

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

March 31, 2015

1:46 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."

- MOVED CSHB 126(MLV) OUT OF COMMITTEE

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

WITNESS REGISTER

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: Introduced Amendment 1 to HB 126, Version H, and answered questions.

CAPTAIN JENNIFER KING, Judge Advocate General
Alaska Army National Guard
Joint Base Elmendorf-Richardson, Alaska
POSITION STATEMENT: Answered questions during the hearing on HB 126.

ACTION NARRATIVE

[1:46:25 PM](#)

CHAIR BOB HERRON called the House Special Committee on Military and Veterans' Affairs meeting to order at 1:46 p.m. Representatives LeDoux, Hughes, Colver, Tuck, Lynn, and Herron were present at the call to order. Representative Gruenberg arrived as the meeting was in progress.

HB 126-CODE OF MILITARY JUSTICE; APPEALS

[1:46:51 PM](#)

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."

[Committee substitute for HB 126 labeled 29-LS0473\H, Strasbaugh, 3/24/15 was adopted 3/26/15; Amendment 1 labeled 29-LS0473\H.1, Strasbaugh, 3/25/15, was moved and objected to on

3/26/15. Version H and Amendment 1 were before the committee.
Amendment 1 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"]

[1:47:56 PM](#)

FIRST LIEUTENANT FORREST DUNBAR, Alaska Army National Guard, Office of the Commissioner/Adjutant General, Department of Military & Veterans' Affairs (DMVA), explained Amendment 1 expands the pool of those who can serve in specific capacities, such as judge advocates. He reminded the committee the Alaska National Guard (AKNG) has few judge advocate resources, and they are sometimes "conflicted" or otherwise unavailable, therefore, in order for courts-martial proceedings to advance, AKNG seeks to draw upon resources from other national guards or from active duty components. Lieutenant Dunbar directed attention to a memo from Kathleen Strasbaugh, Legislative Counsel, Division of Legal and Research Services, Legislative Affairs Agency, dated 3/25/15, included in the committee packet. In the memo, Ms. Strasbaugh questioned whether the intent of Amendment 1 was to include National Oceanic and Atmospheric Administration (NOAA) and Public Health Service (PHS) commissioned corps in the pool of military officers. Lieutenant Dunbar said yes, that was the intent as AKNG wishes to broaden its resources when necessary. The officers would be overseen by the senior force judge advocate, and will have had experience that qualifies them to act as counsel. He said AKNG wants to avoid a situation where a qualified person is not allowed to serve as a judge advocate because of provisions in the Alaska Code of Military Justice (ACMJ) proposed in HB 126. Ms. Strasbaugh's memo also points out an error that has been resolved, and questions the intent of Amendment 1 to expand existing law "in a different section in a

very particular way, and we didn't intend it to." Finally, Ms. Strasbaugh asked whether the amendment allows that all judges and attorneys connected with a court-martial, except for the appeals commission, may be from out-of-state, and he said the answer is yes. Lieutenant Dunbar stressed the important point is that the commander bringing the charges and the appeals commission would be Alaskans, which would ensure a strong Alaska component to the proceeding. He concluded that the concerns raised in the memo have been addressed.

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REPRESENTATIVE GRUENBERG read from the memo as follows:

... you did not request that [AS 26.05.410(d), 26.05.453(b)(3), or 26.05.590(21)] be amended to allow a military judge or judge advocate from another force to be detailed to preside or be appointed as counsel.

REPRESENTATIVE GRUENBERG asked whether the intent was to allow a military judge or judge advocate from another force to be detailed to preside, or to be a judge advocate.

LIEUTENANT DUNBAR said no. The key words are "another force" and the definition has to do with the Army National Guard and the Air National Guard. He remarked:

A simple reading of this, we've already done that, but not with respect to 26.05.590(21) which refers to the senior force judge advocate, so it had issues with the senior force judge advocate: there's one for the Air National Guard, there's one for the Army National Guard and she was worried that we wanted to expand it further and, but we don't need to, that's basically what the, what the upshot is.

REPRESENTATIVE GRUENBERG returned attention to the memo on page 1, the second sentence of the third paragraph, which read in part:

The UCMJ applies to National Oceanic and Atmospheric Administration and Public Health Service staff when they are in service to the armed forces

REPRESENTATIVE GRUENBERG said the aforementioned is a "big qualifier" because normally NOAA and PHS are not in proximity to

armed services. He urged that the text make this extremely clear.

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LIEUTENANT DUNBAR explained the memo questions whether the Uniform Code of Military Justice (UCMJ) applies to NOAA or PHS staff; however, AKNG's purpose is to use uniformed officers - in those two services - to serve in its behalf as judge advocates.

REPRESENTATIVE GRUENBERG questioned whether it is appropriate to assign PHS doctors or NOAA officials, who may have no knowledge of the UCMJ, to serve on courts-martial; in addition, whether PHS or NOAA has lawyers in the vicinity of the state.

LIEUTENANT DUNBAR reminded the committee that the provision does not relate to who may serve on courts-martial; for example, a NOAA officer living in Alaska and who has been a judge advocate would be eligible to serve as a judge advocate. He pointed out that the provision does not conscript anyone or require service, but would enable the senior judge advocate to ask.

REPRESENTATIVE GRUENBERG inquired as to whether judge advocates are lawyers.

LIEUTENANT DUNBAR said yes. In further response to Representative Gruenberg, he agreed the chances of AKNG using that specific part of the provision are relatively low; however, AKNG seeks the ability to use the provision if possible.

CHAIR HERRON opined the likelihood of using the provision is extremely low, and asked if Representative Gruenberg sought to offer an amendment.

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REPRESENTATIVE LEDOUX removed her objection to Amendment 1.

REPRESENTATIVE GRUENBERG stated his intent to revisit this issue in the next committee of referral.

[1:59:43 PM](#)

There being no further objection, Amendment 1 was adopted.

[1:59:56 PM](#)

REPRESENTATIVE TUCK moved to adopt Amendment 2, labeled 29-LS0473\H.3, Strasbaugh, 3/28/15, which read:

Page 10, following line 30:

Insert a new section to read:

"Sec. 26.05.452. Who may serve on courts-martial.

(a) A commissioned officer of the militia of a state or of an active duty component of the armed forces of the United States is eligible to serve on a general, special, or summary court-martial for the trial of a member of the militia in active state service.

(b) A warrant officer of the militia of a state or of an active duty component of the armed forces of the United States is eligible to serve on a general or special court-martial for the trial of any person, other than a commissioned officer.

(c) An enlisted member of the militia of the state who is not a member of the same unit as the accused is eligible to serve on a general or special court-martial for the trial of an enlisted member, but only if the accused has, before the conclusion of a session of the court-martial called by the military judge under AS 26.05.528, personally requested, orally on the record or in writing, that enlisted members serve on the court-martial.

(d) After a request is made under (c) of this section, the accused may not be tried by a general or special court-martial unless enlisted members make up at least one-third of the total membership of the court. If eligible enlisted members are not available because of physical conditions or military exigencies, the court may proceed to try the accused without enlisted members, but the convening authority shall place on the record a detailed written explanation of why eligible enlisted members were not available.

(e) The accused may not be tried by a court-martial that includes a member who is junior in rank or grade to the accused, unless the inclusion cannot be avoided.

(f) When convening a court-martial, the convening authority shall detail the members of the militia of a state or of an active duty component of the armed forces of the United States who are, in the convening authority's opinion, the best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. A person is not eligible to serve as a

member of a general or special court-martial if the person is the accuser, is a witness, or has acted as investigating officer or as counsel in the same case.

(g) Before a court-martial is assembled for the trial of a case, the convening authority may excuse a member of the court from participating in the case. The convening authority may delegate the authority under this subsection to a judge advocate or to a principal assistant."

2:00:06 PM

CHAIR HERRON objected for discussion purposes.

REPRESENTATIVE TUCK explained Amendment 2 would establish a procedure for who may serve on a courts-martial, including a commissioned officer of the state militia or of an active duty component of the armed forces of the U.S., a warrant officer of the state militia or of an active duty component of the armed forces of the U.S., an enlisted member of the state militia who is not a member of the same unit as the accused. He advised that the amendment was discussed with First Lieutenant Dunbar and was approved by DMVA.

LIEUTENANT DUNBAR confirmed that the provision in Amendment 2 was a provision of HB 121 and which was not included in HB 126 in error. The amendment provides who may serve on the courts-martial panel and, in addition to the original provision, expands those eligible to a member of a guard or an active duty component. He restated that AKNG is lacking a sufficient number of those who are qualified to serve, particularly on a panel considering a case involving a member of high rank. In response to Representative Gruenberg's previous point, unlike the pool for adjutants general, the pool for the courts-martial panel is not expanded to include members of NOAA or PHS. He provided an example related to administrative separation hearings, and urged the committee to adopt Amendment 2.

REPRESENTATIVE HUGHES asked for additional information related to a courts-martial panel.

LIEUTENANT DUNBAR answered that the panel is similar to a jury; in a general court-martial there are five members, and for a special court-martial there are three members. In further response to Representative Hughes, he said a general court-martial can decree penalties up to ten years or a dishonorable

discharge for more serious offenses, and a special court-martial is limited to less serious offenses.

2:04:29 PM

REPRESENTATIVE GRUENBERG understood that in a general court-martial, at least two of the five members would have to be enlisted members.

LIEUTENANT DUNBAR nodded yes.

REPRESENTATIVE GRUENBERG directed attention to Amendment 1 on page 1, line 20 which read in part:

to try the accused without enlisted members, ...

REPRESENTATIVE GRUENBERG asked whether the intent was to proceed without any enlisted members, or without one-third of enlisted members, and if so, the written explanation would be required.

LIEUTENANT DUNBAR said correct. It is AKNG's intention to have enlisted members on the panel if requested, and a written explanation would be required in the case of exigent circumstances.

REPRESENTATIVE GRUENBERG clarified his concern was "when this comes into play." He opined the ambiguous language requires a modifier, and he would offer "without the required minimum number of enlisted members," as a conceptual amendment at the appropriate time.

LIEUTENANT DUNBAR said the sponsor has no objection.

CHAIR HERRON recommended that Representative Gruenberg hold the foregoing conceptual amendment for the next committee.

REPRESENTATIVE GRUENBERG directed attention to Amendment 2, page 2, line 4 which read in part:

... best qualified ...

REPRESENTATIVE GRUENBERG inquired as to who makes the determination of "best qualified."

LIEUTENANT DUNBAR stated that is based on the discretion of the convening authority.

2:08:23 PM

CAPTAIN JENNIFER KING, Judge Advocate General, Alaska Army National Guard, explained that from her experience, convening authorities are provided a list - created through the personnel section - of all of individuals who could sit on a panel, determined by the rank of the accused, and whether the accused elected to have all officers or a mix of officers and enlisted members. Following that, the convening authority would review the list, and review the enlisted record briefs and the officer record briefs of the potential panel members, and make selections.

REPRESENTATIVE GRUENBERG asked whether there are standards related to religion.

CAPTAIN KING advised that if a panel member were chosen based on faith, his/her appointment would be open to legal challenge during the vior dire of the panel.

REPRESENTATIVE GRUENBERG expressed his interest in knowing what the standards are. Finally, in Amendment 2 on page 2, line 12 which read:

advocate or to a principal assistant."

REPRESENTATIVE GRUENBERG asked whether a principal assistant is a paralegal.

LIEUTENANT DUNBAR was unsure.

CAPTAIN KING advised she did not have access to Amendment 2.

CHAIR HERRON said this issue would be addressed during interim.

2:13:29 PM

CHAIR HERRON removed his objection. There being no further objection, Amendment 2 was adopted.

2:13:58 PM

REPRESENTATIVE TUCK moved to adopt Amendment 3 which read:

Page 37, line 31:
Delete "may"
Insert "shall"

2:14:08 PM

CHAIR HERRON objected for discussion purposes.

REPRESENTATIVE TUCK explained that Amendment 3 is another correction to an oversight.

2:14:31 PM

CHAIR HERRON removed his objection.

REPRESENTATIVE HUGHES asked what regulations are affected by Amendment 3.

2:15:04 PM

LIEUTENANT DUNBAR said most of the regulations in the bill are affected because AKNG intends that future commands are required to create and enforce the regulations.

2:15:30 PM

There being no further objection, Amendment 3 was adopted.

2:15:40 PM

REPRESENTATIVE TUCK then observed that the regulations to be drafted by DMVA - that are authorized in proposed new section 26.050.380 - would give DMVA "a lot of power." He 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).

REPRESENTATIVE TUCK discussed a conceptual amendment to delete proposed subsection (c) because criminal code is usually written in statute and is not drafted by an agency. He pointed out that AS 44.62 establishes procedures to ensure consistencies between regulations and existing statute; that regulations receive prior approval by the lieutenant governor; that the Department of Law (DOL) is involved and would advise the agency on legal matters, policy, and to ensure compliance with the Alaska State Constitution; and compliance to ensure public notice. Representative Tuck cautioned that there have been problems in the past with a lack of transparency, and giving a department authority with no oversight is not really fixing a problem.

REPRESENTATIVE HUGHES surmised without the [discussed conceptual amendment], during interim AKNG would work on the regulations; however, the [discussed conceptual amendment] proposes that after regulations are proposed, there would be a public review process through the Administrative Procedure Act.

REPRESENTATIVE TUCK observed that the bill directs that DMVA "shall" adopt regulations related to courts-marital, but does not instruct how regulations should be adopted. Although comfortable with the process of designing regulations, he said the regulations may not be ready to implement. In the interim, as the ACMJ is developed, there will be transparency, and many facets of government will be involved. He envisioned that the best process would be to let DMVA develop regulations, and then the legislature will overlook the product and determine what belongs in statute and what in regulation. Representative Tuck opined that the authority to issue a prison sentence or a dishonorable charge should be in statute.

[2:22:52 PM](#)

REPRESENTATIVE HUGHES concluded that DMVA and AKNG would continue through the public hearing process on military matters that are not commonly understood by the public. She asked the sponsor for the purpose of including aforementioned subsection (c).

CHAIR HERRON requested that Representative Tuck provide a written memo explaining the [discussed conceptual amendment] to the committee and to DMVA.

REPRESENTATIVE LEDOUX said she was not adverse to Representative Tuck's [discussed conceptual amendment]; on the other hand, these proceedings are different than those for a civilian arrested for a crime, because military members are aware that certain laws are applicable to the military.

REPRESENTATIVE TUCK withdrew the [discussed conceptual amendment]. He acknowledged that he may offer an amendment at a later date, but did not want to impede DMVA's ability to begin its work on this matter. He said the decision whether to follow the administrative code will resurface in order to accommodate the 4,000 employees of DMVA that will be affected by the regulations.

CHAIR HERRON clarified that a conceptual amendment was not offered.

[2:27:49 PM](#)

REPRESENTATIVE GRUENBERG stated he is also opposed to exempting regulations from Administrative Procedure Act (APA) review. As an alternative, he suggested that after "the initial crime list [was] run through the legislature," regulations could be adopted through the APA as a rulemaking function. In the bill, the crimes could be listed in regulation, but regulations would not take effect until the following legislative session, thus the report of the regulations would be referred to a committee for hearings and action. Under the Alaska State Constitution, regulations can only be amended or appealed by statute, which would give time for the legislature to disapprove the regulations, or issue a resolution or a letter to DMVA.

REPRESENTATIVE LEDOUX questioned whether an agency could rescind a regulation.

REPRESENTATIVE GRUENBERG said yes, but it may not. In that case, an informal letter or resolution may be needed. He provided an example of an Alaska Supreme Court decision that said regulations must be amended through a bill; in fact, two attempts at amending the Alaska State Constitution to allow the legislature to repeal regulations by a resolution failed.

REPRESENTATIVE TUCK gave the definition of regulatory action found in AS 44.62.213: adoption, amendment, or repeal of a regulation.

REPRESENTATIVE GRUENBERG stressed that the exemption from APA in the bill is permanent, unlike that of Amendment 3.

CHAIR HERRON thanked the committee and DMVA leadership for their work.

REPRESENTATIVE LYNN congratulated DMVA on its work.

REPRESENTATIVE TUCK said he is happy to work with intelligent and open-minded people in order to correct the image of AKNG, and thanked the chair of the House Judiciary Standing Committee.

REPRESENTATIVE LEDOUX acknowledged the work of Lieutenant Dunbar, her staff, and Representative Tuck, on working as a team on a bipartisan project.

REPRESENTATIVE HUGHES said this issue is very important to Alaskans.

[2:35:49 PM](#)

CO-CHAIR COLVER agreed with the need to restore justice to members of the military. He moved to report CSHB 126, Version 29-LS0473\H, Strasbaugh, 3/24/15, as amended, out of committee with individual recommendations and the accompanying three fiscal notes. There being no objection, CSHB 126(MLV) was reported from the House Special Committee on Military and Veterans' Affairs.

[2:36:57 PM](#)

ADJOURNMENT

There being no further business before the committee, the House Special Committee on Military and Veterans' Affairs meeting was adjourned at 2:36 p.m.