

**ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE**

Anchorage, Alaska
November 17, 2015
1:54 p.m.

MEMBERS PRESENT

Representative Gabrielle LeDoux, Chair
Representative Bob Lynn
Representative Charisse Millett
Representative Matt Claman
Representative Max Gruenberg

MEMBERS ABSENT

Representative Wes Keller, Vice Chair
Representative Neal Foster
Representative Kurt Olson (alternate)

OTHER MEMBERS PRESENT

Representative David Guttenberg (telephonic)
Representative Chris Tuck (telephonic)

COMMITTEE CALENDAR

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 AND HELD

PREVIOUS COMMITTEE ACTION

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
04/14/15 (H) Heard & Held
04/14/15 (H) MINUTE(JUD)
09/22/15 (H) JUD AT 1:30 PM Anch LIO AUDITORIUM

WITNESS REGISTER

FORREST DUNBAR, Captain/Assistant Judge Advocate
Alaska National Guard (AKNG)
JBER, Alaska

POSITION STATEMENT: During the hearing on CSHB 126, explained changes in Version G, and answered questions.

MEGAN WALLCE, Attorney
Legislative Legal and Research Services
Legislative Affairs Agency
Juneau, Alaska

POSITION STATEMENT: During the hearing on CSHB 126, answered questions.

NANCY MEADE, General Counsel
Office of the Administrative Director
Alaska Court System
Anchorage, Alaska

POSITION STATEMENT: During the hearing on CSHB 126, answered questions.

ACTION NARRATIVE

1:54:21 PM

CHAIR GABRIELLE LEDOUX called the House Judiciary Standing Committee meeting to order at 1:54 p.m. Representatives Lynn,

Claman, Gruenberg, and LeDoux were present at the call to order. Representatives Millett arrived as the meeting was in progress.

CHAIR LEDOUX offered a moment of silence for the victims of the Parisian terrorist attack.

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CHAIR LEDOUX announced that rules within the House Judiciary Standing Committee include: a member five-minutes late, or a member violating the cell phone rule, is required to bring donuts or a healthy food of their choice to the next meeting.

HB 126-CODE OF MILITARY JUSTICE; APPEALS

[1:56:01 PM](#)

CHAIR LEDOUX announced that the only 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 committee substitute (CS) for HB 126, Version 29-LS0473\I, Wallace, 9/18/15.]

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REPRESENTATIVE CLAMAN moved to adopt the committee substitute (CS) for HB 126, Version 29-LS0473\G, Wallace, 11/41/5, as the working document. There being no objection, Version G was before the committee.

CHAIR LEDOUX advised that contained within the committee packets are: CSHB 126, Version G, that includes changes discussed during the previous meeting regarding Version I; Version G Memorandum, [dated 11/4/15, from Megan A. Wallace]; Captain Dunbar's presentation; and a Maximum Punishments Matrix of this bill.

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FORREST DUNBAR, Captain/Assistant Judge Advocate, Alaska National Guard, noted that subsequent to amendments made to CSHB 12, the Alaska National Guard (AKNG) is "pretty happy with it." He turned to slide 1 of his power point presentation and advised that after the previous meeting he briefed the bill to Governor Bill Walker who was pleased with the work, and noted that the bill continues to be a high priority for the adjutant general. He advised a "Red Team" was then formed comprised of soldiers, airmen, officers and enlisted guard members, and explained that they review the nonjudicial punishment regulations with "war game" scenarios to ascertain how the regulations work in practice. He said the Red Team meets weekly and their scenarios have included: drug use, inappropriate relationships, AWOL, and sexual assault.

CAPTAIN DUNBAR turned to slide 2, referring to the Maximum Punishments Matrix, and said the most significant change in Version G is the maximum offense attached to every punitive article. He explained that the matrix indicates the potential maximum punishment of the Alaska Code of Military Justice (ACMJ) versus the potential maximum punishment of the Federal Uniform Code of Military Justice (UCMJ). He noted that in almost every case, the potential penalty under the Federal UCMJ is significantly more severe than the ACMJ. A policy choice was made to not pursue the more severe cases or penalties; therefore, many offenses are essentially misdemeanors with a maximum of one year imprisonment, and they do not impanel a grand jury, he explained. The reality is, he noted, that the most severe misbehaviors lead to civilian charges, or in the cases of a death penalty on the federal side is usually in a time of war and a soldier is in Title 10 status.

CHAIR LEDOUX pointed out that throughout CSHB 126, many of the misdemeanor charges result in the maximum penalty of a dishonorable discharge.

CAPTAIN DUNBAR explained that there are only one or two provisions where the Federal UCJM calls for a bad conduct discharge and the ACMJ calls for a dishonorable discharge. He reiterated that there are five levels of discharge with a dishonorable being the most severe. He pointed out that the bill reads that a service member does not have to be given a dishonorable as it reads "up to a dishonorable," in that the real piece of the charge is the ability to determine a dishonorable discharge. He stressed that "never in the history of this guard has a dishonorable discharge been given out," and

the portion of the maximum punishment more likely to be used is the discharge provision.

CHAIR LEDOUX questioned whether under current law, during a National Guard proceeding a person can be dishonorably discharged.

CAPTAIN DUNBAR responded no, currently it is impossible for the National Guard to give a dishonorable discharge or a "bad conduct discharge," and the most severe form of discharge is an "other than honorable discharge." That is most severe type of discharge available under an administrative hearing which, he described, is not a slap on the wrist as the person can be discharged from the military, lose retirement, and busted down to E-1.

[2:05:37 PM](#)

REPRESENTATIVE GRUENBERG referred to the interplay between proceeding under this new code of conduct and the civilian sphere, and asked whether Captain Dunbar had contemplated the two sovereigns working together. Obviously, he explained, the defense has many discovery rights of the prosecution, and not so much vice versa. However, he commented, if this proceeding could be done and then terminated there would be great discovery to go forward in the civilian sphere

CAPTAIN DUNBAR replied that there have been discussions about how prosecutors in the adjutant general's office and civilian side would share information. The Office of the Provost Marshal has been established to coordinate between civilian law enforcement and the guard. There is only one sovereign in this case because it is all under state law and, he reiterated from prior meetings that there is a "double jeopardy" issue if jeopardy attaches on either side under these laws, the other side is precluded and that is not the case if there is a federal charge. He opined that for charges cognizable in civilian courts, the guard expects the vast majority of investigation will be performed by civilians as civilian prosecutors have the ability to investigate better than the National Guard. He pointed to Sec. 26.05.400 "Statement of policy on military justice," [page 3, lines 16-23], which read:

Courts-martial have primary jurisdiction over offenses under this chapter, except when an act of omission violates both this chapter and local criminal law, foreign or domestic. In that case, a court-martial

may be initiated only after a civilian authority has declined to prosecute or dismissed the charge, provided jeopardy has not attached. Jurisdiction over attempted crimes, conspiracy crimes, solicitation, and accessory crimes must be determined by the underlying offense. These jurisdictional requirements do not apply to nonjudicial punishment or administrative action taken by military authorities.

CAPTAIN DUNBAR said it clearly states that civilian prosecutors have the right of first refusal in the prosecution of a case.

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CHAIR LEDOUX offered a scenario of a sexual assault that would go before a grand jury, and that all exculpatory evidence would have to be produced. The civilian court refused to prosecute presumably because there is evidence in the file showing they do not have much of a chance of winning and, she asked how that would work in front of the grand jury.

CAPTAIN DUNBAR advised that the National Guard's standard of proof in courts-martial is "beyond a reasonable doubt" and if it was sexual assault and the civilian prosecutors felt they didn't have the evidence to proceed, it is very unlikely the AKNG would proceed, although, it may proceed with a different charge. Primarily, he explained, cases where the AKNG envisions going forward are primarily cases where the civilians primarily decided not to pursue for reasons of resource constraints. He admitted that may not be a realistic scenario given how aggressively Alaska pursues sexual assaults, and the National Guard does not have the same expertise in prosecuting these cases.

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CHAIR LEDOUX surmised that this allows the AKNG to proceed where it concluded independently that the civilian prosecutor is just wrong.

CAPTAIN DUNBAR replied not necessarily wrong, but the civilian prosecution decided, for whatever reason, it will not proceed. He explained that having the provision in the punitive article means the military can go forward with a nonjudicial punishment even as the civilians move forward with their prosecution without concern of double jeopardy. He conveyed that "some things that we don't envision actually court martialing people

on, we might still want in the code so we can use the nonjudicial punishment provisions."

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REPRESENTATIVE GRUENBERG asked whether the AKNG had discussed any other reasons that it may decide to pursue a case under the Alaska Code of Military Justice (ACMJ) rather than through the state in that the military may have easier access to certain witnesses, federal agencies, or laboratories.

CAPTAIN DUNBAR offered that the discussions concluded that the civilian authorities have better access to resources in that inactive and active witnesses can be compelled to attend. The federal military has access to these resources and the ability to fly around the globe, and it is not clear that the Alaska National Guard (AKNG) has that access. He said in most cases where the military contemplates pursuing a charge, it is either because it is a military charge, or the civilian authorities have affirmatively stated they are not pursuing. In most cases, he said, if there is something cognizable in both realms, the military wants civilians to prosecute the cases.

REPRESENTATIVE GRUENBERG offered a situation with command pressure and for a valid reason militarily, a desire to pursue the case. He suggested reviewing this from all corners and consider things that have not been considered because they are two different worlds.

CAPTAIN DUNBAR answered that it is possible, but not likely, the AKNG will want to take cases and would have to ask the civilian prosecutors not to pursue. He offered that the guard envisions that crimes that can be prosecuted in civilian court will be prosecuted in civilian court. Due to the provision, it would be on the AKNG to work closely with civilian prosecutors to ascertain affirmatively that they are not pursuing the case and the civilian prosecutors would like the military to do so.

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REPRESENTATIVE GRUENBERG said "You're in a situation where, because of personalities involved, it could work either way that you've got somebody on the civilian side who is a 'runner-gunner' and wants the case or vice versa." He described the Alaska National Guard (AKNG) as fortunate in that these are two departments in the same state system and the governor would be the ultimate determiner.

CAPTAIN DUNBAR responded yes, ultimately all authority for both the Department of Law and the AKNG goes back up to the governor as the commander-in-chief. He stressed that within the military context, command pressure is forbidden by its laws and regulations in that a lower level commander cannot be pressured to prosecute someone. He explained the procedure would be to "reserve the case to yourself, you can draw that case up to yourself and then you can prosecute it yourself. So, the adjutant general could pursue a case that a lower level commander didn't want to, but you cannot order a lower level commander to prosecute someone."

REPRESENTATIVE GRUENBERG suggested that in pursuing CSHB 126 through the legislature there may be people requesting clarification on that issue as legislators want to be certain that everyone knows how potential disputes will be resolved.

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CAPTAIN DUNBAR continued his presentation and referred to the 9/22/15 discussion regarding the scenario of a service member being in another state, not on orders, and misbehaves. He advised it was never the intention of the AKNG to pursue people, not on orders, misbehaving in another state. Currently, he explained, the statute reads that if a member is in the State of Alaska regardless of being on active duty orders or not, the member is subject to the Alaska National Guard's jurisdiction. Also, the Alaska National Guard (AKNG) has jurisdiction over a member on active duty orders traveling outside the state. Presumably, he said, the misbehaving member not on active duty orders would be under the criminal laws of that state.

REPRESENTATIVE GRUENBERG offered a scenario of a member being on temporary duty to the South Dakota National Guard and beats up another person, would there technically be jurisdiction under Version G, in Alaska or South Dakota.

CAPTAIN DUNBAR responded that assuming it was something the Alaska National Guard (AKNG) could pursue it would have jurisdiction under this law using the long arm provision and try to punish them militarily. He said, "Now, if South Dakota was pursuing criminal charges, I think we would want to coordinate with the South Dakota authorities ..."

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REPRESENTATIVE GRUENBERG interjected, and said, suppose the civilian authorities were not involved, and it was the Alaska and South Dakota National Guard, and the member went AWOL. He asked how the code resolves that issue.

CAPTAIN DUNBAR opined that it would be Alaska's jurisdiction because the person would be absent without leave from the Alaska National Guard. He offered that he did not yet have an answer regarding a member disrespecting a superior officer in the South Dakota National Guard.

REPRESENTATIVE GRUENBERG said he was not requesting an answer, but that these theoretical questions should be resolved in the initial draft so there are not two conflicting state codes.

CHAIR LEDOUX interjected that she is not sure about going down this trail and described it as a conflict of law. She offered that it may very well be that both National Guards have jurisdiction and wherever the person is tried first will have to decide whose code to apply. She explained in civil law there may be cases in which both California and Alaska have jurisdiction and the answer is not in the statute as to which court has jurisdiction, the court decides.

REPRESENTATIVE GRUENBERG remarked that the legislature should try to resolve issues during the drafting of the law.

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CAPTAIN DUNBAR referred to slide 3, and advised Version G amends title relating to jurisdiction of the Supreme Court over petitions from the Military Appeals Commission, and a three strike system was created for the DUI provision to more closely mirror civilian law, but an amendment is required regarding whether a person is on orders or not on orders. He said it is the hope of the AKNG to remove most of those distinctions of whether a person is, or is not, on orders is largely immaterial. The three strike system is a person having a misdemeanor, misdemeanor, felony, where a person is opened up to one-year of potential jail time, one-year of confinement, and then five-years for a third offense. He opined that someone getting to their third DUI without being discharged from the military is unlikely with the current guard. He explained, "We also create a system of alternates ..."

REPRESENTATIVE GRUENBERG questioned whether he envisions a circumstance where someone with a DUI is prosecuted under the military code.

CAPTAIN DUNBAR advised that it was included with the possibility that the civilians would not pursue the case, yet the military did. He offered his awareness that the State of Alaska aggressively pursues DUIs, and opined it is relatively unlikely.

REPRESENTATIVE GRUENBERG offered that if the military prosecutes for whatever crime, under this provision, then presumably it would be remanded to a federal agency.

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CAPTAIN DUNBAR answered, that is not the case in that the bill is written the Alaska Department of Corrections will take custody of the individual if they receive confinement.

REPRESENTATIVE GRUENBERG asked whether the person would have any greater right to treatment. He offered that if under federal law they would have a better right to mental health treatment or whatever, people might aggressively want them to go through the system.

CAPTAIN DUNBAR advised they have not performed a comparison for the different treatments available, but the military has an extensive substance abuse program and it attempts to treat their soldiers and airmen. He said whether soldiers or airmen would lose rights to that under ... if they were charged, he couldn't answer, but opined they would be charged, go through the American Substance Abuse Professionals (ASAP) program, go through a court martial, and be sentenced.

CHAIR LEDOUX interjected that should this type of questioning continue the committee will not get through the bill.

[2:26:50 PM](#)

CAPTAIN DUNBAR referred to slide 4, and reiterated that the ultimate goal is to promote good order and discipline in the force, be combat ready and, he noted, that the National Guard has lacked this vital tool in promoting good order and discipline. He explained that people currently in the Alaska National Guard (AKNG) expect to be deployed at some point in their service as it is a reserve component of the United State military. He turned to slide 5 and said the bill will receive

work during the interim, although, it is at a path now that would create a functioning system of military justice in Alaska. He reiterated that the Red Team's preliminary results indicate CSHB 126 is a functioning bill, the punitive articles cover most of the misbehavior expected, and nonjudicial punishment regulations appear to work. Interestingly, he said, when the commanders run through the scenarios they often don't use this tool and continue to use the administrative tools they have always used. The indication is that the administrative tools will continue to be the primary mode of discipline in many cases, such as letters of reprimand, reduction boards, and separation boards. It also indicated that the AKNG has a long way to go to educate its own force and commanders on how to use these tools, together with demonstrating that these tools in some cases are more effective and can be used in a more timely fashion than the existing administrative tools. He advised that over the next few months, the AKNG will put together plans to help roll this out to the force.

CAPTAIN DUNBAR remarked that the people working on this bill are hearing from people in the force that they want these tools now. He said they are hopeful the bill will pass in the spring, and shortly thereafter put the regulation forward to Governor Walker. He expects that the earliest the tools can be used after a period of education, and putting out materials to the force on their use, is late summer.

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REPRESENTATIVE CLAMAN referred to a memorandum drafted by Captain Dunbar regarding "attempts" and how attempts were treated. He offered that under Alaska law, attempt is generally scaled back one degree but was not the case in the military code, and asked to be directed to the correct section.

CAPTAIN DUNBAR responded, Sec. 26.05.580(b), "Attempts," page 36, lines 4-7, which read:

(b) A member of the militia who attempts to commit an offense under this chapter shall be punished as a court-martial may direct, unless otherwise specifically prescribed. However, a court-martial may not direct a punishment for an attempt to commit an offense that is greater than the maximum punishment for the offense.

CAPTAIN DUNBAR explained that it is not formulated in the same manner as Alaska law in that "a class A, is now a class B," and said he was uncertain as to whether class A is worse than class B.

REPRESENTATIVE CLAMAN offered that the way of Alaska law, a class A felony with attempt would be a class B felony, and a class C felony would be a class A misdemeanor.

CAPTAIN DUNBAR advised the provision is not formulated in that manner, and that the language is taken from the state model code. He referred to [Sec. 26.05.580(b), "Attempts," page 36], subsection (b), [lines 6-7], which read:

(b) ... However, a court-martial may not direct a punishment for an attempt to commit an offense that is greater than the maximum punishment for the offense.

CAPTAIN DUNBAR explained that it does not automatically drop back in the same manner, but it clearly cannot be more severe.

[2:33:22 PM](#)

REPRESENTATIVE GRUENBERG referred to [Sec. 26.05.580(c), "Attempts," page 36, lines 8-10, which read:

(c) A member of the militia may be convicted of an attempt to commit an offense under this chapter even if it appears, at the trial, that the offense was consummated.

REPRESENTATIVE GRUENBERG asked whether subsection (c) is currently in Title 11.

CAPTAIN DUNBAR advised he is not familiar enough with Title 11 to offer an answer, but that the language was provided by the National Guard Bureau and was not taken directly from Alaska state law.

REPRESENTATIVE GRUENBERG asked Captain Dunbar to determine whether the language is identical in Title 11, because if under subsection (c) a person may be convicted of an attempt, even though the crime was consummated, he questioned whether that is a lesser included offense, and whether a person is entitled to a jury instruction to that effect.

CAPTAIN DUNBAR said he would research the question.

[2:34:39 PM](#)

REPRESENTATIVE GRUENBERG referred to Sec. 26.05.400, "Statement of policy on military justice," [page 3, lines 16-23], which read:

Courts-martial have primary jurisdiction over offenses under this chapter, except when an act of omission violates both this chapter and local criminal law, foreign or domestic. In that case, a court-martial may be initiated only after a civilian authority has declined to prosecute or dismissed the charge, provided jeopardy has not attached. Jurisdiction over attempted crimes, conspiracy crimes, solicitation, and accessory crimes must be determined by the underlying offense. These jurisdictional requirements do not apply to nonjudicial punishment or administrative action taken by military authorities.

REPRESENTATIVE GRUENBERG advised that the law is a sophisticated form of "gamesmanship," and here is a possibility of going forward in one of two forums. He opined that the prosecution is bound here, generally, to take the civilian route, where the defense may not be similarly bound because it is a prosecution question and the defense doesn't have a choice. He commented that Captain Dunbar may want to speak with the military and civilian defense bars to determine how the interplay could be gained by either side.

CAPTAIN DUNBAR responded that Representative Gruenberg is correct in assuming there will be gamesmanship on both sides. He opined that it is difficult to predict how that will proceed because some states have only military offenses in their codes so this would never come into effect. He explained at the federal level, because it is a comprehensive criminal code, the federal military can always proceed without the civilian authorities agreeing to it. He added that they have been working with their own defense counsel on these provisions and noted that in his office, attorneys rotate back and forth between being prosecutors and defense attorneys, but recently defense and prosecution attorneys have become more calcified.

REPRESENTATIVE GRUENBERG said any law will be used in ways that couldn't possibly have been imagined.

[2:38:24 PM](#)

REPRESENTATIVE CLAMAN referred back to Sec. 26.05.580(c), "Attempts," page 36, lines 8-10, having to do with "if the evidence shows that a crime has occurred ..." and said his general sense is that often times a crime is charged under attempt because the information at the time of charging only rises to the level of attempt. He continued that as the evidence comes forward and without having to re-charge the individual, they proceed under attempt for probable reasons of judicial efficiency.

[2:39:30 PM](#)

CHAIR LEDOUX referred to Sec. 2, page 2, line 7, which read:

(a) ... while in this such service.

CHAIR LEDOUX offered that it doesn't make sense to her and asked whether it was a typo.

CAPTAIN DUNBAR agreed that it is a typo.

CHAIR LEDOUX pointed out that it was included in previous versions.

[2:40:18 PM](#)

CHAIR LEDOUX referred to Sec. 26.05.435, "Jurisdiction of courts-martial in general," page 8, lines 6-9, which read:

Each force of the militia of the state in active military service has court-martial jurisdiction over all members of the militia. The exercise of jurisdiction by one force over personnel of another force must be in accordance with the code of military justice.

CHAIR LEDOUX advised she was uncertain of the language.

CAPTAIN DUNBAR advised that there are two forces in the militia, army guard and air guard, and offered that this provision reads that the army guard could charge the air guard, and the air guard could charge the army guard. Although, he indicated, he doubted it would happen, but there could be a situation with a mixed force doing something in the field and something happens.

[2:41:09 PM](#)

CHAIR LEDOUX surmised that the following sentence is referring to the Alaska Code of Military Justice:

The exercise of jurisdiction by one force over personnel of another force must be in accordance with the code of military justice.

CAPTAIN DUNBAR responded yes, and offered the scenario that if an air guard commander charged an army guard soldier, it would have to be under these provisions and not under other regulations unique to one force or the other.

[2:41:54 PM](#)

CHAIR LEDOUX referred to Sec. 26.05.444(b), "Grand jury requirement," page 9, lines 7-11, which read:

(b) The general court-martial convening authority shall designate one or more judge advocates to represent the authority at the grand jury, except that at the request of the adjutant general, and with the consent of the attorney general, a district attorney or an attorney from the Department of Law may represent the convening authority at the grand jury.

CHAIR LEDOUX asked the difference between a district attorney and an attorney from the Department of Law.

CAPTAIN DUNBAR opined that the language was written by Legislative Legal Services and Research and he is not familiar with the [Department of Law's] structure.

[2:43:04 PM](#)

MEGAN WALLACE, Attorney, Legislative Legal and Research Services, Legislative Affairs Agency, [Available for questions.]

CHAIR LEDOUX restated the question regarding Sec. 26.05.400(b) and asked whether attorneys are called district attorney or assistant attorney general at the Department of Law.

MS. WALLACE advised she would have to look into it further and will clarify it for the committee.

CHAIR LEDOUX agreed.

2:44:03 PM

CAPTAIN DUNBAR indicated that removing district attorney and simply adding attorney from the Department of Law would be sufficient.

CHAIR LEDOUX agreed.

2:44:23 PM

CHAIR LEDOUX referred to Sec. 26.05.468(c)(2), "Investigation; preliminary hearing," page 15, lines 19-22, which read:

(2) give the accused the opportunity to cross-examine witnesses against the accused, if the witnesses are available; a victim may not be required to testify at a preliminary hearing; a victim who declines to testify is considered unavailable for the purposes of the preliminary hearing;

CHAIR LEDOUX asked how that mirrors Alaska criminal law.

CAPTAIN DUNBAR noted the language was taken from the most recent version of Federal UCMJ with regard to sexual assault, the rape shield law. The purpose of the provision, he explained, is to prevent sexual assault victims from being re-victimized in the preliminary hearing, but he does not know how it mirrors Alaska law. He added that victims of a non-sexual assault could also avail themselves of this provision.

MS. WALLACE responded that she does not normally draft criminal law and will review Alaska's rape shield law and compare.

2:46:53 PM

REPRESENTATIVE CLAMAN opined that this provision is coming from the national statute as opposed to a state statute. He reported that in many states, felony prosecution has an option of presenting a case to the grand jury and holding a person over for a felony trial, or they can proceed through a preliminary hearing. He offered that if the person goes through the preliminary hearing process and the court find probable cause, there is no need to go before the grand jury. In contrast, he remarked, in Alaska there can be a preliminary hearing which gives the state the opportunity to hold a person in custody until going before the grand jury because there is no way to avoid the grand jury requirement. For purposes of going to

trial, the case must be presented to the grand jury and, he opined, this particular provision was designed to protect victims from going through cross-examination twice. Typically in Alaska, the victim would testify in a grand jury proceeding but would not be cross-examined by the defense counsel. He opined that the provision reads that victims would be considered unavailable and could not be forced to appear by subpoena.

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CAPTAIN DUNBAR responded that within the military there is a fairly well-established and aggressive system of investigation, and referred to the work of Senator Kirsten Gillibrand of New York. He explained that Senator Gillibrand and other leaders from the United States Senate and elsewhere realized that the manner in which the military investigated sexual assaults was not sympathetic to the victims, in that the investigation process was very aggressive and lead to very aggressive cross-examinations. For that purpose they put in these amendments, and he mentioned that he was unsure how that interplays with the grand jury. Practically speaking, he said, the goal is to prevent people from being re-victimized during the investigation process.

REPRESENTATIVE CLAMAN advised that it is very clear at the federal and state levels with the grand jury proceedings in that the defense attorney is outside the door. Occasionally defendants choose to testify before the grand jury but their lawyers are not allowed inside and, he pointed out, the issue of cross-examination in grand jury rooms is a non-issue.

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CHAIR LEDOUX asked how the preliminary hearing gels with the grand jury proceeding in this bill.

CAPTAIN DUNBAR noted that Alaska is the only state with a grand jury requirement, and it was included due to Alaska's uniquely strong constitutional protections for a right to a grand jury. He noted that the preliminary hearing or the grand jury proceeding should satisfy due process and they do not envision a case with both. He offered that they have not exactly "war gamed" the issue of when a person goes to either one, but he believes it will probably lean toward the preliminary hearing process as it is similar to established ways of investigation in the military.

CHAIR LEDOUX questioned whether a felony would require a grand jury.

CAPTAIN DUNBAR responded, probably.

[2:51:47 PM](#)

CHAIR LEDOUX pointed out that all sexual assault cases are felonies.

CAPTAIN DUNBAR answered that with sexual assaults the vast majority of investigations will be performed by trained civilians, and in that regard the investigation process may not be necessary on the military side. He reiterated that the investigation will be performed by trained civilians who know how to investigate sexual assaults and then "we'll" present the evidence to the grand jury.

CHAIR LEDOUX then pointed out that Captain Dunbar had previously advised the committee that the reason for subsection (b) is to not [re-] victimize the rape victim, and said that now he is saying he does not expect to use this section for sexual assaults, which is confusing.

CAPTAIN DUNBAR agreed that it is a confusing question and noted that Alaska is the first state to do both at once. Even though the process is not expected to be used, in the unlikely cases that they do AKNG wants protections in place for victims, he stated.

[2:53:27 PM](#)

CHAIR LEDOUX commented that it should be somewhat narrowed. She offered a scenario of someone being beaten up, not sexually assaulted; therefore, the rape shield law is not needed, and asked why that witness would be shielded.

CAPTAIN DUNBAR explained that they have taken most of the regular assault out of the bill, although, contained within the bill is a misdemeanor "abusive sexual contact." He further explained that the case would not go to a grand jury, but there would be an investigation of the person victimized in a sexual manner, and the military may want victims to have these protections available to them.

CHAIR LEDOUX said they would speak again about this provision.

[2:54:42 PM](#)

REPRESENTATIVE MILLETT requested the definition of a misdemeanor sexual crime.

CAPTAIN DUNBAR referred Representative Millett to Sec. 26.05.620(b), "Sexual assault," [page 49, lines 5-9], which read:

(b) A member of the militia who commits or causes sexual contact on or by another person, and in doing so violates (a) of this section, is guilty of abusive sexual contact and shall be punished by up to five years of confinement, by separation with characterization up to dishonorable discharge, and by such other punishment as a court-martial may direct.

CAPTAIN DUNBAR acknowledged that he misspoke in that the minimum punishment for "abusive sexual contact" is five years, a felony. He related that the only misdemeanor crimes related to sex are Sec. 26.05.622, "Other sexual misconduct: indecent viewing, visual recording, or broadcasting." He said if there is physical contact with a victim, the military has the ability to determine up to five years of confinement, a felony.

[2:56:13 PM](#)

CHAIR LEDOUX referred to page 16, [Sec. 26.05.468(h), "Investigation; preliminary hearing," page 16, lines 18-21], which read:

(h) In this section, "victim" means a person who is alleged to have suffered a direct physical, emotional, or pecuniary harm as a result of the matters set out in a charge or specification being considered and who is named in a specification being considered.

CHAIR LEDOUX pointed to "direct physical, emotional, or pecuniary harm," and said it sounds like it goes "way, way beyond" a victim of sexual assault.

CAPTAIN DUNBAR agreed, and offered that the motivation for including these protections has to do with the rape shield law, and these provisions go significantly beyond sexual assault victims.

CHAIR LEDOUX advised they would speak again about this issue.

2:57:34 PM

CHAIR LEDOUX referred to Sec. 26.05.485(d), "Statute of limitations," page 19, lines 19-22, which read:

(d) When the United States is at war or engaged in contingency operations, the running of a period of limitation for an offense under this chapter is suspended until two years after the termination of hostilities as proclaimed by the President of the United States or by a joint resolution of the United States Congress if the offense

CHAIR LEDOUX pointed to, "When the United States is at war or engaged in contingency operations, the running of the statute of limitations is extended ..." and said they discussed that this actually means it is extended probably forever. She then referred to a memorandum from Colonel Dan Collins, Staff Judge Advocate, Alaska National Guard, who attempted to explain the rationale behind the provision. She offered a scenario, "there is an operation in Iraq and it is not a declared war but just an operation, and somehow or other the National Guard is not federalized at this point. And so, the operation in Iraq comes to an end. And so that would seem that that would be justification for extending the Statute of Limitations. But then, we're in another contingency operation, let's say in Afghanistan. Well, why should it be continued for the operation in Afghanistan when it's come to light after the end of hostilities in Iraq?"

CAPTAIN DUNBAR offered that the AKNG service members are not serving in Iraq or Afghanistan because otherwise they'd be fully federalized under Title 10, which subject to the UCMJ. In this scenario they are being charged in Alaska ... or they're not being charged, and the Statute of Limitations is being suspended due to some operation outside the state. He offered that the argument would have to be that something about that contingency operation is taking resources out of the AKNG and preventing it from proceeding with this in a timely fashion. He opined it is an interesting policy question and something to be discussed further whether to retain the provision, revise it in a manner that it is clear the AKNG command is not trying to take advantage of this in some manner, or trying to keep someone basically in a state of "suspended animation." He offered that the National Guard has been in contingency operations in

Afghanistan for 14-years in that the United States Congress has not declared war, but the National Guard is engaged in something that looks very much like a war, such as in Iraq and Afghanistan. He opined that Colonel Collins's point, and the reason to insert contingency operation, is because they didn't want to get caught up in the legalese of the definition of war as America has not technically been in a war since World War II.

CHAIR LEDOUX agreed with Representative Gruenberg that the ongoing above-discussion will include the full committee.

[3:02:22 PM](#)

CHAIR LEDOUX referred to Sec. 26.05.488(a), "Former jeopardy," page 20, lines 13-14, which read:

(a) A person may not, without the person's consent, be tried a second time for the same offense under this chapter.

CHAIR LEDOUX asked when a person would consent to [being tried a second time].

CAPTAIN DUNBAR advised that this language was taken directly from the state model code and he could not imagine a situation where it would be used. He said he will speak with the lawyers at the National Guard Bureau and get back to the committee.

REPRESENTATIVE GRUENBERG offered the concept of "manifest necessity" and the rule that a person cannot be re-tried for the same crime unless the dismissal was for a manifest necessity.

CHAIR LEDOUX said that possibly Colonel Collins could explain.

[3:04:24 PM](#)

CHAIR LEDOUX referred to Sec. 26.05.488(b), "Former jeopardy," page 20, lines 15-17, which read:

(b) A proceeding in which an accused has been found guilty by a court-martial on any charge or specification is not a trial under the code of military justice until a finding of guilty has become final after review of the case has been completed.

CHAIR LEDOUX said that the provision is not clear.

CAPTAIN DUNBAR offered to speak with the National Guard Bureau as to its intent.

REPRESENTATIVE GRUENBERG said that apparently the phrase "a trial under the code of military justice" is a term of art in that it is looking to be defined by the UCMJ, and it is not the civilian term "trial."

[3:06:27 PM](#)

CHAIR LEDOUX referred to Sec. 26.05.500(d), "Lack of mental capacity or mental responsibility; commitment of accused for examination and treatment," page 23, lines 24-31, which read:

(d) If, at the end of a period of commitment under (b) and (c) of this section, it is determined that the accused's mental condition has not improved so as to permit the trial to proceed, the charges shall be dismissed without prejudice, and continued commitment proceedings shall be governed by the provisions relating to civil commitment under AS 47.30.700 - 47.30.915. If the accused remains incompetent for five years after the charges have been dismissed under this subsection, the accused may not be charged again for an offense under this chapter arising out of the facts alleged in the original charges.

CHAIR LEDOUX pointed to "if the accused remains incompetent for five years the charges will be dismissed under this subsection," and asked Ms. Wallace whether Alaska's criminal law is the same in that if a person remains incompetent for five years the charges are dismissed.

MS. WALLACE responded that she will research the question and determine how Title 12 proceedings handle this issue.

CHAIR LEDOUX asked Captain Dunbar, assuming Alaska law is not the same, why dismiss the charges that could be quite serious charges if five years have elapsed.

CAPTAIN DUNBAR answered that this language is from the state model code and he was unsure of its intent. He opined that the Alaska National Guard's maximum penalty is 10-years, and if a person is committed for the purpose of trying to rehabilitate them for five years, and the person could not become competent to stand trial, there may be a case where the AKNG did not feel

it was "just" to proceed with the charges. He stated the AKNG does not criminally prosecute the mentally incapacitated.

3:08:40 PM

REPRESENTATIVE GRUENBERG said that when language is taken from a model code, it would be helpful for the experts to telephonically testify at the next hearing.

CHAIR LEDOUX agreed.

MR. DANBAR agreed, but offered that many of the people involved in drafting the 2007 model statutes are gone, but he will contact the new judge advocates to answer these questions. He warned that some responses to the committee's questions may be unsatisfying as people may not recall why it was drafted in this manner.

REPRESENTATIVE GRUENBERG related that when a statute is taken from another state, with it comes the highest recorded court interpretation that was handed down before the effective date of CSHB 126.

CHAIR LEDOUX pointed out that while there may have been language taken from the uniform code, this bill is far from a uniform code.

REPRESENTATIVE GRUENBERG responded that if a particular section was taken from this model code, whether other jurisdictions reported ...

CHAIR LEDOUX interjected that the current issue is the five-year requirement and are attempting to determine why the military might want this.

REPRESENTATIVE GRUENBERG referred to the uniform code annotated as it contains ...

CHAIR LEDOUX asked Captain Dunbar whether there is such a thing as the uniform code annotated for this.

3:12:35 PM

CAPTAIN DUNBAR responded, not exactly. He explained the state model code does have some annotation, and the Federal UCMJ has a lot of annotation and precedent. He added that other states have adopted the model code "and some of them presumably have

done some of these things," and he could ask other states why they used this provision in this manner. He said he suspects this particular provision has been rarely to never used, and he will perform research on that issue.

CHAIR LEDOUX responded to Representative Gruenberg's statement that he is not limiting himself to "this," by advising him that "this" is what is being discussed. She agreed to come back at some point.

[3:13:57 PM](#)

CHAIR LEDOUX referred to Sec. 26.05.598, "Noncompliance with procedural rules," page 41, lines 9-17, which read:

A member of the militia who (1) is responsible for unnecessary delay in the disposition of the case of another person accused of an offense under this chapter shall be punished by up to six months of confinement, by separation with characterization up to a bad conduct discharge, and by such other punishment as a court-martial may direct, or (2) knowingly and intentionally fails to enforce or comply with a provision of this chapter regulating the proceedings before, during, or after trial of an accused shall be punished by up to one year of confinement, by separation with characterization up to dishonorable discharge, and by such other punishment as a court-martial may direct.

CHAIR LEDOUX commented that the provision appears to be similar to a "frivolous" cause of action filed in the civil court for delay, and are fined by the Alaska Court System.

REPRESENTATIVE GRUENBERG replied that he is not aware of it in the state criminal sphere, although Civil Rule 82 allows enhanced attorney fees.

CHAIR LEDOUX described this as a fairly harsh punishment.

[3:15:29 PM](#)

CAPTAIN DUNBAR referred to the Maximum Punishments Matrix and said the punishment of six months; and a bad conduct discharge is the same punishment as the Federal UCMJ. He said the "knowingly and intentionally fails to enforce or comply" punishment is up to one-year confinement and a dishonorable

discharge, with the Federal UCMJ being five-years and a dishonorable discharge. He agreed that up to one-year is a serious penalty, although it is significantly less than what they would be subject to if they were on active duty.

CHAIR LEDOUX asked whether this would apply to defense attorneys trying to delay proceedings.

CAPTAIN DUNBAR offered that he does not believe that is the case, and will provide a more concrete answer. Defense judge advocates, as with civilian defense attorneys, attempt to extend the proceeding to the benefit of their client. He reiterated that judge advocates rotate back and forth at different times in their career between being a defense attorney and a prosecutor so things are more collegial, and the kind of gamesmanship seen on the civilian side happens less. He remarked that the AKNG does not prosecute defense attorneys for being defense attorneys.

[3:17:29 PM](#)

CHAIR LEDOUX requested an example of where this provision would be used and on whom.

CAPTAIN DUNBAR responded that he would like to review the Manual for Courts-Martial and get back to her.

REPRESENTATIVE GRUENBERG commented that this can be used in federal racketeering cases and it forces the defense attorney to disgorge their fees. Under Civil Rule 11, pleadings must be certified in good faith, and he opined that if an attorney disobeys a court order the remedy is contempt of court. He described this as having a significant chilling effect particularly if the lawyer is a member of the military.

CAPTAIN DUNBAR said he could not speak to federal racketeering charges, but believes this deals with cases of favoritism wherein a prosecuting judge advocate is sympathetic to the defendant in some manner, and is intentionally and knowingly delaying proceedings.

[3:19:38 PM](#)

CHAIR LEDOUX referred to Sec. 26.05.600, "Subordinate compelling surrender," page 42, lines 10-17, which read:

A member of the militia who compels or attempts to compel the commander of the militia of this state or of any other state, of a place, a vessel, an aircraft, or another military property, or of a body of members of the armed forces to give it up to an enemy or to abandon it in the face of a threat described in AS 26.05.070, or who strikes the colors or flag to an enemy without proper authority, shall be punished by up to 10 years of confinement, by separation with characterization up to dishonorable discharge, and by such other punishment as a court-martial may direct.

CHAIR LEDOUX referred to "any other state, of a place, a vessel, an aircraft ..." and said she does not understand.

CAPTAIN DUNBAR explained that it compels a commander of this state or another state to surrender a place, vessel, aircraft, or other property. He commented it is not clearly written, but it is a separate provision. He offered it is where a subordinate member of the militia is forcing a commander to give up a place, to give ground.

CHAIR LEDOUX asked that he work with Legislative Legal Service and Research to draft this provision in a clear manner.

[3:21:17 PM](#)

REPRESENTATIVE GRUENBERG opined there is a military term of art when surrendering under conditions they are not supposed to surrender.

CAPTAIN DUNBAR agreed to include clarifying language as the substance of the provision is good.

REPRESENTATIVE GRUENBERG asked whether there is something in the bill that makes it a military crime, not civilian crime. He suggested that if the executive officer requires the commanding officer to do something it is a type of mutiny.

CAPTAIN DUNBAR advised that mutiny has a very particular name in the military and there is a mutiny provision. He said the AKNG would look to the precedent of the UCMJ for the determination of whether it was mutiny or a subordinate compelling surrender.

REPRESENTATIVE GRUENBERG asked why this is drafted to only criminalize the subordinate, what if the commanding officer

gives up his command and doesn't have to, there should be punishment for the commanding officer.

CAPTAIN DUNBAR opined that there is always a higher commanding officer until reaching the [governor of the state] and surrendering ...

REPRESENTATIVE GRUENBERG interjected that he is discussing the unit.

CAPTAIN DUNBAR continued that the commander is disobeying an order, such as wrongfully surrendering, engaging in mutiny, misbehavior in front of the enemy, or deserting, but it wouldn't be this provision.

REPRESENTATIVE GRUENBERG asked him to determine why this is drafted solely for the subordinate, and asked whether this should be amended to include the commanding officer. He clarified that he is discussing the unit commander.

[3:24:19 PM](#)

CHAIR LEDOX referred to Sec. 26.05.610, "Improper Hazarding of vehicle, aircraft, or vessel," page 44, lines 18-28, and asked the definition of hazarding.

CAPTAIN DUNBAR explained it is a term of art specifically defined within the Manual for Courts-Martial, and generally a person takes unnecessary risks with a vehicle or ship and puts it at risk of damage. He remarked that the maximum penalty under the federal law is death because the idea that a commander when commanding a battle ship is unnecessarily running it up against a reef and losing this vessel, thereby losing a conflict or battle. This provision has been amended because the AKNG does not have vessels except several small zodiacs, or aircraft carriers, but it does apply to aircraft and vehicles. An example is people joy riding in a tank, he said, and the penalties have been drastically reduced.

CHAIR LEDOUX asked about a person running a red light with a car.

CAPTAIN DUNBAR explained that if the car was the property of the United States the person could be prosecuted under this. Practically speaking, he noted, they probably wouldn't be prosecuted as they would have to be driving willfully and wrongfully, more than negligently running a red light.

CHAIR LEDOUX expressed a problem with his answer in that if the military is "probably not going to do this," there probably shouldn't be a law letting the military do it. She pointed out there is always the question of, why are you doing it to this person and not to that person.

[3:27:57 PM](#)

REPRESENTATIVE GRUENBERG pointed out that this is a very serious portion of this code and should not be tossed out. He offered that in the event someone is negligently driving a car they are not going to be prosecuted under this and will be prosecuted for the traffic offense. There is a problem, he suggested, in that there is not a provision for recklessness and there should be. He noted that possibly the genesis of this was from a jurisdiction that didn't have that intermediate phase, but Alaska does.

CAPTAIN DUNBAR offered that Representative Gruenberg's comment might resolve some of Chair LeDoux's concerns to reduce the penalties in the negligence provision - reduce [negligence] to six-months, with reckless being one-year may address ...

CHAIR LEDOUX agreed it would address some of her concerns.

REPRESENTATIVE GRUENBERG offered an antidote of a fighter pilot turning his aircraft left instead of right in order to be caught and the aircraft was lost. He described that as negligent not reckless, and warned to be careful when eliminating things.

CHAIR LEDOUX pointed out that the discussion is not eliminating anything, but discussing the idea that there be willful, reckless, and negligent.

[3:29:55 PM](#)

CHAIR LEDOUX referred to Sec. 26.05.609, "Property other than military property; waste, spoilage, or destruction," page 44, lines 12-17, which read:

A member of the militia who wilfully or recklessly wastes, spoils, or otherwise wilfully and wrongly destroys or damages any property other than military property of the United States or of any state shall be punished by up to one year of confinement, by separation with characterization up to dishonorable

discharge, and by such other punishment as a court-martial may direct.

CHAIR LEDOUX asked why this provision is in the bill.

CAPTAIN DUNBAR offered that the language was taken from the state model code and he will provide a more detailed answer. He remarked there are provisions for looting and presumably it is not speaking to other civilian properties, and it could be the property the military is in control of that is not military property and some other civilian agency ...

CHAIR LEDOUX interjected that Captain Dunbar could get back to the committee to explain.

[3:31:22 PM](#)

CHAIR LEDOUX referred to Sec. 26.05.611, "Drunken or reckless operation of a vehicle, aircraft, or vessel," beginning page 44, line 29. Chair LeDoux asked Ms. Wallace, under the criminal code, whether first time offenders are subject to one-year in imprisonment for a DUI.

MS. WALLACE responded that she would research the question and get back to the committee in a moment.

CAPTAIN DUNBAR offered the explanation contained in Article 109, Federal UCMJ, regarding Sec. 26.05.609, and acknowledged that he misspoke as it is a situation where soldiers or airmen are not stealing or looting property, but are destroying or damaging the property of another person. He read the definition contained within the Manual for Courts-Martial, as follows:

Wastes or spoils as used in this article refer to such wrongful acts of voluntary destruction of, or permanent damage to, real property as burning down buildings, burning piers, tearing down fences, or cutting down trees. The destruction is punishable whether it done wilfully, that is intentionally or recklessly, added to a culpable disregard of the perceivable consequences of some voluntary act.

CHAIR LEDOUX expressed that she understands the reason for including sexual assault in the bill even though it is not a military crime, but not other things included in the bill, such as that provision. She asked why that one provision is picked out as something the military wants to prosecute, as opposed to

Alaska's entire penal code, and noted the entire penal code is not incorporated into the bill.

3:35:16 PM

CAPTAIN DUNBAR related that this was a military offense in the state model code and was not one of the offenses they went through and wanted to add such as, DUI and sexual assault. He used the example of burning down someone's house and noted the person would be charged under state criminal law. He offered, for example, a junior enlisted soldier shoveling snow and recklessly, not intentionally, broke a window. It would not be a criminal charge, but the military would use this offense to conduct a nonjudicial punishment or potential court-martial, he explained. He expressed that he does not believe these types of offenses are completely subsumed by existing Alaska criminal law.

CHAIR LEDOUX pointed out that under this example it would be a criminal offense whether the prosecutors choose to prosecute or not, that's a totally different question.

CAPTAIN DUNBAR said that examples do exist where a person would not be criminally prosecuted.

3:37:36 PM

MS. WALLACE explained that the current DUI provisions are governed by AS 28.35.030, and generally a DUI is a class A misdemeanor with a sentence dependent upon various factors and exceptions. She asked Chair LeDoux to repeat her question as a lot of the sentencing comes into a case-by-case basis and the factors apparent with every incident prosecuted.

CHAIR LEDOUX restated her question and asked whether a first-time DUI was subject to one-year in jail.

MS. WALLACE responded that, as it is a class A misdemeanor it is up to one-year in jail, but not less than 72 consecutive hours, if there are certain protections available. She suggested the Department of Law comment on prosecuting specific instances and crimes as they prosecute these cases on a regular basis and have more specialized knowledge relating to hypothetical situations.

CHAIR LEDOUX agreed.

3:39:39 PM

NANCY MEADE, General Counsel, Office of the Administrative Director, Alaska Court System, said that the Department of Law would know better and she just happens to know that first-time DUI standard is 3-days, 72-hours, although it could go above that for a class B misdemeanor with a maximum of 90-days. She offered that the second DUI is 20-days in jail, and the third DUI approaches felony and is 120-days in jail.

CHAIR LEDOUX asked the maximum allowed for a first-time offender.

MS. MEADE opined that a first-time DUI is a class B misdemeanor, according to Ms. Wallace, of which have a 90-day maximum in jail. She advised that DUIs have a specific jail term contained within the statute and those only theoretically could be exceeded, and are three-days in jail. In her experience, she said, first-time DUI always receives 3-days in jail unless there is something extraordinary, such as an extremely high blood alcohol content in which case it could go to 5-days in jail. She remarked that it would be quite unheard of to have 90-days or one-year in jail for a first-time DUI.

[3:41:14 PM](#)

CHAIR LEDOUX referred to Sec. 26.05.611, "Drunken or reckless operation of a vehicle, aircraft, or vessel," beginning page 44, line 29, and advised this section needs work as there is a large difference between a careless or reckless manner while under the influence. She advised that generally careless is negligence which is just a violation. She stated she has no problem with the military exerting a harsher sentence for someone driving a military vehicle, but this includes a totally off duty person in the AKNG because the [AKNG decided its soldiers and airmen were under AKNG] 24/7. She stressed problems with subjecting someone who may have just run a stop sign, normally a violation, to one-year in jail.

CAPTAIN DUNBAR asked whether Chair LeDoux meant running a stop sign while intoxicated.

CHAIR LEDOUX explained there are two sections: (1) is just a careless or reckless manner; and (2) is operate under the influence of alcohol.

UNIDENTIFIED SPEAKER (indisc.)

CHAIR LEDOUX read "(a) a member of the military who operates or physically controls a nonmilitary ... in a careless or reckless manner or while impaired by a substance."

UNIDENTIFIED SPEAKER said "therefore..."

CAPTAIN DUNBAR said, you are correct. He advised this provision was brought in from the Federal UCMJ and it probably does subject the National Guard's soldiers and airmen to a higher standard than a typical civilian standard.

CHAIR LEDOUX offered that she does not have a problem with that while they are on duty, but has real problems with it while they are not on duty.

[3:44:09 PM](#)

REPRESENTATIVE GRUENBERG said the term "careless" must have been taken from another jurisdiction because it is not used in Alaska and suggested substituting "negligence."

CAPTAIN DUNBAR agreed, and said it was taken from the Federal UCMJ as it clearly is a term it uses, and he will continue to work on that. In re-reading this, he related, he is curious that maybe the "or" was supposed to be an "and," which it is materially important.

REPRESENTATIVE GRUENBERG pointed out that "or" is used in line 29 also, so it is disjunctive throughout.

CHAIR LEDOUX said this is being marked as the committee is aware there is perhaps a problem.

[3:45:12 PM](#)

CHAIR LEDOUX referred to Sec. 26.05.617, "Provoking speeches or gestures," page 48, lines 11-14, which read:

A member of the militia who uses provoking or reproachful words or gestures toward another member of the militia shall be punished by up to six months of confinement and by such other punishment as a court-martial may direct.

CHAIR LEDOUX asked whether it means that if one militia person says to another "you're an idiot" or worse, they can be jailed

for up to six months, and can this happen will they are off-duty.

CAPTAIN DUNBAR read the definition [located in the Manual for Courts-Marshall]:

As used in this article provoking and reproachful describe those words or gestures which are used in the presence of the person to whom they are directed, and which a reasonable person would expect to induce a breach of the peace under the circumstances.

CAPTAIN DUNBAR described that as essentially "fighting words. He continued reading:

These words and gestures do not include reprimands, sensors, reproofs and the like which may be properly administered in the interest of training, efficiency, or the discipline in the armed forces.

CAPTAIN DUNBAR explained that a reasonable person would have to expect that the provoking speeches or gestures would provoke a breach of the peace.

[3:47:00 PM](#)

REPRESENTATIVE GRUENBERG expressed that he has significant problems with this provision having lived with guys on the deck division for a few years. Although, he offered, if discussing inciting a riot, it should be re-drafted.

CAPTAIN DUNBAR explained that this is one of the few provisions, "and may be an error on my part," where the Alaska National Guard's punishments are potentially harsher than the UCMJ, in that the UCMJ has no discharge. Perhaps, he said, the potential punishments available could be reduced. Although, he stressed, his command would be very upset if this was taken out entirely because it is a tool quite often used in the active duty context.

REPRESENTATIVE GRUENBERG asked Captain Dunbar to review Anniskette v. State of Alaska, 489 P.2d 1012 (1971) in that it dealt with a policeman upset that someone on the telephone was swearing at him, and the person was convicted of disturbing the peace, or something like that. He commented that the case went up to the Supreme Court who reversed and said that this is something that should have been dealt with without ...

3:48:41 PM

CHAIR LEDOUX stated she understands where command may be coming from, but she has real problems when discussing off duty people in that she knows how conversations amongst regular people can go and sometimes they get pretty mad.

CAPTAIN DUNBAR responded that another important limiting factor is that this is only toward another member of the militia.

CHAIR LEDOUX surmised that would be like a rule that legislators can only say nasty things against another member of the legislature. She expressed that if the person is off duty ...

CAPTAIN DUNBAR said that in this case they would have to be off duty and speaking to each other face-to-face and not over the telephone, as that is how it is defined in the definition he read previously. He said, "You have to be physically face-to-face and a reasonable person has to be able to conclude that it would provoke them to a breach of the peace."

REPRESENTATIVE LYNN noted there are many colorful words many people have used from time-to-time. He offered that it is one thing to use this language as a matter of expression and another to get into someone's face, which goes to "fighting words."

3:50:58 PM

REPRESENTATIVE MILLETT pointed out that it leaves a lot to interpretation.

CAPTAIN DUNBAR replied that it is intended to be a reasonable person standard that is objective, but would take into account such things as the age and rank, and whether these words are likely to provoke that particular person. He suggested that the defense attorney and prosecutor would draw upon federal case law that this is based upon to determine cases that fit into their arguments. He said he agrees with comments that the AKNG is prosecuting service people off duty, and that it is larger than other states have contemplated. Command strongly wants this provision, he stressed, thereby giving AKNG the ability to nonjudicially punish people in the event of an array or a verbal altercation between two off duty soldiers or airmen. He described the provision as an "important tool to have us do so."

REPRESENTATIVE MILLETT stressed that she is uncomfortable with the provision because a person may not know the other person's history and; therefore, does not know what will provoke them. She offered that what provokes Captain Dunbar and what provokes her may not be covered in case law, and that case law cannot take into account every conversation or every provocative conversation she may have.

3:54:18 PM

CAPTAIN DUNBAR referred to information provided within the Manual of Courts-Martial, and read:

It is not necessary that the accused have knowledge of the person toward whom the words or gestures are directed to the person subject to the code.

CAPTAIN DUNBAR explained that the person does not have to know the other person is service member for this to apply. He expressed that the AKNG will prosecute a service member regardless of whether that service member had a specific issue that would set them off. He agreed there is no question this is a broad power, but the AKNG holds its soldiers and airmen to a higher standard than the standard civilians expect. He said while it may be okay for civilians to get up in each other's face and scream and cuss, a soldier or airman swears to uphold the Alaska State Constitution and follow every order and regulation, and they are expected to give up certain things of which perhaps the ability to swear in someone's face is one. He offered that he is sympathetic to the thought that six-months in prison is a long time.

3:55:32 PM

CHAIR LEDOUX reminded Captain Dunbar that the Alaska National Guard (AKNG) is the military as a governmental entity, but that AKNG is also an employer. As an employer, she may be able to fire her employees for swearing, but she can't make them go to jail because she doesn't like what they are doing. The jail element of this is a problem, she stressed.

CAPTAIN DUNBAR offered the thought of removing the ability to put service men in prison and to discharge them, the AKNG would still be able to use nonjudicial punishment to fine and reduce them in rank, thereby, receiving punishment. He argued that the AKNG is much more than just an employer in that a person commits themselves to an organization that has the power of life and

death over them. He related that it goes beyond the typical employer/employee relationship, but he is sympathetic that putting someone in jail for six-months might be severe.

CHAIR LEDOUX reminded Captain Dunbar that the committee has amended other broadly drafted sections.

[3:57:21 PM](#)

REPRESENTATIVE LYNN pointed out that the Alaska National Guard (AKNG) is on duty 24/7, and he wanted to be certain the committee separates this from insubordination. He asked whether there can be insubordination for an off duty member in the civilian realm if the member knows the person they are directing these words to is a superior officer. He said there should be a clear distinction regarding insubordination when on duty, and off duty.

CAPTAIN DUNBAR agreed that there is a different kind of offense when addressing a superior officer, and the ability to impose a sentence of confinement in disrespect toward a superior officer has been deleted. Although, he said, the ability to dishonorably discharge remains in the provision, Sec. 26.05.589 and noted that at the request of Chair LeDoux, subsection (b) was added, page 39, lines 7-8, which read:

(b) A court-martial may not impose a sentence of confinement under this section.

CAPTAIN DUNBAR remarked there was a contradiction in that where it stands now, as a service member could disrespect a superior officer and not be confined, but if a service member disrespected another enlisted service member they could be confined. Representative Lynn is correct in that there are different insubordination provoking gestures and disrespecting superior officer are distinct provisions and there are provisions for each.

[4:00:11 PM](#)

REPRESENTATIVE GRUENBERG conveyed that this provision needs to be discussed at length with each member individually by Captain Dunbar, particularly because there are these others on page 39. He asked whether this is really needed when most of the conduct concerned about probably is, or should be, in that part of the bill. He suggested that Captain Dunbar advise command that if this provision remains, it should start from the narrowest

possible language, and then justify going beyond that. He advised that this is a state legislature by a constitution that protects individual rights and this is way beyond anything that would even provide a threat. He conveyed that unless he is convince this provision is necessary he will not support the provision.

CHAIR LEDOUX offered that the committee is aware there are problems.

[4:02:38 PM](#)

ADJOURNMENT

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 4:02 p.m.