

**ALASKA STATE LEGISLATURE**  
**HOUSE SPECIAL COMMITTEE ON MILITARY AND VETERANS' AFFAIRS**

March 26, 2015

1:01 p.m.

**MEMBERS PRESENT**

Representative Bob Herron, Chair  
Representative Gabrielle LeDoux, Vice Chair  
Representative Jim Colver  
Representative Shelley Hughes  
Representative Bob Lynn  
Representative Max Gruenberg  
Representative Chris Tuck

**MEMBERS ABSENT**

All members present

**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 & 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

## **WITNESS REGISTER**

THOMAS BROWN, Staff  
Representative Gabrielle LeDoux  
Alaska State Legislature  
Juneau, Alaska

**POSITION STATEMENT:** On behalf of Representative LeDoux, House Judiciary Standing Committee Chair, introduced HB 126.

BOB DOEHL, Deputy Commissioner  
Office of the Commissioner/Adjutant General  
Department of Military & Veterans' Affairs  
Joint Base Elmendorf-Richardson, Alaska

**POSITION STATEMENT:** Provided a PowerPoint presentation entitled "Alaska Code of Military Justice HB 126 and the Alaska National Guard," and answered questions.

FIRST LIEUTENANT FORREST DUNBAR, Alaska Army National Guard  
Office of the Commissioner/Adjutant General  
Department of Military & Veterans' Affairs  
Joint Base Elmendorf-Richardson, Alaska

**POSITION STATEMENT:** Answered questions during the hearing of HB 126.

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

**POSITION STATEMENT:** Answered questions during the hearing of HB 126.

CAPTAIN JENNIFER KING, Judge Advocate General  
Alaska Army National Guard  
Joint Base Elmendorf-Richardson, Alaska

**POSITION STATEMENT:** Answered a question during the hearing on HB 126.

## **ACTION NARRATIVE**

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**CHAIR BOB HERRON** called the House Special Committee on Military and Veterans' Affairs meeting to order at 1:01 p.m. Representatives LeDoux, Hughes, Tuck, and Herron were present at the call to order. Representatives Gruenberg, Lynn, and Colver arrived as the meeting was in progress.

**HB 126-CODE OF MILITARY JUSTICE; APPEALS**

[Contains discussion of HB 121]

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CHAIR HERRON 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."

CHAIR HERRON acknowledged Representative Tuck and his staff for the work they have done on the proposed legislation.

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REPRESENTATIVE LEDOUX moved to adopt the proposed committee substitute (CS) for HB 126, labeled 29-LS0473\H, Strasbaugh, 3/24/15, as the work draft.

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CHAIR HERRON objected for discussion purposes.

[The committee treated Chair Herron's objection as removed.]

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REPRESENTATIVE GRUENBERG objected for discussion purposes.

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REPRESENTATIVE LEDOUX, speaking as the chair of the House Judiciary Standing Committee, sponsor, informed the committee HB 126 is timely and necessary legislation. Alaska's National Guard command has asked for a greater ability to pursue and prosecute those members who violate military rules and protocols. House Bill 126 honors that request and lays out a blueprint for administrative procedures for use by National

Guard leadership in the state. Representative LeDoux thanked Representative Tuck and his staff for their work on this issue and their assistance to the House Judiciary Standing Committee staff.

REPRESENTATIVE TUCK said it has been difficult for the Department of Military & Veterans' Affairs (DMVA) to not have a code of military justice when guidance is needed. The bill establishes a set of procedures and substantive criminal laws modeled from a code provided by the U.S. Department of Defense (DoD). He observed that Alaska Statutes are unique, thus it was difficult to draft a document that protects members of the Alaska National Guard and ensures its integrity.

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THOMAS BROWN, Staff, Representative Gabrielle LeDoux, Alaska State Legislature, informed the committee HB 126 would grant the Alaska National Guard (AKNG) a basic legal framework to establish a functioning system of military justice. He recalled that Representative Tuck introduced HB 121, which was similar legislation; in fact, a significant portion of HB 121 has been rolled into HB 126. However, HB 126 grants a greater amount of administrative authority to AKNG in order to achieve its goal, and is the method preferred by DMVA and AKNG leadership. The sponsor does not anticipate that HB 126 would pass the legislature this session, but that technical problems can be discovered and corrected in order to prepare the bill for passage early in 2016. Mr. Brown paraphrased from the sectional analysis of HB 126 as follows [original punctuation provided]:

Section 1, page 1 - amends 22.07.020. Designates the Alaska Court of Appeals as the appellate court for service-members who have exhausted their administrative appeals. Section 2, page 2 - amends 26.05.140(a). Limits criminal liability for Guard members for any act done in their official capacity in the line of duty, but does not apply to charges already brought before a military court; 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 which will,

p.3: - Organize courts-martial; - Provide for nonjudicial 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; - Grant of 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, and jurisdictions of courts-martial, p.8- 11; - 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.

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CHAIR HERRON turned the gavel over to Vice-Chair LeDoux.

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ROBERT DOEHL, Deputy Commissioner, Office of the Commissioner/Adjutant General, DMVA, provided a PowerPoint presentation entitled "Alaska Code of Military Justice HB 126

and the Alaska National Guard." Mr. Doehl said AKNG traces its heritage to the militias of the colonies that predate the formation of the United States. The Alaska National Guard remains under the command and control of the governor and is a state militia, although the federal government recognizes the federal interest in a militia and provides financial support to organize, train, and equip AKNG (slide 1 entitled "AK National Guard Funding"). Mr. Doehl said DMVA supports HB 126 on the following key points: HB 126 provides an enabling statute to assure that AKNG adjusts to changes in the federal Uniform Code of Military Justice (UCMJ); HB 126 addresses constitutional issues of due process unique to Alaska; HB 126 is the right mechanism to address recent AKNG issues and to maintain good order and discipline; HB 126 is not redundant to state civilian criminal law but will supplement state law; HB 126 serves as a deterrent (slide 2 entitled "Key Points on HB 126 & ACMJ"). Mr. Doehl said the missing leg for the "three-legged stool of good order and discipline" is a mechanism for an Alaska Code of Military Justice (ACMJ); AKNG has the use of administrative law and Alaska criminal law, but lacks a means to reform an individual (slide 3 entitled "Good order and Discipline").

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FIRST LIEUTENANT FORREST DUNBAR, Alaska Army National Guard, Office of the Commissioner/Adjutant General, DMVA, informed the committee that AKNG does have a territorial-era military code: Alaska Statute Title 26; however, the code does not provide for a code of military justice. Although the existing code does provide that AKNG may create a military code, it does not define the necessary procedures, or require AKNG to do so, which are provisions in HB 126. The federal UCMJ includes criminal offenses, in addition to military offenses, thus the proposed ACMJ would not mirror UCMJ, but would be limited to military offenses. The Alaska state criminal code also applies to soldiers/airmen (slide 4 entitled "Existing Relevant Law"). He explained the following different statuses that apply to guardsmen (slide 5 entitled "Examples of Service-member Statuses and slide 6 entitled "Applicable Law"):

- Title 32 occurs during a duty weekend when guardsmen are commanded by the governor and resourced by the federal government. Also in Title 32 are active guard reserve (AGR) in full-time guard status.
- Title 10 occurs when guardsmen are fully federalized and deployed, thus are subject to UCMJ.

- State Active Duty occurs when guardsmen are commanded and resourced by the state, for example, during disaster response.

LIEUTENANT DUNBAR further explained that Title 10 also applies to active duty U.S. military and to fully federalized national guardsmen, and the Alaska criminal code applies at all times when guardsmen are in Alaska, regardless of status; however, there is no military code of justice that applies to Title 32 or State Active Duty guardsmen, and these are the circumstances HB 126 seeks to address. He returned attention to the goal of good order and discipline and further described that the missing part - ACMJ - has not been available either through courts-martial or for non-judicial punishment. Non-judicial punishment is a frequently-used tool by commanders and does not require a trial or severe punishment, but is swift and certain discipline (slide 7 entitled "Good order and Discipline"). Among the tools required by commanders and administrators to maintain order and discipline are administrative actions, such as letters of reprimand and administrative separation with a characterization of service (slide 8 entitled "Tools Required to Maintain Good Order & Discipline"). At this time, AKNG cannot give bad conduct or dishonorable discharges, however, dishonorable discharges would be available by the proposed code under a general court-martial. He restated AKNG's support of the bill and its intent to develop a set of regulations that stipulate offenses and penalties, as well as procedures and a regulation for non-judicial punishment. Lieutenant Dunbar stated AKNG's intent to work with the legislature during interim to determine detailed statutory language, and hear testimony from commanders (slide 9 entitled "The Guard's Current Plan of Action"). Prior to January 2016, regulations will be presented to legislators.

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REPRESENTATIVE GRUENBERG directed attention to Version H on page 2, lines 14-16 which read in part:

Nothing in this subsection applies to a proceeding or action brought under this chapter or the code of military justice.

REPRESENTATIVE GRUENBERG suggested the aforementioned language should be included in the applicability clause found in section 10 on page 37. He then directed attention to Version H on page 34, lines 3-5 which read in part:

The code of military justice shall be construed to carry out their general purpose and, so far as practicable, in a manner uniform with 10 U.S.C. 801-946.

REPRESENTATIVE GRUENBERG surmised that crimes adopted in the proposed bill would be interpreted as the equivalent provision in UCMJ.

LIEUTENANT DUNBAR said correct; this provision is persuasive, but not controlling, precedent.

REPRESENTATIVE GRUENBERG expressed his understanding that following the adoption of a law from another state, the interpretation of the law from the other state's highest court is simply persuasive. Further, this is true if a uniform act is adopted and is a major advantage to adopting a uniform act. Referring back to HB 126, he said "this here, sounds like it's different, like it's simply persuasive" and he urged the sponsor to review this aspect, and opined it's very important to really understand how the bill is going to work.

VICE-CHAIR LEDOUX confirmed the section in question was proposed section 26.05.560.

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MR. DOEHL said the intent of this language was to define a consistent body of law at the state level in Alaska. He recalled:

Looking at these military code provisions, because there is still variance and ... on how the uniform code has been adopted to look to article 1 and article 3 courts as they have interpreted the federal code of military justice, and as they have developed that body of law and that body of law frankly continues to evolve. ... At any time it remains persuasive to this jurisdiction, was my best recollection of that case law.

REPRESENTATIVE GRUENBERG said the issue is that crimes would not be adopted by the legislature, but would be adopted administratively; in the past, precedent was set by judges and not by an administrative agency. If a statute is enacted through a regulation, the ruling of the statute is important.

VICE-CHAIR LEDOUX understood that if Alaska adopts a law of another state, the interpretation of that law by the highest court of the other state would be persuasive on Alaska's court, but would not be binding on Alaska's court.

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NANCY MEADE, General Counsel, Administrative Staff, Office of the Administrative Director, Alaska Court System, opined that adopting codes from other jurisdictions, which was done largely at the onset of statehood, meant that the other jurisdiction's courts' interpretation of those provisions are highly persuasive on the Alaska courts, but are not binding. In a similar manner, when Alaska adopts uniform laws, the interpretations are persuasive on Alaska's courts, but not binding.

REPRESENTATIVE HUGHES returned attention to slide 8 and asked for examples of crimes addressed by non-judicial punishment and courts-martial, under the proposed ACMJ. Also, she asked for an example of procedures that precede issuing a non-judicial punishment.

LIEUTENANT DUNBAR answered that some procedures would be in regulation as tasked by the bill. In general, a non-judicial punishment charge is less serious than one addressed by court-martial. Certain officers at certain levels bring non-judicial punishments.

MR. DOEHL added that the accused can request a non-judicial punishment or a special court-martial. Non-judicial punishment is for crimes such as sleeping on duty, or failure to report for duty; courts-martial are for more serious offenses such as urging others to disobey a direct order.

REPRESENTATIVE HUGHES surmised that non-judicial punishment would be issued by an officer.

MR. DOEHL stated although the decision is made by one officer, there is a process to give the individual a right to be heard, to be represented, and to present evidence, and the decision can be challenged.

REPRESENTATIVE HUGHES observed that it is unusual to have proposed regulations drawn prior to the passage of a bill; she asked whether this process has been used elsewhere. She also inquired as to whether participation in discussions about the bill by military members would only include officers (slide 9).

LIEUTENANT DUNBAR offered that Oregon adopted existing regulations on substantive offenses in a similar manner as proposed; in general, Alaska will draw on the experiences of the federal UCMJ, that of other states, and the model code distributed by National Guard Bureau. The National Guard Bureau model was used extensively in HB 121, although some offenses in the model code are archaic. Military participation will be encouraged from a broad cross-section of guardsmen.

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MR. DOEHL directed attention to slide 9 and explained the commander's action group will include members at the airmen level from each branch. The importance of the issue affected the timing and he said, "in order to move the process along, and also to simplify the oversight, to say 'this is how we envision carrying out the legislation you're giving us' we felt it best to proceed now rather than wait."

REPRESENTATIVE HUGHES asked whether the bill was based on UCMJ with the criminal part removed.

LIEUTENANT DUNBAR acknowledged that ACMJ will essentially be UCMJ stripped of nonmilitary offenses; however, that is not specified in the proposed statute. There may be certain offenses not carried forward from UCMJ, or others added. The statute and regulations will be Alaska documents, and he gave an example of protections in the Alaska State Constitution that would cause ACMJ to differ from UCMJ.

REPRESENTATIVE HUGHES inquired as to whether other states have adopted a similar code.

LIEUTENANT DUNBAR deferred to Captain Jennifer King.

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CAPTAIN JENNIFER KING, Judge Advocate General, Alaska Army National Guard, was unsure of the number of states that are operating without their own state UCMJ; however, Alaska is not the last as Alabama put its code in place in 2015, and Kentucky is in the process of revision.

VICE-CHAIR LEDOUX asked whether the military codes adopted in other states include criminal laws.

LIEUTENANT DUNBAR was unsure.

MR. DOEHL said, "I believe some have criminal codes on the book, I believe they are rarely, if ever, exercised." In Alaska, the small size of the military creates a challenge when a panel is needed for procedural and due process. For example, gathering a jury of members of a rank above the rank of the accused, from a small pool, is daunting in a felony case.

REPRESENTATIVE TUCK returned attention to slide 8, and recalled a problem with the old code of military justice in Alaska was that it did not have a system of checks and balances, thus there was favoritism. He noted HB 126 provides the opportunity to be consistent in regulations and statute. He urged the sponsor to consider that courts-martial may need to be in statute in order to prevent unilateral changes following a change in command. Representative Tuck supported the process underway.

LIEUTENANT DUNBAR agreed that commanders must enforce the law appropriately whether in regulation or statute; however, HB 126 defines court-martial procedures and requires AKNG to create regulations with the intent to bind future commanders and adjutants general to identify substantive offenses. He acknowledged that "by putting this in regulation rather than statute, we are putting some trust in this command, that we will develop appropriate regulations and that we will enforce them."

REPRESENTATIVE TUCK restated that one of the best ways to bind future commanders is through statute.

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MR. DOEHL pointed out that the challenge with binding statute is to keep current as the law evolves. In the age of digital offenses, he cautioned about having to come back to the legislature for changes in statute after court rulings.

VICE-CHAIR LEDOUX asked whether [UCMJ] is in statute or regulations.

MR. DOEHL responded that UCMJ is in U.S. Code Title 10. In further response to Vice-Chair LeDoux, he said the military is challenged to keep the code relevant, timely, and effective.

REPRESENTATIVE TUCK agreed, but urged the sponsor to remain open to his suggestion.

REPRESENTATIVE GRUENBERG advised that crimes found in Alaska law may not be found in federal military law. He posed the situation in which a guardsman serving under Title 32 violated Alaska law, and asked whether the accused would be prosecuted by Alaska civil authorities.

LIEUTENANT DUNBAR said yes; currently accepted procedure is that the civilian authorities act first.

REPRESENTATIVE GRUENBERG assumed the Alaska State Constitution would be applicable to the proposed ACMJ.

LIEUTENANT DUNBAR said absolutely; this is a state law governed by the protection of double jeopardy and by the Alaska State Constitution.

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REPRESENTATIVE GRUENBERG asked whether ACMJ would include [Alaska Statutes] Title 12, which describes provisions of sentencing such as aggravators and mitigators, and the right to a jury.

MR. DOEHL said if a crime is actionable in the context of Title 11 of the Alaska criminal code, Title 12 would apply. Part of the reason for the time needed to write the regulations is to carefully look at the applicability of aggravating and mitigating factors of Title 12 in an administrative context.

REPRESENTATIVE GRUENBERG turned to "nonequivalent kinds of crimes" and asked whether the Alaska State Constitution would also apply.

LIEUTENANT DUNBAR said yes. In further response to Representative Gruenberg, he confirmed that the sponsor will be looking at aggravating and mitigating factors.

VICE-CHAIR LEDOUX said the reference to aggravating and mitigating factors is confusing. She observed ACMJ would apply to civil law, and aggravating and mitigating factors apply to criminal cases where one has committed a crime under state law, which would be referred to state authorities.

LIEUTENANT DUNBAR confirmed that if a civilian criminal law applies, the case would be prosecuted in civilian court; however, the substantive provisions of ACMJ would be similar to criminal law. For example, a general court-martial conviction

can result in a prison sentence of up to ten years. He acknowledged that military offenses are unique, and thus do not apply to other citizens of the state, such as dereliction of duty and conduct unbecoming an officer. In that the penalties can be ten years in prison, ACMJ must conform to the protections that a criminal defendant would receive.

REPRESENTATIVE GRUENBERG advised that military crimes can be major crimes resulting in severe penalties.

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MR. DOEHL remarked:

We're taking a military context of what constitutes criminal law and applying it under the regiment of the Alaska [State] Constitution ... that's why we're going to be diligently working hard on it this summer to try to de-conflict and sort out those things. Ultimately what we do has to comport with the Alaska [State] Constitution as well as the [U.S. Constitution], a requirement the feds don't have because we're an Alaska governmental entity.

REPRESENTATIVE TUCK questioned how the state differentiates what should be in statute and what should be in regulations.

MS. MEADE advised that criminal penalties and criminal rights and duties are found in Alaska Statutes, Title 11, and procedures to implement criminal laws are found in Title 12. Currently, there are no criminal provisions in regulations; for example, neither the Department of Public Safety nor the Department of Law can put criminal provisions in their regulations. Regulations can provide for civil penalties such as parking tickets.

VICE-CHAIR LEDOUX asked whether the Alcoholic Beverage Control Board, Department of Commerce, Community & Economic Development, could promulgate regulations which would be criminal.

MS. MEADE said she was unsure.

REPRESENTATIVE TUCK asked whether other departments can create offenses and punishments.

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MS. MEADE said she will inquire. She stated that the Alaska Court System is interested in HB 126 because of the provision that a person who has exhausted appeals within the military court-martial process can then go to the Alaska Court of Appeals. Ms. Meade said her understanding is that crimes will absolutely not be in ACMJ. She remarked:

So that if somebody does something untoward that seems somewhat criminal, and the state district attorney's office ... declines to prosecute ... under their typical criminal law, then this would fill in that gap and they, under the code, they could be court-martialed for conduct unbecoming, although it doesn't rise to the level of a criminal offense.

LIEUTENANT DUNBAR agreed with Ms. Meade and provided an example. He pointed out that the proposed code would grant the department unique powers to create and enforce a criminal code; however, the code would only be enforced against guard members who have volunteered to join AKNG, and who have sworn an oath to uphold the Constitution and follow orders in the chain of command. When new service members join, they will receive a briefing on the code to explain the new laws to which they must adhere.

VICE-CHAIR LEDOUX asked whether the aforementioned briefing would be given to an enlistee prior to, or after, enlistment. She related that a person can waive their right to a jury trial, which is waiving a right to a Constitutional provision, but suggested a person is best apprised that they are waiving their rights before "employment."

MR. DOEHL said this is an important separation of powers question that may be an issue of first impression in the state. He remarked:

If we look at federal law though, for instance, the regulation-writing authority for criminal misconduct that is delegated to like, Department of Interior and National Parks, there is, in a very similar Constitution, the federal Constitution, to ours, there is a basis for this delegation to the executive branch.

MR. DOEHL noted that every enlistee takes an oath to support and defend the U.S. Constitution, the Alaska State Constitution and the laws therein, but is not provided an explanation of what the

laws are. He agreed that recruiters should "provide notice of what you are signing up for ...."

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REPRESENTATIVE TUCK questioned the effect of ACMJ on civilians who work for AKNG.

MR. DOEHL responded that as currently written, HB 126 envisions actions only against guardsmen. On the federal side, civilians working for AKNG would not fall under the jurisdiction of ACMJ.

VICE-CHAIR LEDOUX observed that there are many civilians working for the military; she asked how civilians are affected by UCMJ.

MR. DOEHL advised that civilians who commit a crime go to a federal district court for criminal offenses, or to the Office of Personnel Management for labor issues. However, for government civilian workers and contractors deployed in Iraq or Afghanistan, offenses can be addressed by a military panel or in federal district court.

REPRESENTATIVE HUGHES questioned how an appeals process through the Alaska Court System would follow military court action.

LIEUTENANT DUNBAR stressed that relatively few cases would attain this level of ruling - perhaps less than one court-martial per year. The initial appeal would be to the Military Appeals Commission, although cases of first impression may reach the Alaska Court System. Jurisprudence will be based on that of other states, although this is a new area of law for Alaska civilian courts.

REPRESENTATIVE HUGHES returned attention to slide 8 and asked what type of punishment is used currently for minor offenses such as sleeping on duty.

MR. DOEHL stated that letters of reprimand with counseling are used for first and second offenses, but in some cases these actions lack the strength to deter behavior.

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REPRESENTATIVE HUGHES referred to the "military justice account" established by HB 126 and asked for its cost to the state. Also, she suggested that federal funds may be available for that account.

LIEUTENANT DUNBAR answered that the costs are reflected in Fiscal Note Identifier: HB126-MVA-NGMHQ-3-20-15 in the amount of \$107,000 in fiscal year 2016 (FY 16). Costs are expected to come down after the first year during which regulations are developed and military judges are trained.

MR. DOEHL added that the fiscal note accounts for a "worst case scenario" due to the infrequent number of cases. He acknowledged that a court-martial is very expensive and DMVA would seek applicable federal funds.

VICE-CHAIR LEDOUX asked for the unique elements of the Alaska State Constitution that affect the proposed ACMJ and which differ from the U.S. Constitution and its effects on UCMJ.

LIEUTENANT DUNBAR provided the examples of the Alaska State Constitution's right to a unanimous jury verdict and the right to a grand jury. Other provisions may arise. In further response to Vice-Chair LeDoux, he said federal law does not require a unanimous jury verdict. He clarified that the proposed ACMJ, in order to comport with the Alaska State Constitution, would require a unanimous decision by the panel, which is equivalent to a jury.

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REPRESENTATIVE GRUENBERG expressed his interest in the proposed Military Appeals Commission. There are "article 1 courts" that are created by the legislature, and which differ from courts created constitutionally and quasi-judicial bodies. He asked whether court rules would apply, and cautioned that this is a big issue.

MR. DOEHL said DMVA intends to search the administrative law provisions in Alaska regarding boards and commissions in order to capture what is required; in fact, the research in this context is incomplete at this time.

LIEUTENANT DUNBAR stated his intent to work with Legislative Legal Services, the Alaska Court System, and the Alaska Bar Association on all of the issues that arise.

REPRESENTATIVE GRUENBERG directed attention to Version H on page 31, lines 6-10 which read:

(h) The adjutant general shall adopt regulations to govern appellate procedure before the court. The regulations shall be substantially similar to the provisions for post-trial procedure and review of courts-martial under 10 U.S.C 801 - 946. The regulations must be approved by the governor. Regulations adopted under this section are exempt from AS 44.62 (Administrative Procedure Act).

REPRESENTATIVE GRUENBERG said the foregoing relates to the Military Appeals Commission exemption from the Administrative Procedures Act.

LIEUTENANT DUNBAR confirmed that many procedural regulations mandated by HB 126 are exempt; however, the legislature retains some oversight of the Military Appeals Commission.

REPRESENTATIVE TUCK asked for clarification.

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LIEUTENANT DUNBAR directed attention to Version H on page 4, lines 1-2 which read:

(c) The regulations adopted under this section are exempt from AS 44.62 (Administrative Procedure Act).

LIEUTENANT DUNBAR explained that the exemption is applicable to the majority of the proposed regulations, such as the offenses and non-judicial punishments.

REPRESENTATIVE TUCK directed attention to Version H on page 3, lines 1-3 which read in part:

(a) The adjutant general shall by regulation adopt a code of military justice consistent with this chapter for members of the militia of the state not in federal service;

REPRESENTATIVE TUCK said use of the word "shall" is inconsistent with the bill on page 37, line 31 which read:

TRANSITION: REGULATIONS. The adjutant general may adopt regulations to

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LIEUTENANT DUNBAR said this was a drafting error.

REPRESENTATIVE HUGHES understood that conduct unbecoming reaches into the personal life of a military member. She asked whether ACMJ would apply to guardsmen when they are not in uniform.

LIEUTENANT DUNBAR said yes. Certain rules apply only when one is on duty but in general, guardsmen are held to standards when in uniform or not.

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REPRESENTATIVE TUCK restated that only one court-martial is expected per year.

LIEUTENANT DUNBAR said that is the best estimate based on statistics from Washington and Oregon. The department has estimated two per year in its fiscal note.

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REPRESENTATIVE TUCK directed attention to Version H beginning on page 29, line 31, through page 31, line 10 which read:

Sec. 26.05.538. Military Appeals Commission. (a) The Military Appeals Commission is established in the Department of Military and Veterans' Affairs. The commission is a quasi-judicial agency. (b) The commission has jurisdiction to hear appeals from sentences and punishments imposed by courts-martial under the code of military justice. (c) The commission consists of three members appointed by the governor and confirmed by a majority of the members of the legislature in joint session. A member shall be a resident of this state and (1) be licensed to practice law (A) in this state and be a member in good standing with the Alaska Bar Association;(B) in another state and be a member in good standing of the bar of that state; or (C) as a member of the bar of a federal court; (2) have engaged in the active practice of law for at least five years; (3) be a former commissioned officer in the armed forces of the United States or the reserve components, or in the militia of a state; and (4) have at least five years' experience as an officer in the judge advocate general's corps of the armed forces of the United States or the militia of the state. (d) Except as provided in AS 39.05.080(4),

an appointee selected to fill a vacancy shall hold office for the unexpired term of the member whose vacancy is filled. A vacancy in the commission does not impair the authority of a quorum of members to exercise the powers and perform the duties of the commission. (e) A member may be reappointed if the reappointment complies with this section. (f) The members of the commission shall select a chair from among the members of the commission. The selection shall be subject to the approval of the adjutant general. (g) The governor may remove a commissioner from office for cause including but not limited to incompetence, neglect of duty, or misconduct in office. A commissioner, to be removed for cause, shall be given a copy of the charges and offered an opportunity to be publicly heard in person or by counsel in the commissioner's own defense upon not less than 10 days' notice. If a commissioner is removed for cause, the governor shall file with the lieutenant governor a complete statement of all charges made against the commissioner and the governor's finding based on the charges, together with a complete record of the proceedings. (h) The adjutant general shall adopt regulations to govern appellate procedure before the court. The regulations shall be substantially similar to the provisions for post-trial procedure and review of courts-martial under 10 U.S.C. 801 - 946. The regulations must be approved by the governor. Regulations adopted under this section are exempt from AS 44.62 (Administrative Procedure Act).

REPRESENTATIVE TUCK asked whether the foregoing section of the bill related to the Military Appeals Commission, "is satisfactory."

LIEUTENANT DUNBAR anticipated some changes to the language. One of the key points to remember is that AKNG is a small organization with few legal resources; therefore, AKNG seeks to expand the number of people who can serve as judge advocates and on the commission. Currently, the proposed bill contains stringent conditions for those who serve on the commission. In further response to Representative Tuck, he said the Military Appeals Commission is an appeals court. The court-martial is the trial court, the Military Appeals Commission is the appellate court, and the last right to appeal is to the Alaska Court of Appeals. In further response to Representative Tuck, he said the language related to who may serve on the court-

martial court was included in HB 121, but is not in HB 126, because it has not been determined whether this provision would be in statute or regulation.

REPRESENTATIVE TUCK recalled discussing possible conflicts of interest and impartiality, and offered to advise the sponsor on this matter.

LIEUTENANT DUNBAR noted that HB 126 holds some provisions to prevent conflicts, which is another reason to expand the pool of those who can serve as defense and trial counsel.

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VICE-CHAIR LEDOUX asked for examples of actionable conduct against a guardsman who is not on duty.

MR. DOEHL said those regulations have not been drafted or approved; however, he suggested an example would be posting one's military affiliation in conjunction with inappropriate comments on social media.

VICE-CHAIR LEDOUX posed the situation in the above example without a reference to one's military affiliation.

MR. DOEHL advised that the regulatory process needs to define the shared expectations of conduct on duty and off duty, and to establish notice to enlistees.

REPRESENTATIVE HUGHES asked for the term of service for commissioners on the Military Appeals Commission.

LIEUTENANT DUNBAR directed attention to Version H, page 37, lines 23-28 which read:

MILITARY APPEALS COMMISSION; STAGGERED TERMS.  
Notwithstanding AS 26.05.538, enacted by sec. 4 of this Act, and AS 39.05.055, the governor shall appoint the members of the commission to staggered initial terms as follows:

- (1) one member shall be appointed for two years;
- (2) one member shall be appointed for four years;

and

- (3) one member shall be appointed for six years.

LIEUTENANT DUNBAR acknowledged the default term of service would be inserted during interim.

REPRESENTATIVE GRUENBERG inquired as to whether there would be a requirement that the commissioners have been admitted to the [United States Court of Appeals for the Armed Forces].

LIEUTENANT DUNBAR said no.

REPRESENTATIVE GRUENBERG asked whether commissioners would be subject to the Alaska Code of Judicial Conduct.

MR. DOEHL responded that additional discussion with the Alaska Bar Association and the Alaska Court System is needed to define and delineate the professional responsibilities of the commissioners.

REPRESENTATIVE GRUENBERG asked for any comment on why commissioners are appointed by the governor and confirmed by the legislature instead of appointed by the Alaska Judicial Council.

LIEUTENANT DUNBAR suggested there would be further discussion on this matter.

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REPRESENTATIVE TUCK inquired as to whether AKNG currently has jail facilities or detention centers.

LIEUTENANT DUNBAR answered no. If a guardsman is imprisoned for any length of time the bill specifies that he/she would go to the Department of Corrections (DOC). In further response to Representative Tuck, he explained that if a guardsman were deployed overseas and committed an offense, AKNG would not be involved, but the active duty military would investigate. The military has all of the facilities of a free-standing judicial system. During deployment, military members are in Title 10 status, and subject to the federal UCMJ.

REPRESENTATIVE TUCK directed attention to Version H on page 7, lines 14-15 which read:

(a) A person confined as a prisoner under the code of military justice shall be confined in a civilian or military confinement facility.

REPRESENTATIVE TUCK observed that a guardsman convicted of a crime in Alaska would be held by DOC, and asked whether AKNG would need military confinement facilities.

MR. DOEHL said he did not envision building any confinement facilities. The military bases have a memorandum of agreement with DOC to provide confinement services.

REPRESENTATIVE GRUENBERG asked who would be admitted to practice in the proposed tribunals.

LIEUTENANT DUNBAR said this question is under discussion with the Alaska Bar Association; the sponsor prefers that an attorney would not have to be admitted to the Alaska Bar to participate in courts-martial because of the state's limited judge advocate resources.

REPRESENTATIVE GRUENBERG gave an example of an attorney from out-of-state who was hired to defend a client in a court-martial or before the Military Appeals Commission.

LIEUTENANT DUNBAR stated the sponsor's intention is that an attorney would be admitted to practice "somewhere," and duly qualified as a judge advocate. He pointed out that outside civilian counsel must be qualified to practice law in Alaska. In further response to Representative Gruenberg, he said in a proceeding in a federal court-martial, an attorney can practice anywhere in the country.

REPRESENTATIVE HUGHES returned to the topic of possibly needing a holding facility or a memorandum of agreement for confinement services, and noted that this is not reflected in the bill's fiscal note.

MR. DOEHL stated that the probability is very low, but the possibility would be examined.

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REPRESENTATIVE TUCK inquired as to why the inappropriate use of social media is not already in regulation.

LIEUTENANT DUNBAR returned attention to slide 8 and noted that social media issues are addressed by letters of reprimand, administrative action, and administrative separation, although administrative separation takes a long time to process.

MR. DOEHL, in further response to Representative Tuck, added that AKNG now has the means to initiate action against inappropriate social media posting; however, in some instances

action is required beyond letters of reprimand, but short of separation.

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REPRESENTATIVE GRUENBERG removed his objection.

[There being no further objection, Version H was before the committee.]

[2:55:20 PM](#)

VICE-CHAIR LEDOUX opened public testimony on HB 126. After ascertaining that no one wished to testify, public testimony was closed.

REPRESENTATIVE COLVER said that quite a lot of work was yet to be done on the bill and recommended delaying action until the committee receives a new proposed CS.

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REPRESENTATIVE COLVER moved to adopt Amendment 1, labeled 29-LS0473\H.1, Strasbaugh, 3/25/15 which read:

Page 5, line 16:

Delete "the state"

Insert "a state or of an active or reserve component of the armed forces or another uniformed service of the United States"

Page 11, line 6:

Delete "the state"

Insert "a state or of an active or reserve component of the armed forces or another uniformed service of the United States"

Page 30, line 16:

Delete the third occurrence of "the"

Insert "a"

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VICE-CHAIR LEDOUX objected for discussion purposes.

LIEUTENANT DUNBAR explained that Amendment 1 amends the bill to expand who can be involved in the military justice process. As

the bill is currently written, one who serves as a judge advocate must be a commissioned officer of AKNG. The intent of the amendment is to expand the pool of those who can work as a judge advocate before courts-martial to include those from other states, from active or reserve forces, or from active duty members at Joint Base Elmendorf-Richardson or Fort Wainwright.

REPRESENTATIVE GRUENBERG directed attention to a memo from Kathleen Strasbaugh, Legislative Counsel, Legislative Legal Services, dated 3/25/15, which was included in the committee packet, and in which questions are raised. Noting that Representative Herron, sponsor of the amendment, was not present, he suggested that Amendment 1 be held for further discussion.

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VICE-CHAIR LEDOUX agreed.

HB 126 was held over.

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#### **ADJOURNMENT**

There being no further business before the committee, the House Special Committee on Military and Veterans' Affairs meeting was adjourned at 3:00 p.m.