

**ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE**

April 14, 2015

1:06 p.m.

MEMBERS PRESENT

Representative Gabrielle LeDoux, Chair
Representative Wes Keller, Vice Chair
Representative Bob Lynn
Representative Matt Claman
Representative Max Gruenberg

MEMBERS ABSENT

Representative Neal Foster
Representative Charisse Millett
Representative Kurt Olson (alternate)

COMMITTEE CALENDAR

SENATE BILL NO. 5

"An Act relating to loss of income and valuing property for orders of restitution."

- MOVED SB 5 OUT OF COMMITTEE

HOUSE BILL NO. 126

"An Act relating to the administration of military justice; relating to the adoption of a code of military justice by the adjutant general; relating to the authority of the adjutant general; relating to appeals of convictions and sentences of courts-martial; establishing the Military Appeals Commission; relating to the detention and incarceration of members of the militia; relating to the jurisdiction of the court of appeals; relating to involuntary commitment for evaluation or treatment of a mental disease or defect before court-martial proceedings; and providing for an effective date."

- HEARD & HELD

PREVIOUS COMMITTEE ACTION

BILL: SB 5

SHORT TITLE: RESTITUTION: PROPERTY AND INCOME LOSS
SPONSOR(s): SENATOR(s) MICCICHE

01/21/15 (S) PREFILE RELEASED 1/9/15
 01/21/15 (S) READ THE FIRST TIME - REFERRALS
 01/21/15 (S) L&C, JUD
 02/19/15 (S) L&C AT 1:30 PM BELTZ 105 (TSBldg)
 02/19/15 (S) Moved SB 5 Out of Committee
 02/19/15 (S) MINUTE(L&C)
 02/20/15 (S) L&C RPT 5DP
 02/20/15 (S) DP: COSTELLO, STEVENS, GIESSEL, MEYER,
 ELLIS
 02/20/15 (S) FIN REFERRAL ADDED AFTER JUD
 03/02/15 (S) JUD AT 1:00 PM BUTROVICH 205
 03/02/15 (S) Heard & Held
 03/02/15 (S) MINUTE(JUD)
 03/09/15 (S) JUD AT 1:30 PM BUTROVICH 205
 03/09/15 (S) Moved SB 5 Out of Committee
 03/09/15 (S) MINUTE(JUD)
 03/11/15 (S) JUD RPT 4DP 1NR
 03/11/15 (S) DP: MCGUIRE, COSTELLO, MICCICHE,
 COGHILL
 03/11/15 (S) NR: WIELECHOWSKI
 03/17/15 (S) FIN AT 1:30 PM SENATE FINANCE 532
 03/17/15 (S) Moved SB 5 Out of Committee
 03/17/15 (S) MINUTE(FIN)
 03/18/15 (S) FIN RPT 4DP 2NR
 03/18/15 (S) DP: MACKINNON, MICCICHE, BISHOP,
 DUNLEAVY
 03/18/15 (S) NR: HOFFMAN, OLSON
 03/25/15 (S) TRANSMITTED TO (H)
 03/25/15 (S) VERSION: SB 5
 03/27/15 (H) READ THE FIRST TIME - REFERRALS
 03/27/15 (H) JUD
 04/14/15 (H) JUD AT 1:00 PM CAPITOL 120

BILL: HB 126

SHORT TITLE: CODE OF MILITARY JUSTICE; APPEALS
 SPONSOR(S): JUDICIARY

02/25/15 (H) READ THE FIRST TIME - REFERRALS
 02/25/15 (H) MLV, JUD
 03/24/15 (H) MLV AT 1:00 PM CAPITOL 120
 03/24/15 (H) -- MEETING CANCELED --
 03/26/15 (H) MLV AT 1:00 PM CAPITOL 120
 03/26/15 (H) Heard & Held
 03/26/15 (H) MINUTE(MLV)
 03/31/15 (H) MLV AT 1:00 PM CAPITOL 120

03/31/15 (H) Moved CSHB 126(MLV) Out of Committee
03/31/15 (H) MINUTE(MLV)
04/01/15 (H) MLV RPT CS(MLV) NT 3DP 4AM
04/01/15 (H) DP: LYNN, LEDOUX, HERRON
04/01/15 (H) AM: TUCK, GRUENBERG, COLVER, HUGHES
04/14/15 (H) JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

SENATOR PETER MICCICHE
Alaska State Legislature
Juneau, Alaska

POSITION STATEMENT: Presented SB 5 as prime sponsor, and answered questions.

CHUCK KOPP, Staff
Senator Peter Micciche
Alaska State Legislature
Juneau, Alaska

POSITION STATEMENT: During the hearing on SB 5, offered a sectional analysis and answered questions.

CHRIS NETTLES, President
GeoTek Alaska, Inc.
Anchorage, Alaska

POSITION STATEMENT: During the hearing on SB 5, offered the support of the National Federation of Independent Business and GeoTek Alaska in strengthening restitution laws.

NANCY MEADE, General Counsel
Administrative Staff
Alaska Court System
Anchorage, Alaska

POSITION STATEMENT: During the hearing on SB 5, answered questions.

STACI SHROEDER
Assistant Attorney General
Criminal Section
Department of Law
Juneau, Alaska

POSITION STATEMENT: During the hearing on SB 5, answered questions.

THOMAS BROWN, Staff
Representative Gabrielle LeDoux
Alaska State Legislature

Juneau, Alaska

POSITION STATEMENT: Presented and answered questions during the hearing on HB 126, on behalf of the House Judiciary Standing Committee, prime sponsor.

LIEUTENANT FOREST DUNBAR, First Lieutenant
Judge Advocate Officer
Alaska Army National Guard
Joint Base Elmendorf-Richardson, Alaska

POSITION STATEMENT: During the hearing on HB 126, offered testimony and answered questions.

BOB DOEHL, Deputy Commissioner
Commissioner's Office
Department of Military and Veterans Affairs (DMVA)
Joint Base Elmendorf-Richardson, Alaska

POSITION STATEMENT: During the hearing on HB 126, answered

ACTION NARRATIVE

[1:06:21 PM](#)

CHAIR GABRIELLE LEDOUX called the House Judiciary Standing Committee meeting to order at 1:06 p.m. Representatives Keller, Lynn, Claman, Gruenberg, and LeDoux were present at the call to order.

SB 5-RESTITUTION: PROPERTY AND INCOME LOSS

[1:07:07 PM](#)

SENATOR PETER MICCICHE, Alaska State Legislature, said SB 5 strengthens Alaska restitution laws, assists in restoring crime victims to a pre-offense condition, and protects the property interests of all Alaskans. According to the 2013 Department of Public Safety Annual Report, Alaskans suffered over \$23 million in loss due to property crimes, which is up more than 12 percent since 2011. A fundamental component of Alaska court ordered restorative justice is making crime victims whole. He explained that SB 5 addresses a language inconsistency in statutes speaking to restitution as a provision of sentencing, and the statutes have a provision of probation resulting in persons and businesses affected by crime receiving compensation [only] for loss and victim restitution orders. He noted that SB 5 reconciles this inconsistency under a provision of sentencing adding a public policy consideration calling for offenders to compensate victims for damages and injury, including loss of

income. The bill defines loss of income as a total loss of income a business or person may lose due to not having stolen property available for the period of time it takes to replace that property, he stated. The new language directs courts, while making determinations of loss for restitution, to value property as the market value of the property at the time and place of the crime, or a reasonable time after the crime. The bill amends, as a condition of probation, establishing the same standard as in AS 12.55.045, and restitution as a condition of sentencing.

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SENATOR MICCICHE pointed out that current inconsistency in Alaska's restitution laws contributed to a recent Alaska Appellate Court decision that is problematic to Alaskan and their property interests. The 9th Circuit Court of Appeals found in Lori S. Welsh v. State of Alaska, No. A-11197 (2013), that restitution orders, as a condition of sentencing or probation, would be restricted to actual damages or loss suffered by the victim. In that regard, there is no consideration of the market value of the property or loss of income to the crime victim. He offered that within his district there have been a rash of drug related crimes where folks are looking for money for additional drugs. Within his district, he described, there is a small water well drilling company and some folks broke in one night and literally trashed that vehicle for all of the copper on board, the welding leads, and all the wiring harnesses. He commented that the company was out of business for weeks and it was within the portion of the season with the highest amount of activity. The way the law stands, he explained, the court is [not] instructed to consider loss of income in restitution. The bill reconciles that inconsistency in the restitution orders so that the law clearly considers loss of income as a real loss to persons and businesses, and the court should make that consideration when determining restitution orders. He observes the rights of perpetrators but, he expressed, prefers to protect the rights of victims higher with just and fair restitution orders from the courts. He described SB 5 as a substantial step in that direction.

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CHUCK KOPP, Staff, Senator Peter Micciche, Alaska State Legislature, advised that Section 1 of the bill clearly states public policy preference that the court consider loss of income in issuing restitution orders. He reiterated Senator Micciche

in that Sec. 2 adds a new definition for loss of income specifying the inclusion of the total loss of income that a business or person suffers as a result of not having this property available for the period of time it takes to replace the property. He pointed to Sec. 3 and remarked that it directs the court when making determinations of loss for restitution to [include the] value of property as the market value at the time and place of the crime, or if that cannot be easily ascertained the cost of replacement. He extends this is taken directly from AS 11, criminal statutes where the courts determine value under the criminal law for property so it is the same language commonality in statute there. He explained that Sec. 4 speaks to conditions of restitution as a provision of probation and it makes amended language so that it is consistent with conditions of restitution for sentencing stating, "the court will determine the amount of actual damages or loss under the paragraph by valuing property as the market value of the property at the time and place of the crime, or if it cannot reasonably be ascertained the cost of replacement of the property within a reasonable time after the crime." The language brings in line the provisions of restitution under sentencing and the provisions of restitution under probation so that the standard is the same and the court, in both circumstances, he explained, can consider the loss of income to businesses and persons in determining restitution orders. He related that it is not mandatory as the law declares that the court will consider this. He reiterated Senator Micciche's comments in that the retail value in many cases is properly recognized as the replacement cost, and additionally, it is not just the items stolen but the cost of project delays and project cancelation. Off road system [theft or damage] can cost the season and liquidated damages begin depending upon what is stolen or damaged from the job site and, he related, how long it takes to replace that property. There is broad based support for SB 5 from businesses and persons across Alaska, he opined.

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REPRESENTATIVE GRUENBERG asked whether the bill deals with loss of income and valuation of property.

MR. KOPP answered in the affirmative.

REPRESENTATIVE GRUENBERG offered his concern regarding valuation of property in that the bill requires the court to value the property "at that amount, using that standard," which is different from just requiring the court to take into account the

loss of income. He questioned whether the intent is to require the court to use that measure of value, and pointed out there different methods of valuing property, such as, the cost of replacement or, in the area of income producing property to value it as stolen income producing property that was stolen, which would be similar to dealing with loss of income. Another method in reviewing the value of similar properties could be that someone shoots an unreplaceable prized animal, but would be [evaluated] as similar animals. He suggested that the sponsor may consider giving the court discretion in making determinations. Representative Gruenberg referred to [page 2], lines 16, 28-19, and suggested the following language: "value property at the market value," thereby substituting "as" for "at." Connected with that, the term normally used at the law is the "fair market value" and he recommended using the term as it is in the law. One of the really harsh rules is when a person is insured and their car is totaled, it is valued on a basis that is not the replacement cost but much less, he remarked.

CHAIR LEDOUX asked that Representative Gruenberg stay with issues related to SB 5.

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SENATOR MICCICHE responded that this bill language is permissive and does not dictate the method of valuation as each case will differ depending upon the circumstances. He advised that the intent of the bill is that not every Alaskan can go to Costco and purchase a new generator [that day] as it may have to be shipped on a \$2,000 flight across the Inlet. He offered a scenario of someone in a boat, stealing a generator, is then caught, and the thief does not owe the victim for a \$1,000 generator - they owe the victim for a \$3,000 generator. The intent of the bill is that the court consider the actual cost of that object at the site at the time [of theft] and, pointed out that the bill is permissive enough to not steer the court on how it will value each item, rather that the actual value of the item is considered.

REPRESENTATIVE GRUENBERG suggested that rather than requiring [the court] to value it, add the language crafted at the beginning of the bill.

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MR. KOPP replied that this issue came up in the other body and the language on page 1, lines 14-15, is clearly permissive as it

reads, "In determining the amount and method of payment of restitution or compensation, the court shall take into account ...". He offered the language does not tell the court ...

REPRESENTATIVE GRUENBERG argued that it deals with loss of income, the suggestion he previously made deals with damage or loss of restitution.

MR. KOPP explained that the entire section deals with restitution orders and sentencing, a predecessor to Sec. 2, which is permissive. It reads that a public policy favors requiring criminals to compensate for damages and injury, including loss of income. He offered that loss of income is internally consistent in that section as it is stated later in the same section with respect to someone who might steal commercial fishing gear, set net gear, drift gill net gear, or trolling gear that the court will consider loss of income in that consideration, "again, consider loss of income." He pointed out that the reference to "considering" is consistent "taking into account" is consistent throughout the statute and is something that is not a new concept, and highlighted it as a public policy priority.

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CHAIR LEDOUX related that the time for amendments has passed and she will not slow down the bill at the end of the session for an amendment which could have been made and been introduced to the House Judiciary Standing Committee in compliance with the 24-hour rule.

REPRESENTATIVE GRUENBERG pointed out that he does not believe that subsection (o) is limited to loss of income.

MR. KOPP submitted that market value is a well-defined term in criminal law under AS 11.46.980, which is the same standard used by the courts to determine property valuation with respect to thefts and burglary in property crimes.

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REPRESENTATIVE CLAMAN opined that as a statistical matter the public defender would say that 80-85 percent of criminal defendants are public defender eligible and usually do not have a lot of money. He questioned whether this changes the court's fundamental obligation to make a determination about the ability to pay or set restitution schedules consistent with how much

money the defendant can actually earn. He advised he supports restitution and also does not like the idea of creating debtor's prisons or sending people back to prison because they can't pay. He asked how the bill impacts the obligation of the ability to pay.

SENATOR MICCICHE explained that current Alaska law does not allow a person in prison solely due to the inability to pay under AS 12.55.051(a) and (c). He offered that perpetrators of a crime usually have no idea of the ultimate value of the damage and his goal is to get the perpetrator out of prison as quickly as possible, turn their lives around, and be put on a reasonable restitution payment plan. He further offered that AS 12.55.051[(c)] reads:

... If, at a hearing under this subsection, the defendant proves by a preponderance of the evidence that the defendant will be unable through good faith efforts to satisfy the order requiring payment of the fine or restitution, the court shall modify the order so that the defendant can pay the fine or restitution through good faith efforts ...

SENATOR MICCICHE pointed out there is no potential for a debtor's prison in Alaska law, and no value to the victim even when retrieving cents on the dollar. He opined that it largely represents the expectation of the perpetrator to do their best to provide restitution to the victim.

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REPRESENTATIVE CLAMAN submitted that a generator could be running for 10-years before being stolen and the old generator is worth less than \$500, but the practical reality of locating a 10-year old replacement is hard to imagine. He surmised this bill allows the court make the determination of [replacement] value.

SENATOR MICCICHE responded he has faith that common sense will prevail.

CHAIR LEDOUX opened public testimony.

[1:28:00 PM](#)

CHRIS NETTLES, President, GeoTek Alaska, Inc., said he is testifying on behalf of the National Federation of Independent

Business, and as primary owner of GeoTek Alaska. He pointed out how important it is to a business to strengthen restitution laws, and offered that within his business a snow machine was stolen from an off-road site, and fortunately it was stolen after the project had been completed. However, he said, had the machine been stolen before the project, his business would not only have undergone the cost of replacing the snow machine, but the cost of getting another one to the site. On top of that issue, a company may be under contracts and standby costs, and suffer liability or loss due to not meeting the contract time. When reviewing the cost of an item or damage performed by a perpetrator, it is not just the cost for that item as there are many other costs possibly included for one item that is essential to a project. It is important that victims receive restitution from perpetrators, if possible, he expressed.

CHAIR LEDOUX closed public testimony after ascertaining no one further wished to testify.

[1:31:44 PM](#)

NANCY MEADE, General Counsel, Administrative Staff, Alaska Court System, [Advised she is available to answer questions.]

REPRESENTATIVE GRUENBERG offered his concern regarding Sec. 3-4 of the bill and opined that subsection (o) which will be added in Sec. 3, would not be limited to a determination of loss of income language at page 1, "requiring the court to take that into account." He further opined the new subsection (o) would not be permissive but would require the court to value the property at the fair market value.

MS. MEADE responded that the legal interpretation of the bill is something the court system does not normally provide as it would be a better question for Legislative Legal and Research Services. She offered that from the court system's point of view, this does clarify how to apply some currently inconsistent statutes, which the court can easily apply. At restitution hearings there are currently arguments and discussion brought forth regarding valuation of property, she explained. This bill offers more guidance for the court which, she noted, is something the judges appreciate and reiterated it clarifies some inconsistencies. She did not see a problem with courts applying it as written, she remarked.

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STACI SHROEDER, Assistant Attorney General, Legal Services Section, Department of Law, asked Representative Gruenberg to briefly restate the question.

REPRESENTATIVE GRUENBERG turned to Sec. 3, and asked whether that subsection would only apply to property involved in loss of income. He opined it is a standalone section under restitution and compensation, AS 12.55.045, not all of which involves income producing property or property involved in the loss of income. He surmised that subsection (o) applies to income producing situations and non-income producing situations.

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MS. SCHRODER answered that she reads subsection (o) as applying to the entire statute and not being limited in clarifying how the court should value property.

REPRESENTATIVE GRUENBERG agreed that it is just not a factor to be taken into consideration, but "in a non-income situation the court would have to value it at that method." He opined it is not all bad, but there may be other ways the court would want to have some leeway.

REPRESENTATIVE KELLER pointed out that is not necessarily bad as it applies to all restitution compensation.

[1:36:38 PM](#)

The committee took an at-ease from 1:36 to 1:38 p.m.

[1:38:50 PM](#)

CHAIR LEDOUX referred to the discussion of whether or not there is a grammatical error on [page 2], lines 16, 28-29, which read:

... shall value property as the market value of
the property ...

CHAIR LEDOUX submitted that the sponsor does not believe it is a grammatical error.

SENATOR MICCICHE pointed out that when reading the whole sentence "the court shall value property ..." which is taking the value and valuing it "as" the market value of the property. He said that "at" the market value of the property would be looking at one singular item. The bill says, "it is valued as

the market value of the property," and he does not see it as a grammatical error as it fits, it went through the Department of Law, and Legislative Legal and Research Services, who all agreed that is the correct language, and for all intents and purposes it is fully functioning as written.

[1:40:02 PM](#)

REPRESENTATIVE KELLER moved to report SB 5, labeled 29-LS0109\H, out of committee with individual recommendations and the accompanying fiscal notes. There being no objection, SB 5 moved from the House Judiciary Standing Committee.

[1:40:28 PM](#)

The committee took an at-ease from 1:40 to 1:44 p.m.

HB 126-CODE OF MILITARY JUSTICE; APPEALS

[1:44:46 PM](#)

CHAIR LEDOUX announced that the final order of business would be HOUSE BILL NO. 126, "An Act relating to the administration of military justice; relating to the adoption of a code of military justice by the adjutant general; relating to the authority of the adjutant general; relating to appeals of convictions and sentences of courts-martial; establishing the Military Appeals Commission; relating to the detention and incarceration of members of the militia; relating to the jurisdiction of the court of appeals; relating to involuntary commitment for evaluation or treatment of a mental disease or defect before court-martial proceedings; and providing for an effective date." [Before the committee was CSHB 126, labeled 29-LS0473\E.]

[1:45:00 PM](#)

THOMAS BROWN, Staff, Representative Gabrielle LeDoux, Alaska State Legislature, said he will give a brief overview of HB 126, offer a sectional analysis, and Lieutenant Forrest Dunbar will then provide an overview. Mr. Brown explained that HB 126 is legislation crafted at the request of Alaska's military command requesting greater authority and latitude in pursuing and prosecuting service members who violated military rules and protocols. This version of the bill is a synthesis of a separate bill presented by Representative Chris Tuck, HB 121, which sought the same ends as HB 126, but came at the result

from a different means. This bill seeks to grant authority to the Department of Military and Veterans Affairs (DMVA) and allow the creation of regulations to govern themselves. Representative Tuck's bill, HB 121, sought the same but chose statute as opposed to regulation.

MR. BROWN advised the sectional analysis lays out the result of that synthesis.

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REPRESENTATIVE GRUENBERG advised he received pages 44-54, HB 121, Representative Tuck's bill, and asked where the language originated.

[1:47:51 PM](#)

LIEUTENANT FOREST DUNBAR, First Lieutenant, Judge Advocate Officer, Alaska Army National Guard, advised Representative Gruenberg that he sent pages 44-45 to him after their meeting, and that the language came from the Model State Code [of Military Justice] created by the National Guard Bureau.

REPRESENTATIVE GRUENBERG asked Lieutenant Dunbar whether he will identify what portion of the bill is from the Model State Code of Military Justice, and what is not.

CHAIR LEDOUX interjected that the bill is not moving out of committee today, therefore, the committee can meet and craft the perfect bill before attending the second session of the legislature in January.

[1:48:50 PM](#)

LIEUTENANT DUNBAR advised that the vast majority of the language in HB 126, whether originally HB 126 or brought across from HB 121, is taken from the Model State Code of Military Justice created by the National Guard Bureau.

[1:49:40 PM](#)

MR. BROWN offered the following sectional analysis which read [original punctuation provided]:

CODE OF MILITARY JUSTICE; APPEALS

Section 1, page 1 - amends 22.07.020. Designates the jurisdiction of the court of appeals over actions and proceedings in a military court;

Section 2, page 2 - amends 26.05.140(a). Eliminates protection from criminal liability for Guard members charged with crimes resultant from their duties and clarifies that any exemption from liability will not apply to offenses under the Alaska Code of Military Justice.

Section 3, page 2 - amends 26.05.228(b). Conforming amendment;

Section 4, pages 2-36 - amends 26.05. Creates a new Article, the Code of Military Justice. Of the new sections in this Article, it instructs the adjutant general to adopt regulations for a code of military justice under the terms of the chapter to include, p.3:

- Organization and conduct of courts-martial; Provide for non-judicial punishment (NJP);

- Identify which offenses are subject to court-martial or NJP;

- Identify allowable punishments for such offenses;

- Identify rules of trial, pretrial, post-trial and related procedures;

- Organize courts of inquiry;

- Provide adequate protection of classified information;

Other sections in the new Code of Military Justice include:

- A statement that all non-military offenses shall be tried in a civilian court, p.4;

- Designation the exclusive jurisdiction of courts-martial over the code of military justice and that the code applies to all military offenses, p. 4;

- Sets jurisdiction of the military code over deserters and fraudulently discharged personnel and those members who commit their offense outside of the state or live outside of the state when charged with the offense, p.4;

- Details the duties and qualifications of those who serve as judge advocates, p.5;

- Defines who may apprehend members accused of a military offense and how that apprehension is to take place, p. 5-6;

- Defines how a member may be arrested, under what conditions they may be arrested, who may do so, and how they may be confined, p. 6-7;

- Defines how a member accused of a military offense may be delivered to a civilian authority, p.7;

- Describes the composition, duties, terms of service, jurisdictions, and convening authorities of courts-martial, p.8-11;

- Lays out requirements for who may serve on courts-martial, and specifies that a Guardsman cannot be tried by a service member lower ranking than themselves, p. 11.

- Provides the requirements for military judges, p. 12

- Describes the duties and qualifications of trial counsel, defense counsel, assistant counsel, court reporters, and interpreters of courts-martial, p. 11-12;

- Specifies the procedures for bringing charges against a member. p.13;

- Prevents the self-incrimination of the accused, p.13;

- Defines the investigatory process, p.14;

- Lays out how charges may be processed and the procedures for continuances, oaths of office for court officers,p.15-17;

- Defines the statutes of limitations for military offenses,p.19;

- Prohibits double jeopardy charges and describes how pleas of the accused are to be processed,p.19;

- Defines how subpoenas and contempt of court charges are to be processed,p.19-20;

- Provides for an insanity defense for the accused and the determination for mental competency of the accused, p. 20-23;

- Describes the procedures for voting and ruling in courts-martial,p.23-24;

- Requires the recording of courts-martial,p.24-25;

- Describes the allowable punishments and sentences and prohibits cruel and unusual punishments,p. 25-27;

- Describes the appeals process in the military code, including appeals by the state,p.27-28;

- Allows for a vacation of suspension under certain circumstances,p.28;

- Allows for the accused to petition for a new trial and the restoration of privileges,p.28-29;

- Describes the composition and duties of the Military Appeals Commission,p.29-32;

- Defines who may administer oaths for the purposes of military administration proceedings,p.32;

- Allows for the governor to delegate authority for the code of military justice,p.32;

- Creates a military justice account in the general fund,p.33;

- Describes the system of paying and collection of fines associated with the military code,p.33;

- Describes the pay scale of officers and witnesses of the courts-martial,p.33-34;

- Provides immunity for persons who acted pursuant to their duties under the military code,p.34;

- Defines terms associated with the new Article,p.34-36;

Section 5, page 36 - amends 33.30.011. Further defines 'held under authority of state law' to include persons held under the military code;

Section 6, page 36 - amends 33.30.051. Describes how persons convicted under the military code are to be restrained or confined;

Section 7, page 36 - amends 44.23.020. requires the Attorney General to assist courts-martial in cases of mental incompetency;

Section 8, page 36-37 - amends 44.35.020(a). Conforming amendment dealing with the duties of the Dept. of Military and Veterans' Affairs;

Section 9, page 37 - Repeal section;

Section 10, page 37 - Applicability clause;

Section 11, page 37 - Establishes and describes the terms of office of the Military Appeals Commission;

Section 12, page 37-38 - Authorizes the adjutant general to enact and enforce the regulations under the Code of Military Justice, upon approval of the governor;

Section 13, page 38 - Effective date for section 12

Section 14, page 38 - Effective date for the rest of the bill.

[1:50:24 PM](#)

MR. BROWN referred to Sec. 4, pages 2-36, and advised it is the meat of the bill of which a large portion comes from Representative Tuck's HB 121, and explained it instructs the adjutant general to adopt regulations for a Code of Military Justice.

[1:56:05 PM](#)

LIEUTENANT DUNBAR offered a slide show depicting efforts to create a system whereby soldiers and airmen can effectively be disciplined using the Alaska Code of Military Justice. The vast majority of funding for the Alaska National Guard comes from the federal government and, he expressed, "in a sense, we get very good bang for our buck as a state."

He explained that he is currently paid by the federal government because it wants the state to have a common effective force, and this process of creating a new Code of Military Justice will assist in that endeavor.

He referred to slide 3, and stated that the Code of Military Justice will allow the Alaska National Guard Commanders to administer courts-martial and potentially convict guardsmen of offenses. He pointed out it also offers tools to perform "Non-Judicial Punishment," which is usually offenses more minor than those warranting court martial, and allows commanders to quickly discipline guardsmen using suspensions, fines, and sometimes a bust in rank. He remarked this is an important part of HB 126 in that Alaska is one of few states that does not have this type of Code, as most states have these regulations and use them to good effect. The bill is not attempting to replace a judicial system, he emphasized, in attempting to convict every offense that guardsmen potentially commit. The policy of the prior Territorial National Guard, carried forward in HB 126, is that if an offense is cognizable under civilian law such as, a theft, homicide, sexual assault, the default is that it would be prosecuted by civilian authorities. He related that manner is the strong preference of the National Guard as it does not have its own police force, jail, or specialized prosecutors to deal with issues like sexual assault.

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LIEUTENANT DUNBAR said there may be cases where civilian authorities decline to prosecute something that the general

public believes is an offense. For example, he offered, the most recent scandal involving the National Guard was behavior by guardsmen involving sexual relations with recruits. The civilian authorities, for a variety of reasons, decided not to prosecute as perhaps there was not enough evidence or it didn't tightly fit the definition of sexual assault but, he related, there are military offenses broad enough wherein the offenders could potentially be pursued for things like dereliction of duty, conduct unbecoming an officer, drunk on duty. Those offenses will be put into regulation should HB 126 pass, although it is anticipated there will be a relatively small number of courts-martials due to settlement. He referred to slide 4, and advised there are three legs to Good Order and Discipline, being: Administrative actions such as separation, letters of reprimand; Alaska Criminal Law which applies to soldiers and airmen living in the state; and, Alaska Code of Military Justice allowing the power of courts-martial and non-judicial punishment. Had this leg to Good Order and Discipline been present prior to the activities leading to the scandal, he said there is no way to know, but it would have increased the likelihood of bringing Good Order and Discipline to those units more quickly.

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REPRESENTATIVE GRUENBERG offered that in order to determine how well the current system works, or how well this could have worked, this committee may consider going into executive session as to what actually occurred in the investigation previously. He advised he is raising that issue now in light of certain procedures to undertake should the committee decide to subpoena people. He remarked he does not know whether those procedures must be performed before the legislature adjourns.

CHAIR LEDOUX asked if he had a question for Lieutenant Dunbar.

REPRESENTATIVE GRUENBERG asked whether the attorneys involved in this process are member of the Alaska Bar Association because if they are Alaskan attorneys they would be familiar with Alaska Statutes and Alaska procedures which will have relevance in his following questions.

LIEUTENANT DUNBAR responded that the National Guard has members of the Alaska Bar Association and those that are not, although the majority are members of the Alaska Bar Association.

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REPRESENTATIVE GRUENBERG submitted that in going through [the bill] will determine which proposed statutes are actually taken from "Model Code," and questioned whether there is a body of law for reference, for example, fraudulent enlistment. In that regard, is there an annotated code somewhere so the committee can determine how courts have previously interpreted the statute.

LIEUTENANT DUNBAR advised he is holding a document published by the National Guard Bureau, but it does not have quite the detail he believes Representative Gruenberg was referring. It mostly refers to the attendant regulations in the Uniform Code of Military Justice (UCMJ), which contains vast case law associated with it.

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REPRESENTATIVE GRUENBERG surmised that if this is taken from the regulations under the Code, the lawyers involved will be able to see how this language has been interpreted by other courts.

LIEUTENANT DUNBAR answered in the affirmative.

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REPRESENTATIVE GRUENBERG asked whether the committee will be informed in individual cases whether the language selected under the crimes are different than the "Model Code."

LIEUTENANT DUNBAR replied that this issue is later in his presentation wherein he describes the process by which they hope to determine the actual "Code" itself. He opined he will start with a base line of the "Model Code," and through input with this committee, through the chain of command, soldiers, and people he is in contact with at the Judge Advocate Legal Center and School, and there may be offenses taken out, added, or changed. He pointed out that "absolutely" they will provide guidance in a document to show where it differs from the strict "Model Code."

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REPRESENTATIVE GRUENBERG remarked that Lieutenant Dunbar chose a military model with the "Model Code," yet on the other hand some of these in the offense area deal with issues that are defined in the Alaska Criminal Code, Title 11, such as, attempts,

solicitation, and conspiracy. In the interim, he surmised, Lieutenant Dunbar will be prepared not just to talk about the geneses coming from the "Model Code," but the alternative whether there is any difference between that and Title 11. He advised his last statement refers to members of the Alaska Bar Association because they will likely be more familiar with Title 11 than the "Model Code."

LIEUTENANT DUNBAR answered that the guard members most involved in this process over the interim are members of the Alaska Bar Association, primarily based at Joint Base Elmendorf-Richardson (JBER) and hope to work closely with his office on exactly those types of questions.

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LIEUTENANT DUNBAR noted that slide 5 goes to Representative Gruenberg's point in that there is already existing relevant law: the Territorial Era Military Code, Title 26 of Alaska Statutes, but it does not establish a Code of Military Justice; the Alaska Criminal Code which in most cases will provide for prosecutions and punishments for the most serious offenses; and the Federal Uniform Code of Military Justice (UCMJ) which is a fairly comprehensive criminal code with offense such as homicide and theft and the like. He noted that the Federal Code only applies to guard members when in a Fully Federalize status. He referred to slide 6, and indicated that status is an important part of the puzzle of which there are three main statuses: Titles 32, 10, and state active duty. He explained that Fully Federalized is under Title 10, when guardsmen are sent to Iraq, Afghanistan, or other missions under the full command of the federal forces, they are subject to the Federal UCMJ. However, he explained, when they are in Title 32 status, which is what most guards people are on most of the time when on their drill weekends, for example. He offered that they are not subject to the Federal UCMJ despite the fact they are usually paid by the federal government. These individuals are paid by the federal government yet commanded by the governor, State of Alaska, and Adjutant General, and are not subject to the Federal UCMJ. State active duty would typically be for disaster response and commanded by the state and paid by the state, he explained.

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LIEUTENANT DUNBAR referred to slide 7, and offered there is a gap in the law at the moment in that military offenses cannot be prosecuted at the moment as the appropriate law to prosecute are

not on the books for military offenses when on Title 32, or state active duty. Which, he related, means certain things are not available such as, dishonorable discharge as the Alaska National Guard cannot and have never dishonorably discharged a member using state law. The "worst thing" they can do is "other than honorable characterization of service," and there are times where other than honorable discharge is not sufficient as dishonorable discharge would be more appropriate. He pointed out that is a tool he would like available by passing HB 126. [Side 8 is a duplicate of slide 4.] He referred to slide 9, depicting the five primary tools used to enforce Good Order and Discipline: Administrative actions; Administrative separation; and Alaska criminal law are all currently available, yet non-judicial punishment and courts-martial under the ACMJ are not. He referred to slide 10, which depicts the plan of action and reiterated that HB 126 is a synthesis between HB 121 and HB 126, which was joined within the Military & Veterans Affairs Standing Committee. The bill includes several amendments the National Guard asked for to expand the type of soldiers and airmen that can be involved on courts-martial. He expanded that it gets to the resource constraints they have in the guard in that it is a small guard with relatively few Judge Advocate and other legal resources. He stressed that the Alaska National Guard needs to be able to draw upon other guards and the active duty components that exist in this state. He expressed that HB 126 is a good bill which would lead to a functioning system of military justice; however, it can be refined in a number of ways. This bill empowers the National Guard to create substantive offenses and regulation and a Non-Judicial Punishment (NJP) regulation instead of putting them in statute. He opined that was the preference of his command. Over the course of the interim the hope is to draw upon commanders and more junior soldiers to gather their input on what that should look like. It is his plan that in the late fall or early winter to bring it to the House Judiciary Standing Committee and other members of the body and say, "if you pass

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REPRESENTATIVE GRUENBERG referred to slide (Indisc.) wherein a choice was made to indicate a middle ground, although as a practical matter, most of the criminal offenses under Alaska law will remain with the state. He asked why Lieutenant Dunbar didn't say that the National Guard will take the Uniform Code of Military Justice (UCMJ) except for the following, and carve out a few things but basically there is a well-developed already existing body of law with many reported decisions and it was

clear where it wouldn't fit in Alaska. As far as the interface between that and Title 11, there is now a statute that says normally if it is a civilian crime it goes to the civilian authorities. In that regard, the wheel would not have to be re-invented.

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LIEUTENANT DUNBAR replied that it is his intention not to re-invent the wheel, and perhaps taking a slightly different wheel than the UCMJ, as he will draw upon what other states have done who have taken much of what they have done from the National Guard Bureau. He reiterated the National Guard Bureau is distinct from the active duty component. The National Guard Bureau itself is a synthesis and only takes out parts of the Federal UCMJ, and the Federal UCMJ itself is currently going through a state of flux. He advised that the Federal UCMJ does not directly apply in all cases for a variety of reasons. Contained within this bill are provisions specific to Alaska, such as, the Model State Code and UCMJ requires only two-thirds of a panel for conviction in a courts-martial. He asserted that the Alaska State Constitution provides a stronger right to a unanimous jury verdict and so the law was changed to provide the unanimous right through a panel decision to guard's members which, he opined, is appropriate to the state law. He further replied to Representative Gruenberg's question and posited that the drafters of HB 121, in particular, and HB 126 drew much of the language from the "State Model Code" from the National Guard Bureau rather than directly from the UCMJ, which is appropriate. Differing areas, he offered, is that the "State Model Code" is not perfect and has some things a bit archaic, such as, dueling. He stated that they are in contact with a Major, considered a legal academic at the JAG Legal Center and School, and said that she and her students are working on this process and looking for ways to update the Federal UCMJ, and also state codes in a manner that makes them more relevant for the modern era.

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REPRESENTATIVE GRUENBERG pointed out that he sees potentially four different things: the Federal UCMJ, the state general UCMJ that other states are using, "our thing," and Title 11.

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CHAIR LEDOUX expressed concern in leaving so much to the regulations as she may feel more comfortable working on this

over the interim, putting the basics into statute and then issues more peripheral through regulations.

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LIEUTENANT DUNBAR responded that he does not want to leave the committee with the impression that there is not a lot of substantive law in the current statutes as it a 39-page bill. There are many constraints in the bill and they are appreciative of the notion that their ability to create substantive offenses is a considerable power they are being entrusted with. He offered that Oregon is the state they drew on closely and does it through regulation. He advised that he and Representative Gruenberg discussed the possibility of a legislative review process.

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CHAIR LEDOUX pointed out that the language in the bill is not even subject to the Administrative Procedure Act, and basically the legislation is giving the National Guard carte blanche, and there may be discomfort in that.

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LIEUTENANT DUNBAR opined that he would not characterize it as carte blanche as there are a number of constraints in the bill, but it is true that they are being given more regulatory authority over their own guard people than other agencies typically receive over the general public. The reason being that they swear oaths to uphold the Constitution and also follow every general command. The degree to which the commanders can already regulate its soldiers and airmen through orders could surprise people. For example, an order could read "Don't do this broadly," as an order does not have to be directly to a guardsman, he said. In the event the full Administrative Procedures Act is applied to all of the regulations it would likely delay the implementation of these regulations for a considerable amount of time. He stressed that they would like to have a functioning Code of Military Justice as quickly as possible during the next session. Although, he pointed out, for those regulations and changes to regulations thereafter, to implement a more thorough regulatory review process.

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CHAIR LEDOUX opined that the first group of regulations should be adopted into statute because by then the members have all vetted the regulations. Put those into statute and perhaps the next group doesn't have to be in statute but still requires a vetting process.

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LIEUTENANT DUNBAR related a concern of the National Guard being if a regulation is initially put into statute and realizes it is not workable, it could be difficult to come back and get a revision. He opined that not putting initial regulations into statute allows the flexibility to change things ...

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CHAIR LEDOUX interjected that the legislature deals with that sort of thing all the time, as the legislature passes a law, and if not working out as expected that is what the next session is for.

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MR. BROWN responded that while HB 126 would be granting greater regulatory authority to the Department of Military and Veterans Affairs than other agencies or department generally receive. He explained that when those agencies craft regulations, they are crafting them for everyone in the state, Alaska residents and visitors, period. The DMVA is asking for the authority to police the 4,000 people who volunteered and swore oaths. He suggested these are not comparable situations in that the extra element should be taken into account as part of the greater conversation.

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REPRESENTATIVE GRUENBERG argued that Mr. Brown's statement is not always true, such as, the Alaska Public Offices Commission (APOC). He advised that Lieutenant Dunbar and he had a discussion regarding the initial language being in statute but, thereafter, the DMVA could prepare regulations under the Alaska Procedures Act (APA). The rule making provisions in the APA quasi-legislature requires notice to the general public and an opportunity to comment, but it would still come into the department, he explained. The department would evaluate anything and come back to the legislature in order to determine whether there is a problem, he noted.

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REPRESENTATIVE CLAMAN proposed a hybrid approach that the department propose regulations for the legislature to adopt on an up or down basis and not get too involved in the idea of specific language in specific statutes or regulations. He suggested the legislature look at the drafts as a whole, rather than becoming experts in military justice, and it still receives legislative review.

[2:28:05 PM](#)

REPRESENTATIVE KELLER offered that having served as Joint Chair of the Administrative Regulation Review Committee, that does not work well and is a waste of time, he opined. "It seems like whether engaged or not but ... how many regulation notices have we gotten during session and, frankly I confess, I don't get through the details like I sure wish I could," he posited.

REPRESENTATIVE CLAMAN said he was suggesting something different from just regulatory review in that the entire Code of Military Justice come before the legislature for specific review in a more systematic manner than the legislature gets from regulations that show up from time to time.

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REPRESENTATIVE GRUENBERG remarked that he was thinking along the same line in that they would submit it to the legislature, and the Military and Veterans Affairs Committee that specializes in this could review it, or the House Judiciary Standing Committee.

CHAIR LEDOUX reiterated that the House Judiciary Standing Committee has the entire interim to review HB 126.

CHAIR LEDOUX opened public testimony

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REPRESENTATIVE GRUENBERG asked Bob Doehl, Deputy Commissioner, whether he had any direct experience while in the service dealing with the Code of Military Justice.

[2:30:06 PM](#)

BOB DOEHL, Deputy Commissioner, Commissioner's Office, Department of Military and Veterans Affairs (DMVA), responded in the affirmative to Representative Gruenberg, and stated that as a commander utilizing the Code of Military Justice for action necessary to maintain Good Order and Discipline in determining whether formal court-martial was appropriate versus non-judicial punishment.

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REPRESENTATIVE KELLER questioned when a guardsman is on active duty for training, whether that is a separate category addressed differently. He asked the status of a person who is active duty for two-weeks of training stents.

MR. DOEHL answered that generally an individual on active duty for training is under Title 32, meaning that they do not come under the Federal Uniform Code of Military Justice, but rather under state law.

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CHAIR LEDOUX closed public testimony after ascertaining no one further wished to testify, and announced HB 126 is held over.

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ADJOURNMENT

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 2:32 p.m.