however, is not permitted.

There is no authority for delaying the processing of Article 139 claims to await the outcome of disciplinary action under the UCMJ. Administrative action taken under Article 139 is "entirely separate and distinct" from disciplinary action taken under the UCMJ.³ Article 139 investigations require independent findings of fact,⁴ involve a different standard of proof and rules of evidence,⁵ and afford the respondent significantly less due process than is present in disciplinary actions.⁶ Investigating officers must facilitate a crime victim's "right to restitution"⁷ and cannot delay action on an Article 139 claim simply because criminal charges are pending.⁸

A respondent's refusal to provide a statement to an Article 139 investigating officer (because of the effect it may have in a pending criminal proceeding) is an insufficient basis for delaying an Article 139 investigation.⁹ A delay in these circumstances may prevent an Article 139 claimant from obtaining restitution, particularly if the respondent is convicted and sentenced to total forfeiture of all pay and allowances.

In taking final action on an Article 139 claim, the investigating officer must also be careful not to rely on a verdict in a UCMJ action; the result of the UCMJ action is not dispositive of the Article 139 claim.¹⁰ However, the requirement for an independent inquiry under Article 139 does not preclude an investigating officer from reviewing relevant information contained in a law enforcement report or from observing relevant testimony of witnesses at a court-martial or administrative separation hearing. It is essential, however, that the investigating officer not delay an investigation to await such information or testimony. In addition, the investigating officer must consider all relevant evidence permitted under *Army Regulation 15-6*¹¹ and must submit independent findings of fact and an independent recommendation to the approval authority. The investigating officer will most effectively protect the rights of the claimant and the respondent by thoroughly obtaining and carefully analyzing all admissible evidence pertaining to the alleged property crime. Captain Metrey.

1. UCMJ art. 139 (1994).

2. See U.S. DEP'T OF ARMY, REG. 27-20, LEGAL SERVICES: CLAIMS, para. 9-7(c) (1 Aug. 1995) [hereinafter AR 27-20] (governing the appointment of Article 139 investigating officers).

3. *Id.* para. 9-3.

4. *Id.*

5. U.S. DEP'T OF ARMY, PAM. 27-162, LEGAL SERVICES: CLAIMS, para. 10-4(a) (15 Dec. 1989) [hereinafter DA PAM 27-162].

6. Due process for Article 139 claims is not the same as due process for criminal proceedings under the *Manual for Courts-Martial*. See generally UCMJ art. 139 (1994); MANUAL FOR COURTS-MARTIAL, UNITED STATES (1995). See also AR 27-20, *supra* note 2, ch. 9; DA PAM 27-162, *supra* note 5, ch. 10; U.S. DEP'T OF ARMY, REG. 15-6, BOARDS, COMMISSIONS, AND COMMITTEES: PROCEDURE FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS, ch. 4 (11 May 1988) [hereinafter AR 15-6].

7. U.S. DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE, para. 18-10(a)(6) (24 June 1996) [hereinafter AR 27-10].

8. DA PAM 27-162, *supra* note 5, para. 10-5(d). It is essential, however, that "Article 139 investigations are conducted in a manner that does not interfere with any ongoing criminal investigations or courts-martial proceedings." AR 27-10, *supra* note 7, para. 18-16(b).

9. A respondent is not precluded, however, from requesting reconsideration of a finding of pecuniary liability after completion of disciplinary action against him. AR 27-20, *supra* note 2, para. 9-8. Because final action under Article 139 may be modified under certain circumstances, including the presentation of "substantial new evidence," a respondent may be able to present evidence which he previously withheld while disciplinary action was pending. Even if the original action is modified, however, the approval authority can neither compel the claimant to repay money which has been assessed from the respondent's pay nor order repayment to the respondent from appropriated funds. *Id.*

10. *Id.* para. 9-3.

11. AR 15-6, *supra* note 6.

Recovery for Damage Not Listed on DD Form 1840/1840R

A recent Defense Office of Hearings and Appeals (DOHA) decision has shed some light on the Military-Industry Memorandum of Understanding (MOU) on Loss and Damage Rules.¹² The DOHA reaffirmed that the military can recover for loss and damage that is not listed on the Department of Defense (DD) Form 1840 or 1840R,¹³ as long as *some* damage to the item involved is noted on the form.¹⁴

The case involved a German schrank. On a DD Form 1840, the claimant indicated that hardware was missing from the schrank. When she submitted her claim on the DD Form 1844,¹⁵ she claimed other damage to the schrank which was not listed on the DD Form 1840. The carrier denied liability for everything except the missing hardware.

The Army argued that the MOU provides for such situations. Section IV(B), *Carrier Settlement of Claims by the Government*, states that “[t]he claims for loss and/or damage shall not be limited to the general description of loss or damage to those items noted on the DD Form 1840 and 1840R.”¹⁶ The Army contended that it is not limited by the “general description” noted on the DD Form 1840.

The DOHA concurred with this approach and noted:

[W]here the claimed damage is not even limited by a “general description” of the damage, there is a fair inference that any loss or damage involving the subject item(s) may be claimed. This is consistent with the decisions of this Board and the Comptroller General which hold that a notice of loss or

damage is adequate in content when it alerts the carrier that there may be a claim on the item and that it should investigate the facts surrounding the loss or damage.¹⁷

The Army contended that the carrier should inspect the damage when it receives notice of loss or damage. The Army referred to a DOHA case which noted that “the purpose of the DD Form 1840R is to provide notice to the carrier that damage occurred to an item so that the carrier may inspect.”¹⁸ In *American Van Services*,¹⁹ the Comptroller General held that, where the carrier had enough information to conduct an investigation of the damage, the notice was adequate.²⁰ In another case, the Comptroller General held that “[n]otice of a claim is sufficient if it alerts the carrier that damage or loss occurred for which reparation is expected so that the carrier may promptly investigate the facts.”²¹

Claims practitioners should keep the recent DOHA decision in mind when damage is claimed that is not specifically listed on DD Form 1840 or DD Form 1840R. Section IV(B) of the MOU, along with the case law discussed in this note, can be used to establish that the damage, though not specifically listed, may be claimed. Ms. Schultz.

VTC Schedule

The next two claims video teleconferences (VTCs) are scheduled for 8 April and 10 June 1998. The VTCs will begin at 1300 on each of the scheduled dates. Starting in September 1998, VTCs will be scheduled quarterly. Ms. Johnson.

12. Military-Industry Memorandum of Understanding on Loss and Damage Rules (1 Jan. 1992), *reprinted in* ARMY LAW., Mar. 1992, at 45 [hereinafter MOU].

13. The DD Form 1840 is a Joint Statement of Loss or Damage at Delivery, and DD Form 1840R is a Notice of Loss or Damage.

14. DOHA Claims Case No. 97112401 (Dec. 11, 1997).

15. The DD Form 1844 is the List of Property and Claims Analysis Chart.

16. MOU, *supra* note 12.

17. DOHA Claims Case No. 97112401.

18. DOHA Claims Case No. 96070212 (Nov. 27, 1996).

19. *American Van Serv., Inc.*, B-249834, 1993 WL 50530 (Comp. Gen. Feb. 11, 1993), *aff'd*, B-249834.2, 1993 WL 342244 (Comp. Gen. Sept. 3, 1993).

20. *Id.*

21. *Resource Protection*, B-270319 (Comp. Gen. May 21, 1996).