

HB

126

<TARGET><BILL>HB 126</BILL><SUBJECT>HB
126</SUBJECT><COMM>SSTA29</COMM></TARGET>

SENATE COMMITTEE REPORT

DATE: 2/5/16

FURTHER: Judiciary

DATE TURNED
IN TO OFFICE: 4/14/2016

State Affairs Committee considered CS FOR HOUSE BILL NO. 126(JUD) am

HB 126 CODE OF MILITARY JUSTICE; APPEALS

"An Act relating to the administration of military justice; relating to the adoption of regulations 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 supreme court over petitions from the Military Appeals Commission; relating to involuntary commitment for evaluation or treatment of a mental disease or defect before court-martial proceedings; relating to offenses subject to court-martial proceedings; amending Rule 6, Alaska Rules of Criminal Procedure; and providing for an effective date."

and recommends:

- ☒ be replaced with SCS C SCS/CS- Forthcoming 7) ☐ Same Title ☐ Technical Title Change
☐ New Title/SCR No. F/C
- ☐ adopt previous SCS _____ (_____) ☐ Same Title ☐ Technical Title Change
☐ New Title/SCR No. _____
- ☐ attached amendment(s)
- ☐ adopt _____ Letter of Intent
- ☐ further referral to _____ Committee

Dept Abbr.	
ADM	LWF
CED	LAW
COR	LEG
EED	MVA
DEC	DNR
DFG	DPS
GOV	REV
DHS	DOT
AJS	UA

NEW FISCAL NOTE(S)				
Dept.	Fiscal	Indet.	Zero	FN #

PREVIOUS FISCAL NOTE(S)				
Dept.	Fiscal	Indet.	Zero	FN #
COR			✓	5
DHS			✓	6
4JS			✓	7
MVA			✓	8

☐ APPROPRIATION - no fiscal note

SIGNATURES AND RECOMMENDATIONS:	PRINTED LAST NAME	DO PASS	DO NOT PASS	NO REC	AMEND
	Wielechowski				✓
	Cogholl			✓	
	HUGGINS			✓	
	McGUIRE			✓	
CHAIR:	STOLTZE			✓	

Daniel George

From: Clarke, Ron G (MVA) <ron.clarke@alaska.gov>
Sent: Monday, April 11, 2016 6:50 PM
To: Daniel George
Subject: DMVA Guests for HB 126 in (S) STA

Here's our support team tomorrow:

On line: Brigadier General Laurie Hummel, Commissioner of the Department of Military and Veterans' Affairs and The Adjutant General of the Alaska National Guard

Present in person:

1. Brigadier General Karen Mansfield; Director, Alaska Air National Guard
2. Colonel Lee Knowles; Commander, 297th Battlefield Surveillance Brigade
3. Lieutenant Colonel Christopher Weaver; Staff Judge Advocate to the Adjutant General, Alaska National Guard
4. Lieutenant Colonel Alex Elmore; Executive Officer to the Adjutant General of the Alaska National Guard
5. Captain Joseph Radke; Adjutant, 1-207th Aviation Regiment, Alaska Army National Guard
6. Command Chief Master Sergeant Paul Nelson, Senior Enlisted Leader, Alaska National Guard
7. Chief Master Sergeant Lance Jordan; Superintendent, 176th Wing Operations Group, Alaska Air National Guard
8. Senior Master Sergeant Lolly Reid; Maintenance Management Production Superintendent, 176th Wing Maintenance Group, Alaska Air National Guard

And I will be on hand, for whatever that's worth. Please let me know if you need anything more.

Ron

Daniel George

From: Clarke, Ron G (MVA) <ron.clarke@alaska.gov>
Sent: Monday, April 11, 2016 6:54 PM
To: Daniel George
Subject: P.S.

P.S.: The following Guard members in the audience tomorrow participated on the development team for the Alaska Code of Military Justice:

Captain Joseph Radke

Chief Master Sergeant Lance Jordan

Senior Master Sergeant Lolly Reid

rgc

ALASKA STATE LEGISLATURE

Representative Gabrielle LeDoux,
Chair

Representative Wes Keller,
Vice Chair



Representative Charisse Millett
Representative Neal Foster
Representative Bob Lynn
Representative Matt Claman
Representative Max Gruenberg

HOUSE JUDICIARY COMMITTEE

Alaska State Capitol, Room 120
Juneau, AK 99801
907-465-4998 • 907-465-4419 (fax)

House Bill 126 - Sponsor Statement (29-LS0473\F.A)

House Bill 126 provides the Alaska National Guard with a comprehensive code of military justice. It functions similarly to the federal code, but was tailored to the needs of Alaska's militia. This bill defines military crimes and their penalties, provides for nonjudicial punishment and courts martial procedures, and limits the jurisdiction of the code to members of the Guard.

Alaska's code has not been substantively updated since statehood and leaves Guard leadership ill-equipped to systematically address violations of military rules and protocol. When the National Guard is called up to federal service, they are subject to the same federal code that applies to all members of the United States armed forces. However, they currently lack the similarly-defined code when non-federalized and subject only to Alaska laws and regulations. House Bill 126 is the solution to this deficiency.

Version F.A of House Bill 126 is the culmination of a year of legislative dialog and feedback, first in the Military and Veterans' Affairs Committee, then the Judiciary Committee. All of this has been supported by the Alaska Department of Military and Veterans' Affairs and the Alaska National Guard. It passed the House unanimously.

I urge your support for House Bill 126.

ALASKA STATE LEGISLATURE

Representative Gabrielle LeDoux,
Chair

Representative Wes Keller,
Vice Chair



Representative Charisse Millett
Representative Neal Foster
Representative Bob Lynn
Representative Matt Claman
Representative Max Gruenberg

HOUSE JUDICIARY COMMITTEE

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House Bill 126 – Sectional Summary (29-LS0473\F.A)

Section 1. Amends AS 22.05.010 by adding a new subsection to allow for Supreme Court review of a final decision of the Military Appeals Commission under certain circumstances.

Section 2. Amends AS 26.05.140(a) to note that the provision does not apply to an action or proceeding brought under the code of military justice.

Section 3. Makes a conforming change to an internal reference in AS 26.05.228(b)(2).

Section 4. Amends AS 26.05 by adding new subsections under Article 2, Code of Military Justice.

AS 26.05.380. Provides for adoption of certain regulations.

AS 26.05.400. Provides a statement of policy on military justice, noting that courts-martial have primary jurisdiction over offenses under the chapter.

AS 26.05.403. Provides that the code applies to members of the militia at all times.

AS 26.05.405. Provides jurisdiction to try certain personnel by court-martial.

AS 26.05.408. Provides applicability to offenses and court-martials outside the state.

AS 26.05.410. Provides for and relates to judge advocates.

AS 26.05.420. Provides for apprehension of person subject to the code.

AS 26.05.423. Relates to imposition of restraint.

AS 26.05.423. Provides for restraint of persons charged with offenses.

AS 26.05.428. Relates to the place for confinement of prisoners and reports.

AS 26.05.430. Provides for the delivery of a person accused of a criminal offense to a civil authority.

AS 26.05.433. Classifies courts-martial.

AS 26.05.435 - AS 26.05.443. Provides for jurisdiction of courts-martial.

AS 26.05.444 - AS 26.05.445. Makes grand jury requirements.

AS 26.05.446 - AS 26.05.450. Provides who may convene a court-martial.

AS 26.05.452. States who may serve on courts-martial.

AS 26.05.453 - AS 26.05.458. Provides for the appointment to a court-martial of a military judge, trial and defense counsel, and other staff.

AS 26.05.460. Relates to absences and additional members of courts-martial.

AS 26.05.463. Details requirements of charges and specifications.

AS 26.05.465. Prohibits compulsory self-incrimination.
AS 26.05.468. Outlines investigation requirements of charges and specifications.
AS 26.05.470. Provides for forwarding of charges.
AS 26.05.473. Requires advice of judge advocate before trial.
AS 26.05.475. Relates to service of charges on the accused.
AS 26.05.478. Prohibits influencing the action of a court.
AS 26.05.480. Relates to continuances.
AS 26.05.483. Provides for oaths or affirmations.
AS 26.05.485. Sets forth the statute of limitations for offenses.
AS 26.05.488. Prohibits former jeopardy.
AS 26.05.490. Relates to pleas of the accused.
AS 26.05.493. Relates to subpoenas and service of process.
AS 26.05.495. Provides for punishment of contempt.
AS 26.05.498 - AS 26.05.500. Provides for defenses of insanity and lack of mental capacity or mental responsibility.
AS 26.05.503 - AS 26.05.508. Relates to voting and rulings at courts-martial, number of votes required, and record of trial.
AS 26.05.510 - AS 26.05.518. Sets forth prohibition of cruel and unusual punishment, outlines punishments, maximum limits on punishments, deferment of sentences, and execution of confinement.
AS 26.05.520 - AS 26.05.543. Provides for appeals, including establishment of Military Appeals Commission.
AS 26.05.545 - AS 26.05.558. Provides miscellaneous administrative provisions, including provisions regarding delegation by the governor and payment of fines.
AS 26.05.560. Provides that the code shall be uniformly applied, so far as practicable.
AS 26.05.563. Provides immunity for a person acting under the code.
AS 26.05.577 - AS 26.05.634. Sets forth offenses for members of the militia subject to courts-martial.
AS 26.05.900. Provides definitions for the chapter.

Section 5. Amends AS 33.30.011 to include definition of "held under authority of state law."

Section 6. Requires persons confined under the code to be committed to the custody of the commissioner of corrections as directed by the adjutant general.

Section 7. Requires the attorney general to assist a military court in obtaining the commitment of a person accused of an offense under AS 26.05 for a competency examination or in the event of a finding of incompetence.

Section 8. Makes conforming changes to AS 44.35.020(a).

Section 9. Repeals provisions of existing military code of Alaska.

Section 10. Provides that the bill applies to offenses occurring on or after the effective date of the Act.

Section 11. Provides for staggered initial terms for the members of the Military Appeals Commission.

Section 12. Provides for a July 1, 2016, effective date.

ALASKA STATE LEGISLATURE

Representative Gabrielle LeDoux,
Chair

Representative Wes Keller,
Vice Chair



Representative Charisse Millett
Representative Neal Foster
Representative Bob Lynn
Representative Matt Claman
Representative Max Gruenberg

HOUSE JUDICIARY COMMITTEE

Alaska State Capitol, Room 120
Juneau, AK 99801
907-465-4998 • 907-465-4419 (fax)

House Bill 126 – Explanation of Changes

Introduced Version W to CS Version F.A (JUD) am

Appellate Jurisdiction:

After a final decision has been made by the Military Appeals Commission, the State Supreme Court may be petitioned to review a conviction where confinement has been imposed. This court of appeals was previously given this jurisdiction.

Regulations:

Regulations allowed by HB 126 are limited to providing for nonjudicial punishment; rules of evidence and procedure in a court martial; and pre-trial, trial, and post-trial procedure. Many aspects of the organization of courts martial have been added to statute elsewhere in this bill, where previously left to regulation.

Jurisdiction of Code of Military Justice:

Courts martial have jurisdiction over crimes in this chapter, except for cases where an act also violates a civilian criminal law. In these cases, the civilian authority has primary jurisdiction and must decline to prosecute before a court martial may be initiated. A member of the National Guard may not be convicted by civil and military authorities for the same crime. This code also applies to members of the militia at all times, except when federalized or outside the state and not in active duty status.

Grand Jury Requirement:

For all courts martial for crimes with an authorized length of confinement longer than one year, a grand jury must first indict the individual being charged. A grand jury was not required in the original bill.

Statute of Limitations:

This new section limits the imposition of nonjudicial punishment and initiation of a court martial to within two and three years of an act, respectively. It also provides certain exceptions.

Maximum Limits on Punishments:

An offense will be classified as a felony only if the actual sentence of confinement imposed is greater than one year. Previously, the felony classification was based on the maximum authorized confinement of a crime.

Military Crimes and Penalties:

Offenses and their maximum penalties which are authorized under this chapter have been added as new sections, instead of being assigned to regulation.

29-LS0473\F.A.1
Wallace
4/13/16

AMENDMENT # 1

OFFERED IN THE SENATE

BY SENATOR STOLTZE

TO: CSHB 126(JUD) am

1 Page 26, line 30:

2 Delete "imposed"

3 Insert "authorized"

4

5 Page 27, line 2:

6 Delete "imposed"

7 Insert "authorized"

29-LS0473\F.A.2
Wallace
4/13/16

AMENDMENT #2

OFFERED IN THE SENATE

By: Senator Huggins

TO: CSHB 126(JUD) am

- 1 Page 3, line 8, following "service":
- 2 Insert "or prohibit a member of the militia from declining the imposition of
- 3 nonjudicial punishment in favor of a courts-martial"

Fiscal Note

REPORTED OUT OF
HOUSE SPECIAL COMMITTEE ON
MILITARY & VETERANS' AFFAIRS
REPLACED BY FN # 5

State of Alaska
2015 Legislative Session

Bill Version: CSHB 126(MLV)
Fiscal Note Number: 1
(H) Publish Date: 4/1/2015

Identifier: HB126-DOC-IDO-03-21-2015
Title: CODE OF MILITARY JUSTICE; APPEALS
Sponsor: JUDICIARY
Requester: (H) Military & Veterans' Affairs

Department: Department of Corrections
Appropriation: Population Management
Allocation: Institution Director's Office
OMB Component Number: 1381

Expenditures/Revenues

Note: Amounts do not include inflation unless otherwise noted below.

(Thousands of Dollars)

	FY2016 Appropriation Requested	Included in Governor's FY2016 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	FY 2016	FY 2016	FY 2017	FY 2018	FY 2019	FY 2020	FY 2021
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants & Benefits							
Miscellaneous							
Total Operating	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Fund Source (Operating Only)

None							
Total	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Positions

Full-time							
Part-time							
Temporary							

Change in Revenues							
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Estimated SUPPLEMENTAL (FY2015) cost: 0.0 (separate supplemental appropriation required)
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY2016) cost: 0.0 (separate capital appropriation required)
(discuss reasons and fund source(s) in analysis section)

ASSOCIATED REGULATIONS

Does the bill direct, or will the bill result in, regulation changes adopted by your agency?
If yes, by what date are the regulations to be adopted, amended or repealed?

Why this fiscal note differs from previous version:

Prepared By: April Wilkerson
Division: Administrative Services - Department of Corrections
Approved By: Remond Henderson, Deputy Commissioner
Agency: Department of Corrections

Phone: (907)465-3460
Date: 03/21/2015 12:00 PM
Date: 03/21/2015

FISCAL NOTE ANALYSIS

STATE OF ALASKA
2015 LEGISLATIVE SESSION**Analysis**

This legislation adds a new section to the Code of Military Justice establishing AS 26.05.380 Regulations adopting code of military justice for members of the militia of the state not in federal service and establishes a military court for members of the militia who are charged with a military offense.

Section 26.05.428 identifies the requirements regarding the confinement, receiving and reporting of prisoners. This section will require reporting of those confined within a correctional facility within 24 hours. The department currently has a process for reporting of all persons held in a correctional facility including: military, federal, municipal, city and state holds, therefore this section will have no fiscal impact to the department.

Section 26.05.478 establishes punishments and maximum limits for military offenses and identifies those where the sentence exceeds one-year as a felony offense and with the exception of convictions by a summary court martial, all other military offenses are misdemeanors. The department is unable to quantify any increases to the offender population for those that could be charged under this legislation, however, if passed, the department will monitor and track for future fiscal impacts.

Fiscal Note

**REPORTED OUT OF
HOUSE SPECIAL COMMITTEE ON
MILITARY & VETERANS' AFFAIRS
REPLACED BY FN # 6**

State of Alaska
2015 Legislative Session

Bill Version:	CSHB 126(MLV)
Fiscal Note Number:	2
(H) Publish Date:	4/1/2015

Identifier: HB126-DHSS-API-03-27-15
Title: CODE OF MILITARY JUSTICE; APPEALS
Sponsor: JUDICIARY
Requester: House Judiciary Committee

Department: Department of Health and Social Services
Appropriation: Behavioral Health
Allocation: Alaska Psychiatric Institute
OMB Component Number: 311

Expenditures/Revenues

Note: Amounts do not include inflation unless otherwise noted below.

(Thousands of Dollars)

	FY2016 Appropriation Requested	Included in Governor's FY2016 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	FY 2016	FY 2016	FY 2017	FY 2018	FY 2019	FY 2020	FY 2021
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants & Benefits							
Miscellaneous							
Total Operating	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Fund Source (Operating Only)

None							
Total	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Positions

Full-time							
Part-time							
Temporary							

Change in Revenues							
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Estimated SUPPLEMENTAL (FY2015) cost: 0.0 (separate supplemental appropriation required)
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY2016) cost: 0.0 (separate capital appropriation required)
(discuss reasons and fund source(s) in analysis section)

ASSOCIATED REGULATIONS

Does the bill direct, or will the bill result in, regulation changes adopted by your agency? No
If yes, by what date are the regulations to be adopted, amended or repealed? n/a

Why this fiscal note differs from previous version:

Not applicable, initial version.

Prepared By: Albert E. Wall, Director
Division: Behavioral Health
Approved By: Sarah Woods, Deputy Director Finance & Management Services
Agency: Health & Social Services

Phone: (907)465-4841
Date: 03/27/2015 01:13 PM
Date: 03/27/15

FISCAL NOTE ANALYSIS

**STATE OF ALASKA
2015 LEGISLATIVE SESSION****Analysis**

This bill outlines a Military Code of Justice for Alaska.

Relevant to the Department of Health and Social Services, this bill authorizes military court-ordered involuntary commitment for mental health competency evaluation and treatment services available at the Alaska Psychiatric Institute. As involuntary commitment for evaluation and treatment is currently provided through other courts for Alaska's general population under AS 12.47, this would not change current practice.

DHSS does not anticipate a need for additional funds resulting from this bill.

Fiscal Note

REPORTED OUT OF
HOUSE SPECIAL COMMITTEE ON
MILITARY & VETERANS' AFFAIRS
REPLACED BY FN # 7

State of Alaska
2015 Legislative Session

Bill Version:	CSHB 126(MLV)
Fiscal Note Number:	3
(H) Publish Date:	4/1/2015

Identifier: HB126-ACS-APP-03-20-15
Title: CODE OF MILITARY JUSTICE; APPEALS
Sponsor: JUDICIARY
Requester: House Military and Veterans' Affairs Committee

Department: Judiciary
Appropriation: Alaska Court System
Allocation: Appellate Courts
OMB Component Number: 767

Expenditures/Revenues

Note: Amounts do not include inflation unless otherwise noted below.

(Thousands of Dollars)

	FY2016 Appropriation Requested	Included in Governor's FY2016 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	FY 2016	FY 2016	FY 2017	FY 2018	FY 2019	FY 2020	FY 2021
Personal Services	73.4		73.4	73.4	73.4	73.4	73.4
Travel							
Services	3.5		3.5	3.5	3.5	3.5	3.5
Commodities	6.5		2.0	2.0	2.0	2.0	2.0
Capital Outlay							
Grants & Benefits							
Miscellaneous							
Total Operating	83.4	0.0	78.9	78.9	78.9	78.9	78.9

Fund Source (Operating Only)

1004 Gen Fund	83.4		78.9	78.9	78.9	78.9	78.9
Total	83.4	0.0	78.9	78.9	78.9	78.9	78.9

Positions

Full-time	1.0		1.0	1.0	1.0	1.0	1.0
Part-time							
Temporary							

Change in Revenues							
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Estimated SUPPLEMENTAL (FY2015) cost: 0.0 (separate supplemental appropriation required)
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY2016) cost: 0.0 (separate capital appropriation required)
(discuss reasons and fund source(s) in analysis section)

ASSOCIATED REGULATIONS

Does the bill direct, or will the bill result in, regulation changes adopted by your agency? No
If yes, by what date are the regulations to be adopted, amended or repealed?

Why this fiscal note differs from previous version:

Initial version.

Prepared By: Nancy Meade, General Counsel
Division: Alaska Court System
Approved By: Nancy Meade for Christine Johnson, Administrative Director
Agency: Alaska Court System

Phone: (907)463-4736
Date: 03/20/2015 12:00 PM
Date: 03/20/15

FISCAL NOTE ANALYSIS

STATE OF ALASKA
2015 LEGISLATIVE SESSION

Analysis

House Bill 126 (version W) would substantially revise and expand AS 26.05 by adding a new article, Alaska's Code of Military Justice. It provides substantive law and procedures for military courts martial and a new Military Appeals Commission within the Department of Military and Veterans' Affairs. AS 26.05.490.

HB 126 also provides that after a person has appealed a court martial to the Military Appeals Commission, the person (if a sentence of confinement was imposed) has the right to further appellate review in the Alaska Court of Appeals. AS 26.05.493. This new type of appeal from the military court to the state civilian court would expand the state Court of Appeals' jurisdiction. Section 1; AS 22.07.020.

The Court of Appeals currently has jurisdiction over all state criminal appeals from the lower state trial courts. The bill would require the Court to accept appeals from cases involving violations of military law, rather than state law. The state Court of Appeals does not currently have familiarity with either substantive or procedural aspects of courts martial, since the court has not previously handled those case types.

The Court of Appeals judges will hear and decide this new category of cases, but the court system does not have verifiable information about the number of state court cases this new law may lead to, and each of these cases will necessarily involve the new, unfamiliar body of law. To effectively research the new substantive laws, learn about procedures and due process owed to persons accused in a court martial, and resolve these new case types fairly, the court system anticipates that it would need an additional law clerk, particularly if the number of new military cases appealed to the Court of Appeals under HB 126 is more than a very small number.

This one new law clerk position carries a personal services expense of \$73,400 annually. (Law clerks do not participate in PERS and have lower costs for benefits than regular full-time employees; this position is therefore more economical than, for example, a staff attorney.) The Services amount on the note of \$3,500 per year covers software licenses for products such as Microsoft Office, WordPerfect, and the costs of the court's case management system software. The Commodities amount is \$6,500 for the first year; this amount is for a desk, computer, printer, books, and general office supplies for the new law clerk position. After the initial year of equipping the office, the Commodities cost becomes \$2,000 per year to cover ongoing consumable general office supplies, legal resources such as subscription costs, and other miscellaneous supplies.

In sum, this fiscal note reflects the total costs to the Alaska Court System of hiring and retaining one new law clerk on the Court of Appeals to process the cases that would come to it under the Code of Military Justice established in HB 126.

Fiscal Note

**REPORTED OUT OF
HOUSE SPECIAL COMMITTEE ON
MILITARY & VETERANS' AFFAIRS
REPLACED BY FN # 8**

State of Alaska
2015 Legislative Session

Bill Version:	CSHB 126(MLV)
Fiscal Note Number:	4
(H) Publish Date:	4/1/2015

Identifier: HB126-MVA-NGMHQ-3-20-15
Title: CODE OF MILITARY JUSTICE; APPEALS
Sponsor: JUDICIARY
Requester: House Judiciary

Department: Department of Military and Veterans' Affairs
Appropriation: Military and Veterans' Affairs
Allocation: National Guard Military Headquarters
OMB Component Number: 2135

Expenditures/Revenues

Note: Amounts do not include inflation unless otherwise noted below.

(Thousands of Dollars)

	FY2016 Appropriation Requested	Included in Governor's FY2016 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	FY 2016	FY 2016	FY 2017	FY 2018	FY 2019	FY 2020	FY 2021
Personal Services	99.4		99.4	99.4	99.4	99.4	99.4
Travel	7.6		7.6	7.6	7.6	7.6	7.6
Services	0.1		0.1	0.1	0.1	0.1	0.1
Commodities							
Capital Outlay							
Grants & Benefits							
Miscellaneous							
Total Operating	107.1	0.0	107.1	107.1	107.1	107.1	107.1

Fund Source (Operating Only)

1004 Gen Fund	107.1		107.1	107.1	107.1	107.1	107.1
Total	107.1	0.0	107.1	107.1	107.1	107.1	107.1

Positions

Full-time							
Part-time							
Temporary							

Change in Revenues							
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Estimated SUPPLEMENTAL (FY2015) cost: 0.0 (separate supplemental appropriation required)
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY2016) cost: 0.0 (separate capital appropriation required)
(discuss reasons and fund source(s) in analysis section)

ASSOCIATED REGULATIONS

Does the bill direct, or will the bill result in, regulation changes adopted by your agency? Yes
If yes, by what date are the regulations to be adopted, amended or repealed? 07/01/16

Why this fiscal note differs from previous version:

Not applicable, initial version.

Prepared By: Susan Colligan, Director
Division: Administrative Services
Approved By: Bob Doehl, Deputy Commissioner
Agency: Military and Veterans' Affairs

Phone: (907)428-6881
Date: 03/20/2015 05:00 PM
Date: 03/20/15

FISCAL NOTE ANALYSIS

STATE OF ALASKA
2015 LEGISLATIVE SESSION

Analysis

This legislation instructs and authorizes the Department of Military and Veterans' Affairs and the Alaska National Guard to create a code of military justice, and attendant regulations and procedures. It supplements and replaces portions of the existing Alaska Military Code, which went into effect during Alaska's territorial days (AS 26.05).

This bill requires the Alaska National Guard to create specific military offenses and penalties. It lays out procedures for the administration of courts-martial, and requires that the Alaska National Guard create further regulations to fill procedural gaps. It sets up a three-panel Military Appeals Commission within the Department of Military and Veterans' Affairs to hear appeals from courts-martial. This law retains policy from the existing Alaska Military Code whereby all crimes existing under civilian law will be left to civilian authorities for prosecution.

If this bill is enacted, commanders will have a new disciplinary tool in the form of what's known as "non-judicial punishment." In severe cases, they will have the option to call a court-martial to punish soldiers. The administration and completion of a court-martial will involve expenditure of time and funds, including attorney salaries, witness costs, the training and employing of military judges, and other related costs. Based on evidence from National Guards in other states as well as active duty components, the Department of Military and Veterans' Affairs predicts that courts-martial will be used infrequently, averaging two courts-martial per year.

The provision of staff for courts-martial will be accomplished by placing members of the Alaska National Guard or Active Guard Reserve into State Active Duty status. The personnel required for each court-martial will include: a military judge, attorneys for both sides, paralegals for both attorneys and the judge, bailiff, escorts for the accused, a court reporter, witnesses, and panel members. There are standard travel and per diem costs associated with the three-member Military Appeals Commission, as well as any out-of-town witnesses.

For the estimated two courts-martial per year, one case is anticipated to be appealed to the Military Appeals Commission and to the court of appeals. Personnel costs were established based on the 2015 State Active Duty pay scale, multiplied by the number of days estimated to be required of each position, multiplied by the number of staff required in each position. Witness costs include witness fees, travel and per diem costs as applicable.

Military judge	\$7.3
Attorneys	\$34.2
Paralegals	\$33.7
Bailiff	\$1.6
Escorts	\$2.8
Court Reporter	\$1.1
Witnesses	\$8.4
<u>Panel</u>	<u>\$10.3</u>
Total personnel costs	\$99.4

Witness fees and travel costs \$6.5

Military Appeals Commission costs are based on one meeting per year, with two of the three members traveling to the meeting location. Commission meetings are expected to last two days.

Total commission costs \$1.2

Fiscal Note

State of Alaska
2016 Legislative Session

Bill Version:	CSHB 126(JUD)
Fiscal Note Number:	5
(H) Publish Date:	1/25/2016

Identifier: HB126CS(JUD)-DOC-IDO-01-21-2016
Title: CODE OF MILITARY JUSTICE; APPEALS
Sponsor: JUDICIARY
Requester: House Judiciary Committee

Department: Department of Corrections
Appropriation: Population Management
Allocation: Institution Director's Office
OMB Component Number: 1381

Expenditures/Revenues

Note: Amounts do not include inflation unless otherwise noted below.

(Thousands of Dollars)

	FY2017 Appropriation Requested	Included in Governor's FY2017 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	FY 2017	FY 2017	FY 2018	FY 2019	FY 2020	FY 2021	FY 2022
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants & Benefits							
Miscellaneous							
Total Operating	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Fund Source (Operating Only)

None							
Total	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Positions

Full-time							
Part-time							
Temporary							

Change in Revenues							
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Estimated SUPPLEMENTAL (FY2016) cost: 0.0 (separate supplemental appropriation required)
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY2017) cost: 0.0 (separate capital appropriation required)
(discuss reasons and fund source(s) in analysis section)

ASSOCIATED REGULATIONS

Does the bill direct, or will the bill result in, regulation changes adopted by your agency?

If yes, by what date are the regulations to be adopted, amended or repealed?

Why this fiscal note differs from previous version:

Prepared By: April Wilkerson
Division: Administrative Services - Department of Corrections
Approved By: Remond Henderson, Deputy Commissioner
Agency: Department of Corrections

Phone: (907)465-3460
Date: 01/21/2016 01:00 PM
Date: 01/21/2016

FISCAL NOTE ANALYSIS

STATE OF ALASKA
2015 LEGISLATIVE SESSION**Analysis**

This legislation adds a new section to the Code of Military Justice establishing AS 26.05.380 Regulations adopting code of military justice for members of the militia of the state not in federal service and establishes a military court for members of the militia who are charged with a military offense.

Section 26.05.428 identifies the requirements regarding the confinement, receiving and reporting of prisoners. This section will require reporting of those confined within a correctional facility within 24 hours. The department currently has a process for reporting of all persons held in a correctional facility including: military, federal, municipal, city and state holds, therefore this section will have no fiscal impact to the department.

Section 26.05.513 establishes punishments and maximum limits for military offenses and identifies those where the sentence exceeds one-year as a felony offense and with the exception of convictions by a summary court martial, all other military offenses are misdemeanors. The department is unable to quantify any increases to the offender population for those that could be charged under this legislation, however, if passed, the department will monitor and track for future fiscal impacts.

Fiscal Note

REPORTED OUT OF HOUSE JUDICIARY
REPLACED FN # 2

State of Alaska
2016 Legislative Session

Bill Version: CSHB 126(JUD)
Fiscal Note Number: 6
(H) Publish Date: 1/25/2016

Identifier: HB126CS(JUD)-DHSS-API-1-16-16
Title: CODE OF MILITARY JUSTICE; APPEALS
Sponsor: JUDICIARY
Requester: House Judiciary Committee

Department: Department of Health and Social Services
Appropriation: Behavioral Health
Allocation: Alaska Psychiatric Institute
OMB Component Number: 311

Expenditures/Revenues

Note: Amounts do not include inflation unless otherwise noted below.

(Thousands of Dollars)

	FY2017 Appropriation Requested	Included in Governor's FY2017 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	FY 2017	FY 2017	FY 2018	FY 2019	FY 2020	FY 2021	FY 2022
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants & Benefits							
Miscellaneous							
Total Operating	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Fund Source (Operating Only)

None							
Total	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Positions

Full-time							
Part-time							
Temporary							

Change in Revenues

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Estimated SUPPLEMENTAL (FY2016) cost: 0.0 (separate supplemental appropriation required)
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY2017) cost: 0.0 (separate capital appropriation required)
(discuss reasons and fund source(s) in analysis section)

ASSOCIATED REGULATIONS

Does the bill direct, or will the bill result in, regulation changes adopted by your agency? No
If yes, by what date are the regulations to be adopted, amended or repealed? n/a

Why this fiscal note differs from previous version:

This version updated to reflect new year; no other changes.

Prepared By: Randall Burns, acting Director
Division: Behavioral Health
Approved By: Sana Efird, Asst. Commissioner, Finance and Management Services
Agency: Health and Social Services

Phone: (907)269-5948
Date: 01/04/2016 04:45 PM
Date: 01/16/16

FISCAL NOTE ANALYSIS

**STATE OF ALASKA
2016 LEGISLATIVE SESSION****Analysis**

This bill outlines a Military Code of Justice for Alaska.

Relevant to the Department of Health and Social Services, this bill authorizes military court-ordered involuntary commitment for mental health competency evaluation and treatment services available at the Alaska Psychiatric Institute (API). As involuntary commitment for evaluation and treatment is currently provided through other courts for Alaska's general population under AS 12.47, this would not change API's current practice.

DHSS does not anticipate a need for additional funds resulting from this bill.

Fiscal Note

State of Alaska
2016 Legislative Session

Bill Version:	CSHB 126(JUD)
Fiscal Note Number:	7
(H) Publish Date:	1/25/2016

Identifier: HB126CS(JUD)-ACS-APP-01-19-16
Title: CODE OF MILITARY JUSTICE; APPEALS
Sponsor: JUDICIARY
Requester: House Judiciary Committee

Department: Judiciary
Appropriation: Alaska Court System
Allocation: Appellate Courts
OMB Component Number: 767

Expenditures/Revenues

Note: Amounts do not include inflation unless otherwise noted below.

(Thousands of Dollars)

	FY2017 Appropriation Requested	Included in Governor's FY2017 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	FY 2017	FY 2017	FY 2018	FY 2019	FY 2020	FY 2021	FY 2022
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants & Benefits							
Miscellaneous							
Total Operating	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Fund Source (Operating Only)

None							
Total	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Positions

Full-time							
Part-time							
Temporary							

Change in Revenues							
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Estimated SUPPLEMENTAL (FY2016) cost: 0.0 (separate supplemental appropriation required)
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY2017) cost: 0.0 (separate capital appropriation required)
(discuss reasons and fund source(s) in analysis section)

ASSOCIATED REGULATIONS

Does the bill direct, or will the bill result in, regulation changes adopted by your agency? No
If yes, by what date are the regulations to be adopted, amended or repealed?

Why this fiscal note differs from previous version:

The House Judiciary Committee Substitute for HB 126 revises the previous version's method for bringing a military justice case to the court system; rather than an appeal to the Court of Appeals, the method in the CS is via a petition for review to the Supreme Court. This results in no fiscal impact on the court system.

Prepared By: Nancy Meade, General Counsel
Division: Alaska Court System
Approved By: Nancy Meade for Christine Johnson, Administrative Director
Agency: Alaska Court System

Phone: (907)463-4736
Date: 01/19/2016 12:00 PM
Date: 01/19/16

FISCAL NOTE ANALYSIS

STATE OF ALASKA
2016 LEGISLATIVE SESSION

Analysis

The House Judiciary Committee Substitute for House Bill 126 (version S) would substantially revise and expand AS 26.05 by adding a new Article 2 to Alaska's Code of Military Justice. It sets out substantive law and procedures for military courts martial and establishes a new Military Appeals Commission within the Department of Military and Veterans' Affairs. AS 26.05.538.

CSHB 126(JUD) also provides that after a person has appealed a court martial to the Military Appeals Commission, the person (if certain conditions are met) has the right to file a petition for review of that final military decision in the Alaska Supreme Court. AS 26.05.540. This new type of petition from the military court to the state (civilian) court would expand the Alaska Supreme Court's jurisdiction to include jurisdiction over these petitions. Section 1; AS 22.05.010. The Supreme Court would have the discretion to consider petitions for review of final decisions of the Military Appeals Commission when persons have filed a petition for review with the Supreme Court and exhausted their rights to appeal to the Commission, and the Commission has imposed a sentence of confinement.

Such petitions for review would involve violations of military law. Though the Supreme Court does not currently handle cases that concern either substantive or procedural aspects of courts martial and military offenses, the Supreme Court is prepared to review the petitions as contemplated by CSHB 126. The bill sponsors and members of the Alaska National Guard who have testified previously on this bill have stated that the number of petitions that will potentially be brought to the Supreme Court is expected to be very small; they have stated that it is expected to be no more than one to two per year.

Based on the representations of those testifiers, the court system anticipates that it can handle these new case types in the ordinary course of the Supreme Court's workload.

Further, CSHB 126(JUD) provides that a general court martial in which confinement of more than one year is sought will use a grand jury of the state to determine whether a true bill can issue. AS 26.05.444. Again, testifiers have stated that the National Guard expects this to be a minimal impact on the state court system's grand juries, that it would be quite rarely used, and that it would be coordinated such that the court system would not experience increased jury costs.

Based on these expectations of and assumptions about the bill's impacts, the court system submits a zero fiscal note for CSHB 126(JUD).

Fiscal Note

REPORTED OUT OF HOUSE JUDICIARY
REPLACED FN # 4

State of Alaska
2016 Legislative Session

Bill Version: CSHB 126(JUD)
Fiscal Note Number: 8
(H) Publish Date: 1/25/2016

Identifier: HB126CS(JUD)-MVA-NGMHQ-3-20-15
Title: CODE OF MILITARY JUSTICE; APPEALS
Sponsor: JUDICIARY
Requester: House Judiciary

Department: Department of Military and Veterans' Affairs
Appropriation: Military and Veterans' Affairs
Allocation: National Guard Military Headquarters
OMB Component Number: 2135

Expenditures/Revenues

Note: Amounts do not include inflation unless otherwise noted below.

(Thousands of Dollars)

	FY2017 Appropriation Requested	Included in Governor's FY2017 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	FY 2017	FY 2017	FY 2018	FY 2019	FY 2020	FY 2021	FY 2022
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants & Benefits							
Miscellaneous							
Total Operating	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Fund Source (Operating Only)

None							
Total	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Positions

Full-time							
Part-time							
Temporary							

Change in Revenues							
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Estimated SUPPLEMENTAL (FY2016) cost: 0.0 (separate supplemental appropriation required)
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY2017) cost: 0.0 (separate capital appropriation required)
(discuss reasons and fund source(s) in analysis section)

ASSOCIATED REGULATIONS

Does the bill direct, or will the bill result in, regulation changes adopted by your agency? Yes
If yes, by what date are the regulations to be adopted, amended or repealed? 07/01/16

Why this fiscal note differs from previous version:

A previous version cited state costs associated with possible administration and completion of courts-martial, but more recent information indicates such expenses will be covered by federal funds, so there will be no cost to the state.

Prepared By: Ron Clarke, Special Assistant
Division: Office of the Commissioner
Approved By: Bob Doehl, Deputy Commissioner
Agency: Military and Veterans' Affairs

Phone: (907)428-6007
Date: 01/15/2016 04:00 PM
Date: 01/15/16

FISCAL NOTE ANALYSIS

STATE OF ALASKA
2016 LEGISLATIVE SESSION

Analysis

This legislation creates a state code of military justice and instructs and authorizes the Department of Military and Veterans' Affairs and the Alaska National Guard to enact attendant regulations and procedures. It supplements and replaces portions of the existing Alaska Military Code (AS 26.05), which went into effect during Alaska's territorial days.

This bill identifies specific military offenses and penalties, lays out procedures for the administration of courts-martial, and requires the Alaska National Guard to create further regulations to fill any procedural gaps. It sets up a three-member Military Appeals Commission within the Department of Military and Veterans' Affairs to hear appeals from courts-martial.

If this bill is enacted, commanders will have a new disciplinary tool in the form of "non-judicial punishment." In severe cases, they will have the option to convene courts-martial. The administration and completion of a court-martial will involve expenditure of time and funds, including attorney salaries, witness costs, the training and employing of military judges, and other related costs. Based on the experience of National Guards in other states, the Department of Military and Veterans' Affairs predicts courts-martial will be rare events, averaging less than one per year.

The personnel required for a court-martial would include a military judge, attorneys for both sides, paralegals for both attorneys and the judge, bailiff, escorts for the accused, a court reporter, witnesses, and panel members. Because convening and running of courts-martial constitutes preparation and training for Active Duty service, all expenses related to courts-martial and administration of non-judicial punishment will be covered using federal funds.

CSHB 126 (JUD) am

Alaska Code of Military Justice

WHAT IT IS, WHY WE NEED IT, AND HOW TO USE IT

How We Got Here

- The National Guard Bureau's Office of Complex Investigations (OCI) issued a report in Sep 2014.
- The report made several findings and recommendations.
- In regard to Military Justice the report stated the following:
 1. The current Alaska Military Code "lacks teeth." It could not be used for civilian like offenses that affect the discipline of a unit
 2. No record of an ACMJ court-martial since the current code's inception in 1955
 3. Most common tool used for discipline was administrative
 4. Lack of confidence in the military justice system
 5. Nonjudicial punishment has "no utility" if Members request Court-Martial and Commanders don't go to Court-Martial

Moving Forward

1. This version of HB 126 is supported by the DMVA.
2. DMVA is preparing implementing regulations to include regulations for Nonjudicial Punishment (NJP).
3. DMVA will be ready to implement in July 2016.

3 Tools for Military Discipline

“Discipline is the soul of an Army.” – George Washington

1. Code of Military Justice to include Courts-Martial and Nonjudicial punishment
2. Administrative Discipline (Separations, Rank Reduction, Letters of Reprimand)
3. Alaska Criminal Code (Civilian Crimes)

Key Points on HB 126 & ACMJ

- Based on principles of Military Law arising from the well established federal Uniform Code of Military Justice (UCMJ)
- Derived from best practices of other states' National Guard and the National Guard Bureau's Model Code
- Statute and regulations addresses constitutional requirements for Due Process
- Does NOT replace civilian criminal law BUT addresses Military Offenses and civilian like offenses that affect military good order and discipline
- Most offenses will be adjudicated through Nonjudicial Punishment
- The most serious offenses will be adjudicated through Court-Martial

Concurrent Offenses – Offenses that are both Civilian and Military

- Civilians have right of first refusal
- Court-Martial may create double-jeopardy
- Need affirmative statement of non-prosecution to proceed to Court-Martial
- Nonjudicial Punishment does NOT create double jeopardy

ACMJ Basics

- A code of offenses that applies to the State Military Forces
- Offenses adjudicated through
 - ★ ◦ Courts-Martial (General, Special, and Summary)
 - Nonjudicial Punishment (NJP) – Minor Offenses
- Offenses and punishments are stated in the Code
- Provides framework for HOW we can conduct Courts-Martial
- Authorizes Regulation for Nonjudicial Punishment. Regulation lays out HOW a commander can NJP a Servicemember and what are the MAXIMUM PUNISHMENTS

The State Militia

Organized Militia

1. Alaska National Guard
2. Alaska Naval Militia
3. Alaska State Defense Force



Unorganized Militia

- Everyone else above the age of 17 and not in the organized militia

National Guard Duty Status

	<i>State Active Duty</i>	<i>Title 32</i>	<i>Title 10</i>
Command & Control	Governor	Governor	President
Where	IAW State Law	USA	Worldwide
Pay	State	Federal	Federal
Mission Types	State Emergencies	Training & other federally authorized missions	Overseas training & as assigned after mobilization
Discipline	★ State Military Justice Code	★ State Military Justice Code	UCMJ
Examples of Domestic Missions	Forest fires, floods, civil disturbances, search and rescue.	Post 9/11 Airport Security, Hurricane Katrina, Southwest border security.	Air sovereignty, missile defense, guarding DoD infrastructure.
Support Law Enforcement	Yes	Yes	As limited by Posse Comitatus

State

Federal

What behavior can be punished under the ACMJ?

1. Military Offenses – Bulk of the Punitive Articles

- AWOL
- Drunk on Duty
- Etc.

2. Offenses chargeable in both military and civilian court

- DUI
- Sexual Assault

3. Conduct that is “counter to good order and discipline” or “brings discredit upon the service.”

- “Article 134” in Federal UCMJ. Called “Section 634” in ACMJ

Specific Offenses are delineated later in the presentation

24/7 Jurisdiction

- AGR (Title 32) = YES
- Dual Status Technician (M-day/DSG) = YES, because of their drilling status
- M-Day/DSG = YES
- Alaska State Defense Force = YES. Same as AKNG because ASDF is part of the organized militia
- State Active – YES. Same as AKNG
- Title 10 = NO JURISDICTION

Where Does Jurisdiction Attach?

- Anywhere in the State of Alaska
- Outside the State and on Orders (e.g., official military travel)

BUT

- NOT outside the State and not on orders (e.g., personal travel)

Nonjudicial Punishment (NJP): Overview

- Most offenses charged with NJP, not Court-Martial
- Commanders at all levels can use NJP
- Much more efficient than Court-Martial or Administrative Separation/Reduction Boards
- NOT for most serious offenses. For minor offenses

NJP: Maximum Punishments (partial list)

Imposed on enlisted

Company Grade Commander: 7 days pay (AGR); 1 UTA (Mday)
1 grade reduction (<E5)

Field Grade Commander: ½ month pay (AGR); 4 UTA (Mday)
2 grade reduct. (<E5); 1 grade (>E5)

General/Flag Officer/Governor: ½ month pay (AGR); 4 UTA (Mday)
2 grade reduct. (<E5); 1 grade (>E5)

Imposed on officers

Company/Field Grade Commanders: Restrictions for 30 days (AGR); 4 UTA (Mday)

General/Flag/Governor: Restrictions; ½ month pay (AGR); 1 UTA (Mday)

AGR = Active Guard Reserve (full-time Title 32)

Mday = Traditional Drilling militia member (part-time Title 32 or ASDF)

UTA = Uniform Training Assembly. Part of a drill. 4 hours is 1 UTA. 4 UTAs is one weekend drill

NJP Cont...: No Turn-Down

- When presented with NJP, Servicemembers do NOT have the right to demand trial by Court Martial
- Based on experience of other states, lack of JAG resources
- Confinement cannot be ordered under Non-judicial punishment

Non-Military Crimes that Impact Military Discipline

- DUI – Max 1 year
- Possession, Use of Controlled Substance – Max 5 years; except Marijuana – No confinement
- Sexual Assault – Max 10 years
- Stalking – Max 3 years
- Other sexual misconduct; indecent viewing; visual recording – Max 1 year
- Larceny or wrongful appropriation – Max 1 year
- Forgery – Max 1 year
- Making, drawing, or uttering a check without sufficient funds – Max 1 year
- Perjury – Max 1 year

Military Crimes

- Fraudulent Enlistment, Appointment, or Separation – Max 1 year
- Unlawful enlistment, appointment, or separation -- Max 1 year
- Desertion – Max 1 year
- Absence without Leave – Max 1 year
- Missing Movement – Max 1 year
- Contempt towards officials – No confinement
- Disrespect toward superior officer – No confinement
- Assaulting or willfully disobeying superior commissioned officer – 5 years
- Insubordinate conduct towards a warrant or noncommissioned officer – 2 years

Military Crimes (cont.)

- Failure to obey order or regulation – Max 1 year
- Cruelty to obey order or regulation – Max 1 year
- Cruelty and maltreatment – Max 1 year
- Mutiny or sedition – Max 10 years
- Resistance, flight, breach or arrest, escape – Max 1 year
- Releasing prisoner without proper authority – Max 1 year
- Unlawful detention – Max 1 year
- Noncompliance with procedural rules – Max 1 year
- Misbehavior before the enemy – Max 10 years

Military Crimes (cont.)

- Subordinate compelling surrender – Max 10 years
- Improper use of countersign – Max 10 years
- Forcing a safeguard – Max 10 years
- Captured or abandoned property – Max 10 years
- Aiding the enemy – Max 10 years
- Misconduct as a prisoner – Max 10 years
- False official statement – Max 1 year
- Military property; other than military property; waste spoilage or destruction – Max 1 year

Military Crimes (cont.)

- Improper hazarding of vehicle, aircraft, or vessel – Max 1 year
- Drunk on duty – Max 1 year
- Misbehavior of sentinel – Max 1 year
- Malingering – Max 1 year
- Riot or breach of peace – Max 1 year
- Provoking speeches or gestures – No confinement
- Fraud against the government – Max 1 year

Military Crimes (cont.)

- Conduct unbecoming an officer – No confinement
- General Article – No confinement
 - Conduct that is prejudicial to good order and discipline; or
 - Conduct of a nature to bring discredit on the militia
 - Examples:
 - Disorderly conduct
 - Fraternization
 - Gambling with a subordinate
 - Pandering and prostitution

QUESTIONS?

For further questions please contact:
LTC Chris Weaver – Christopher.j.weaver12.mil@mail.mil



Discipline Comparisons

Rank	Offense	Disposition	Max Punishment under ACMJ
O-5; Senior Officer	Adultery, Dereliction of Duty, Misappropriation	Separated with OTH; Letter of Reprimand	DD; 1 yr confinement
O-3; Junior Officer	Sexual Assault	Separated with OTH	DD; 10 yrs confinement
O-2; Junior Officer	Viewing porn in Gov't Vehicle, Sexual Assault	Letter of Reprimand	DD; 1 yr confinement
E-9; Senior NCO	Sexual Assault, Adultery	Reduced to E-7; Retirement in-lieu-of Administrative Separation Board	DD; 10 yrs confinement
E-9; Senior NCO	Sexual Misconduct, Poor Command Climate	Separated with General, Letter of Reprimand	DD; 1 yr confinement
E-8; Senior NCO	Sexual Assault, Abuse of Authority	Separated with OTH	DD; 10 yrs confinement
E-8; Senior NCO	Sexual misconduct; Abuse of Authority	Separated with General, Letter of Reprimand	DD; 1 yr confinement
E-7; Senior NCO	Sexual Assault, Abuse of Authority	Separated with OTH	DD; 10 yrs confinement
E-6; Mid-Grade NCO	Sexual Assault, Falsifying Documents	Enlistment Expired	DD; 10 yrs confinement

NCO – Non-Commissioned Officer

OTH – Other Than Honorable Discharge.

DD – Dishonorable Discharge for Enlisted. Dismissal for Officers.

There are two categories of discharges – Administrative and Punitive.

Administrative discharges are done administratively. Punitive discharges are done through courts-martial. The administrative discharges are Honorable, General, and Other Than Honorable. The punitive discharges are Bad Conduct Discharge and Dishonorable. Officers would receive a dismissal which is the equivalent to a dishonorable discharge.



DEPARTMENTS OF THE ARMY AND THE AIR FORCE
JOINT FORCES HEADQUARTERS – ALASKA
OFFICE OF THE ADJUTANT GENERAL
PO BOX 5800
JOINT BASE ELMENDORF-RICHARDSON, ALASKA 99505

NGAK-TAG

1 January 2016

Message to the Force #2

SUBJECT: Ethical Fitness and Status of Discipline

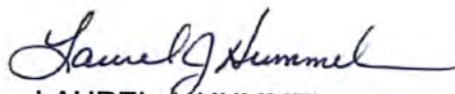
1. Since the release of National Guard Bureau's Office of Complex Investigations (OCI) report and, more recently, that of Governor Walker's independent investigator retired Judge Patricia Collins, the Alaska National Guard has zealously sought justice and reforms to ensure good order and discipline within our force. Those among us who behave contrary to law and regulation sully our ranks and impugn our good name. Taking adverse action in these cases is a necessary component of preserving fitness in our organization.
2. Below is a review of recent personnel actions resulting from external investigations and completed for the purpose of standards enforcement. Other cases are pending.

Current Grade	Previous Grade	Discharge Type	Discharge Date	Notes
O6	O6	Honorable	31-Jul-11	Retired. State and Federal LOMs revoked. Referred to service Discharge Review Board.
O5	O5	Other Than Honorable	28-Feb-15 (Retired Reserves)	Separation and retirement in lieu of withdrawal of Federal Recognition. Awaiting final grade determination and characterization of service.
O3	O3	Other Than Honorable	12-Aug-15	Loss Code: Moral or professional dereliction
O3	O3	Other Than Honorable	23-Sep-15	Loss Code: Moral or professional dereliction
E9	E9	Retired	31-Oct-14	Retired Loss Code: Qualified for retired pay
E8	N/A	General	22-Oct-15	Discharged from the Guard and Reserves per Service Secretary order
E7 (medical retirement)	E9	Honorable	6-Oct-14	Negotiated for swift departure of SM with E7 and honorable discharge
E7	E7	General	9-Sep-15	Loss Code: Misconduct
E7	E7	General	1-Nov-15	Loss Code: Misconduct
E1 (retired AGR)	E7	Other Than Honorable	30-Nov-14	Loss Code: Misconduct
E1 (retired AGR)	E8	Other Than Honorable	31-Oct-14	Loss Code: Misconduct
E6	N/A	Retained in drill status	90 days from 1-Dec-15	Removed from Active Guard Reserve
E5	N/A	Retained in drill status	90 days from 1-Dec-15	Removed from Active Guard Reserve

NGAK-TAG

SUBJECT: Ethical Fitness and Status of Discipline

3. The OCI report also recommended strengthening the Alaska National Guard's ability to respond to inappropriate behavior by corrective action beyond administrative measures. As I'm sure you are aware, our organization lacks a functioning code of military justice, which, along with ethical fitness and engaged leadership, is an essential component of ensuring good order and discipline. We are working closely with the Alaska State Legislature to enact an updated Alaska Code of Military Justice (ACMJ), which can serve as a fair and transparent mechanism to discourage conduct inconsistent with our organization's ethos. Soldiers and Airmen from each brigade and wing have been part of the effort to create an ACMJ that works well for us. We expect final passage in the upcoming legislative session.
4. At all times, our overarching goal remains to foster a professional culture that values and engenders respectful behavior. Promotion of best practices and prevention of improper behavior is paramount. Failing that, appropriate and timely response is imperative. When lapses occur, our priorities are to 1) help victims of improper behavior; 2) bring offenders to justice; and 3) create more effective preventative measures and offer comprehensive training to mitigate improper behavior. We have seen solid progress, but we can never let up. The Alaska National Guard's multilayered approach to good order and discipline is based on all military and civilian personnel exhibiting the highest standards of conduct. Each of us, every day, must work to promote an ethically fit organization. Our membership and those we serve deserve no less. Your chain of command is committed to remaining vigilant and willing to tackle the difficult situations.
5. When it comes to doing what is right, in the Alaska National Guard we are all leaders. Any member observing behavior prejudicial to order and discipline must report it to his/her chain of command. If the chain of command is unresponsive, bring the issue directly to me or call the governor's hot line at (855) 761-5690.


LAUREL J. HUMMEL
Brigadier General (AK), AKNG
The Adjutant General



ALASKA NATIONAL GUARD
JOINT FORCES HEADQUARTERS
 PO BOX 5800
 JOINT BASE ELMENDORF - RICHARDSON AK 99505-0800

13 November 2015

Maximum Punishments Matrix: A Comparison between Maximum Allowable Punishments in the Federal Uniform Code of Military Justice and the Alaska Code of Military Justice.

Note: These punishments available in Courts-Martial, NOT in Nonjudicial Punishment.

<u>Offense</u>	<u>Maximum Punishment ACMJ</u>	<u>Maximum Punishment UCMJ</u>
	(years refer to years of confinement)	(years refer to years of confinement)
Accessory after the fact	1 year; Dishonorable Discharge	Variable
Conspiracy	1 year; Dishonorable Discharge	Variable
Solicitation	1 year; Dishonorable Discharge	10 years; Dishonorable Discharge
Fraudulent enlistment, appointment, or separation	1 year; Dishonorable Discharge	5 years; Dishonorable Discharge
Desertion (in time of war)	10 years; Dishonorable Discharge	Death
Desertion (at other times)	1 year; Dishonorable Discharge	5 years; Dishonorable Discharge
Absence without leave	1 year; Dishonorable Discharge	18 months; Dishonorable Discharge
Missing movement	1 year; Dishonorable Discharge	2 years; Dishonorable Discharge
Contempt toward officials	No confinement; Dishonorable Discharge	1 year; Dismissal
Disrespect toward superior commissioned officer	No confinement; Bad Conduct Discharge	1 year; Bad Conduct Discharge
Assaulting or willfully disobeying superior commissioned officer	5 years; Dishonorable Discharge	In time of war: Death At other times: 10 years; Dishonorable Discharge
Insubordinate conduct toward warrant officer, noncommissioned officer, or petty officer	2 years; Dishonorable Discharge	5 years; Dishonorable Discharge
Failure to obey order or regulation	1 year; Dishonorable Discharge	2 years; Dishonorable Discharge
Cruelty and maltreatment	1 year; Dishonorable Discharge	1 year; Dishonorable Discharge
Mutiny or sedition	10 years; Dishonorable Discharge	Death
Resistance, flight, breach of arrest, and escape	1 year; Dishonorable Discharge	5 years; Dishonorable Discharge
Releasing prisoner without proper authority	1 year; Dishonorable Discharge	2 years; Dishonorable Discharge
Unlawful detention	1 year; Dishonorable Discharge	3 years; Dishonorable Discharge
Noncompliance with procedural rules (unnecessary delay of disposition of case)	6 months; Bad Conduct Discharge	6 months; Bad Conduct Discharge
Noncompliance with procedural rules (knowingly and intentionally fails to enforce or comply)	1 year; Dishonorable Discharge	5 years; Dishonorable Discharge
Misbehavior before the enemy or in time of emergency	10 years; Dishonorable Discharge	Death



ALASKA NATIONAL GUARD
JOINT FORCES HEADQUARTERS
PO BOX 5800
JOINT BASE ELMENDORF - RICHARDSON AK 99505-0800

<u>Offense</u>	<u>Maximum Punishment ACMJ</u>	<u>Maximum Punishment UCMJ</u>
Subordinate Compelling Surrender	10 years; Dishonorable Discharge	Death
Improper use of countersign	10 years; Dishonorable Discharge	Death
Forcing a safeguard	10 years; Dishonorable Discharge	Death
Captured or abandoned property (disposes for personal advantage)	1 year; Dishonorable Discharge	5 years; Dishonorable Discharge
Captured or abandoned property (looting or pillaging)	10 years; Dishonorable Discharge	Life in prison; Dishonorable Discharge
Aiding the enemy	10 years; Dishonorable Discharge	Death
Misconduct as prisoner	10 years; Dishonorable Discharge	Life in prison; Dishonorable Discharge
False official statements	1 year; Dishonorable Discharge	5 years; Dishonorable Discharge
Military property-Loss, damage, destruction, or wrongful disposition	1 year; Dishonorable Discharge	10 years; Dishonorable Discharge
Improper hazarding of vehicle, aircraft, or vessel (willful and wrongful)	5 years; Dishonorable Discharge	Death
Improper hazarding of vehicle, aircraft, or vessel (negligently hazards)	1 year; Dishonorable Discharge	2 years; Dishonorable Discharge
Drunken or reckless operation of a vehicle, aircraft, or vessel (first two offenses)	1 years; Dishonorable Discharge	18 months; Dishonorable Discharge
Drunken or reckless operation of a vehicle, aircraft, or vessel (third and subsequent offenses)	5 years; Dishonorable Discharge	18 months; Dishonorable Discharge
Drunk on duty	1 year; Bad Conduct Discharge	9 months; Bad Conduct Discharge
Wrongful use, possession, etc., of controlled substance (possession)	1 year; Dishonorable Discharge	5 years; Dishonorable Discharge
Wrongful use, possession, etc., of controlled substance (manufacturing, distributing, importing)	5 years; Dishonorable Discharge	15 years; Dishonorable Discharge
Wrongful use, possession, etc., of controlled substance (Marijuana)	No confinement; Dishonorable Discharge	2 years for possession; 10 years for production/distribution; Dishonorable Discharge
Misbehavior of sentinel (in time of war)	10 years; Dishonorable Discharge	Death
Misbehavior of sentinel (at other times)	1 year; Dishonorable Discharge	10 years when receiving special pay; 1 year; Dishonorable Discharge
Malingering	1 year; Dishonorable Discharge	10 years in time of war; otherwise 5 years; Dishonorable Discharge



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<u>Offense</u>	<u>Maximum Punishment ACMJ</u>	<u>Maximum Punishment UCMJ</u>
Riot or breach of peace	1 year; Dishonorable Discharge	10 years; Dishonorable Discharge
Provoking speeches or gestures	6 months; Dishonorable Discharge	6 months; no discharge
Sex assault (sexual act)	10 years; Dishonorable Discharge	30 years; Dishonorable Discharge
Sex assault (sexual contact)	5 years; Dishonorable Discharge	Aggravated sexual contact: 20 years; Dishonorable Discharge Abusive Sexual contact: 7 years; Dishonorable Discharge
Stalking	3 years; Dishonorable Discharge	3 years; Dishonorable Discharge
Other sexual misconduct (indecent viewing, visual recording, or broadcasting)	1 year; Dishonorable Discharge	Viewing: 1 year; Dishonorable Discharge Recording: 5 years; Dishonorable Discharge Distributing: 7 years; Dishonorable Discharge
Other sexual misconduct (compelling another to engage in prostitution)	10 years; Dishonorable Discharge	12 years; Dishonorable Discharge
Other sexual misconduct (indecent exposure)	1 year; Dishonorable Discharge	1 year; Dishonorable Discharge
Larceny and wrongful appropriation (permanent)	1 year; Dishonorable Discharge	5 years; Dishonorable Discharge
Larceny and wrongful appropriation (temporary)	6 months; Dishonorable Discharge	2 years; Dishonorable Discharge
Forgery	1 year; Dishonorable Discharge	5 years; Dishonorable Discharge
Making, drawing, or uttering check, draft, or order without sufficient funds	1 year; Dishonorable Discharge	5 years; Bad Conduct Discharge
Perjury	1 year; Dishonorable Discharge	5 years; Dishonorable Discharge
Frauds against the governments	1 year; Dishonorable Discharge	5 years; Dishonorable Discharge
Conduct Unbecoming an Officer	No Confinement; Dishonorable Discharge	1 year; Dismissal
General Article	No Confinement; Dishonorable Discharge	Variable, with prison sentences; Dishonorable Discharge

ACMJ Quick Fix Bullet Points

- HB 126 is **constitutionally inconsistent** and invites challenge

- Includes Grand Jury Requirement (26.05.444, Art 1, Sec 8) and Unanimous verdict requirement (26.05.505, Art 1, Sec 11), but does not require 12/6 jurors (Art 1, sec 11)

- Legislative history does not support idea that inclusion of GJ and unanimous verdict was policy choice rather than constitutionally driven

- See 23 February 2015 Memo from Legislative Legal, and 22 Sept Judicial Committee hearing (Q: "Does AK Constitution apply?" A: "Absolutely, that's why we included Grand Jury, etc.")

- "Military Exception" to Federal 5th and 6th Amendments (grand jury and petit jury) is based on language of 5th Amend ("...except in cases arising in the land and naval forces, or in the militia, when in actual service in time of war or public danger.") and applied to the 6th by analogy. (*Ex parte Milligan*, 71 US 2, 123 (1866), *Ex parte Quirin*, 317 US 1, 39-40 (1942)). It is not based in power of Executive as Commander-in-Chief, or in Legislature's ability to regulate forces.

- Unclear if "military exception" would apply at state level due to difference in constitutional language, and make up of Guard as citizen soldiers/airmen. (Active duty always in military status, ACMJ would allow military prosecution even if member committed crime while not in military status.) AK Constitution requires grand jury "except in cases arising in the armed forces in times of war or public danger," (no general military exception) and juries of 12/6 in "all criminal prosecutions" (more below)

- If no state level "military exception" applies, then 26.05.433, **Courts-martial classified**, is unconstitutional because it lacks required number of jurors

- Art 1, Sec 11 of the AK Constitution requires "all criminal prosecutions" to have juries of 12, or no fewer than 6. *See also* AK R. Crim. Pro. 23(b). Prosecution under the ACMJ would be both criminal and state law based; making it subject to this provision.

- re: "all criminal prosecutions" language: *See Baker v. City of Fairbanks*, 471 P.2d 386 (1970): "we define the category of "criminal" prosecutions as including any offense a direct penalty for which may be incarceration in a jail or penal institution. ... It must also include offenses which, even if incarceration is not a possible punishment, still connote criminal conduct in the traditional sense of the term.[29]"

- see also AK Constitution: A Citizen's Guide, pgs. 24-25. Available at: https://akleg.gov/docs/pdf/citizens_guide.pdf

-- **Recommend** making the bill consistent by either taking the position that “military exception” applies on the state level (which all other states seem to have done) and removing GJ and unanimous verdict requirements, or upping the number of jurors to 12/6. The consistency will aid in preventing a challenge, and in defending the code if eventually challenged. Selective inclusion of rights would be hard to defend, especially with the rights-friendly nature of our Supreme Court and the language in *Baker v. City of Fairbanks*. The Federal Military Justice Review Group released a 2015 report suggesting making active duty juries an increased, fixed number of members: 8 for a GCM and 4 for a special. **Based on case law, etc., safest course of action would be to include GJ, remove Prelim Hearing, up number of jurors, and include unanimous verdict.**

- Sec 26.05.444, **Grand Jury Requirement**, and 26.05.468, **Prelim Hearing**, are redundant
 - bill currently reads as requiring both a grand jury and prelim in all GCMs, since if prosecution was going to ask for less than a year it would likely be a Special CM
 - if “military exception,” no need for Grand Jury. But, requiring all General CM to go to grand jury instead of a prelim and eliminating the prelim would expedite the process and save resources; it is a mechanism already in place.
 - 26.05.468(c) does not make sense. If the accused does not have the rights outlined in (c)(1), (2), and (3) during the hearing because a grand jury already heard the case, then what is the point of the prelim hearing? Excepting those rights would make the whole prelim meaningless and unnecessary, and further supports removal.
- Sec 26.05.614(c)(1), **Wrongful use or possession of controlled substances**, includes marijuana use which is no longer a crime under state law.
- **Multiple Substantive Articles are Missing**
 - Code of Mil Justice is synergistic. All parts work together to make whole. Every Article essentially serves as enabling statute for Manual for Courts-Martial.
 - Codifying gives provisions daylight and makes less subject to regulatory procedure
 - Consistent with model code & civilian prosecution to codify criminal pro: AK Statutes codify Criminal Procedure in Title 12, “Code of Criminal Procedure.”
 - More consistency, better workability in making code statutory instead of piecemeal statute and regulation. Piecemeal selection is inconsistent, extracts necessary Articles
 - All sentencing articles should be included. Sentencing is fundamental part of process and is substantive. Deserves weight of law as opposed to regulation. See AK Statutes, 12.55 “Sentencing and Probation.”

- all Articles relate directly to CM, why not include when we have opportunity to put complete code on the books and show anyone outside looking in that our code is complete AND workable? Easy to add and still get passage.

- **Art. 13: Punishment Prohibited Before Trial**

- **Importance:** Bedrock principle for treatment of members, and makes it illegal to mistreat/punish (i.e. impose extra duty, hard labor, etc.) based on charges before a finding of guilt. Puts “innocent until proven guilty” into practice. It also sets the standard that arrest or confinement will be no “more rigorous than the circumstances required to insure the person’s presence.” This fits with the State’s overall current push to reduce incarceration.

- Example: Active Duty defendants under federal UCMJ continue to work and perform duties while pending courts-martial.

- **No similar section:** Secs. 26.05.423, Imposition of Restraint, and 26.05.425, Restraint of persons charged with offenses, deal with arrest and confinement, but do not prohibit additional punishments (like those mentioned above) for those defendants not subject to actual arrest and/or confinement.

- **Art. 38: Duties of Trial Counsel and Defense Counsel**

- **Importance:** codifies responsibilities of counsel, especially that of the defense counsel, and codifies important rights of the accused, i.e., the right to appointed counsel, the ability to have civilian counsel, the right of the accused to be represented at a preliminary hearing (inclusion of this would depend on the ultimate resolution of the grand jury vs. preliminary hearing question), and the right to submit matters to the convening authority for consideration following conviction.

- **No similar section:** 26.05.455, Detail of trial/defense counsel deals with the selection/assignment of JAGs as prosecutors/defense attorneys, and list required qualifications. It does not provide for responsibilities/duties of those detailed/assigned. It also does not provide for rights of the accused as outlined in Art. 38

- **Art 39: Sessions**

- **Importance:** Provides forum for arraignment and receiving pleas (the act of receiving pleas is provided for at 26.05.490, but the forum is not), a forum for resolving pretrial motions, etc., outside the presence of the jury (because the jury would be tainted by hearing motions, etc.) and ensures that all other “sessions” are “on the record.”

- **No similar section:** 26.05.503, Voting and rulings, deals with reaching a verdict, receiving the verdict, and jury instructions. It does not deal with motions, etc.

- **Art 41: Challenges**

--- Importance: Provides necessary guidance for jury selection and challenges to jurors and the military judge. Provides for challenges for cause and preemptory challenges. Jury selection is vital part of courts-martial proceedings. Would need modification from Model Code language if number of jurors changes, and possibly an increase in the # of preemptory challenges

--- No similar section

-- **Art 46: Opportunity to Obtain Witnesses and other Evidence**

--- Importance: codifies equal opportunity for both parties to obtain witnesses, and allows service by civil authorities (ex: Judicial Services Troopers). Service of process will comply with state process requirements where the witness located, expediting process. Extends process to all States.

--- No similar section: 26.05.493, does not provide for civil authority involvement, and limits subpoena authority to Alaska only.

-- **Art 47: Refusal to Appear or Testify** (quasi covered in AS 26.05.493)

--- Importance: Gives CM the ability to independently ensure witness participation as opposed to trying to rely on civilian courts and the logistical headache involved with that. Requires payment of witnesses up front. 26.05.493 makes receipt of payment a prerequisite for charging someone under that section, but does not require payment upfront. *Recommend* adding a section requiring upfront payment, or, better fiscally, removing the requirement that a witness have "been paid or tendered fees" before being subject to violation for not complying with a subpoena.

--- While 26.05.493 is similar, there is room for improvement.

-- **Art 49: Depositions**

--- Importance: provides ability to conduct depositions: procedures for, and requirements of. Especially important for highly operational/deployment heavy units like 176 WG and 168 WG. Without, no codified way to take testimony from deploying members before they leave.

--- No similar section

-- **Art 57: Effective Date of Sentence**

--- Importance: Sets date that sentences, to include forfeitures, confinement, etc., become effective. Substantive sentencing provision. Necessary corollary to prosecution.

--- Bill includes Art 57a (Deferment, 26.05.515), but provides no effective date. Need an effective date in order to defer,

--- No similar section

-- **Art 58(a): Sentences: Reduction in Enlisted Grade Upon Approval**

--- Importance: Requires any enlisted member receiving a dishonorable or bad-conduct discharge, or confinement, to automatically be reduced to the lowest rank. Deserves weight of law as removing property interest in rank. Fiscally responsible also.

--- No similar section: 26.05.518 codifies Art 58 and deals with confinement, not reduction. Art 58(a) is a separate substantive article dealing with reduction, not confinement.

-- **Art 58(b): Sentences: Forfeiture of pay and allowances during confinement**

--- Importance: Requires forfeiture of pay and allowances during periods of confinement and requires an effective date provided in Art 57. Fiscally responsible; prohibits members collecting pay and allowances while in jail.

--- No similar section: 26.05.518 codifies Art 58 and deals with confinement, but does not require the member to forfeit pay while jailed. No section of the code does that in spite of its fiscal and equitable merits. Art 58(b) is a separate substantive article not in HB 126

-- **Art 60: Action by Convening Authority**

--- Importance: VITAL: provides procedure for convening authority (CV) following court-martial. CV begins process and has to end it. It also allows the defendant to submit matters for consideration/requests for leniency. "Approval" must happen before a sentence is effective, and is referenced in 26.05.535, but "approval" is not provided for in bill b/c this article is missing. *Recommend* including this article, but modifying it to prohibit the convening authority from overturning a finding of guilty to prevent abuse of discretion and favoritism.

--- No similar section

-- **Art 63: Rehearing**

--- Importance: provides specific guidance for retrials should one be necessary by virtue of a hung jury. Retrials not address anywhere in bill.

--- No similar section: Art 63 deals with retrials after a hung jury, Sec 26.05.530 provides for a completely new trial if new evidence of innocence or fraudulent prosecution found

-- **Art 64: Review by Senior Force Judge Advocate**

--- Importance: Requires legal review of proceedings to ensure legal sufficiency. Provides valuable legal guidance for TAG. Empowers Staff Judge Advocate as process watchdog, and guarantees rights of both defendant and government.

--- No similar section: This legal review is part of the JAGs role as advisor to the TAG and the functional owner of the military justice system. It is separate from and analyzes issues differently than the Military Appeals Commission.

-- **Art 65: Disposition of Records:**

--- Importance: provides that disposition of record of trial should be in accordance with state law, i.e., kept for a period of years, reported to clerk of court, etc.

--- No similar section: 26.05.508 deals with forming the record of trial, but does not provide for its disposition/storage.

-- **Art 71: Execution of Sentence; Suspension of Sentence**

--- Importance: Prohibits executing certain portions of a sentence while an appeal is pending.

--- No similar section

-- **Art 74: Remission and Suspension:**

--- Importance: Provides for suspension of any part or amount of the unexecuted portion of a sentence. More importantly, HB 126 has Art 72 (26.05.528), vacation of suspension, but no mechanism to actually suspend. 26.05.535 also references suspension. This article is that missing mechanism.

--- No similar section

-- **Art 76: Finality of Proceedings:**

--- Importance: Makes findings and sentence final as a matter of law, and makes convictions binding as appropriate. Necessary to end proceedings that begin by statute.

--- No similar section

-- **Art 137: Articles to Be Explained**

--- Importance: Puts members on notice of ACMJ and expectations.

--- No similar section

-- **Art 143: Uniformity of Interpretation**: include direct reference to UCMJ for clarity

-- Art 145: Severability

--- Importance: Codifies idea that if one provision is found to be invalid for any reason, the remainder of the code is still valid. Important considering the constitutional questions raised by the bill.

--- No similar section

Matt Prieksat/07 Feb 16/

Daniel George

From: Clarke, Ron G (MVA) <ron.clarke@alaska.gov>
Sent: Tuesday, April 12, 2016 4:19 PM
To: Daniel George
Subject: BG (AK) Hummel's Four Points

Hi Daniel,

Here are General Hummel's comments from this morning on the "four goals."

In response to the culture that grew the conditions found by the Office of Complex Investigations I set the following four goals: 1) to foster professionalism and ethical fitness; 2) to create preventative measures and offer comprehensive training to mitigate improper behavior, especially as regards sexual harassment or violence; 3) to help victims of improper behavior; and 4) to bring offenders to justice. We are on target with the first three goals, but without the adoption and use of the ACMJ, we'll never get where we need to be on the fourth.

Please let me know what else you need.

 Ron

Daniel George

From: Clarke, Ron G (MVA) <ron.clarke@alaska.gov>
Sent: Tuesday, April 12, 2016 12:27 AM
To: Daniel George
Subject: Weaver, Christopher J LTC USARMY NG AKARNG (US)
On Last Thing Tonight

Hi Daniel,

LTC Weaver is still looking at that longer version of Mr. Prieksat's memo to make sure we've covered everything.

Meantime, here are Col. Weaver's thoughts so far. Since Mr. Prieksat didn't number his points, LTC Weaver referenced the last three numbers to the sections of the bill he cites with a description of the issue, a summary of his issue, and then his response. For Mr. Prieksat's questions about Section .433 -- 12 person jury -- I think the AG's memo addresses that thoroughly, so we won't pile on here.

.444 -- Grand jury requirement -- This is redundant because we also have a military Article 32 hearing requirement in the bill for General Courts-Martial. Article 32 hearings are a little broader than Grand Juries in that they also provide a recommendation to the convening authority from a military officer. An example could be after hearing the evidence, this should be tried by Special Court-Martial instead of General Court-Martial.

.452(c) -- Who may serve on a Court-Martial. A prior version references .528, which is not applicable. He is correct, but this section was amended in House Judiciary. The CS now references the correct section.

.485 -- Statute of limitations for Nonjudicial Punishment. In prior versions, this section didn't make sense. It was amended in House Judiciary and this issue should be resolved now.

.528 -- Section references vacation and suspension, but HB 126 does not have a section regarding vacation and suspension.

.558 -- Pay and allowances. For courts-martial duty it would be 200% of federal pay. He recommends amending .260 on SAD pay. This for the most part should be taken care of, since we realized that we would use Title 32 funds for courts-martial and were able to zero our fiscal note. There's always the possibility of an ASDf court-martial, which would require state funds. I've never heard of a SDF court-martial and I think it would be very rare if it were ever done. But it is a good point for an SAD reform bill next session.

.614 -- Wrongful use or possession of controlled substance -- Lacks the word "wrongful" in the text of the section. This was amended in House Judiciary and the word wrongful is now in the section.

As you can see, Mr. Prieksat's concerns have been considered through the process and have been addressed by the latest version of the

See you in Room 205...



-----Original Message-----

From: Dunbar, Forrest CPT USARMY NG AKARNG (US)
Sent: Wednesday, December 23, 2015 11:01 AM
To: Straub, Alexander M (Alex) MAJ USARMY NG WAARNG (US)
<alexander.m.straub.mil@mail.mil>
Cc: Weaver, Christopher J LTC USARMY NG AKARNG (US)
<christopher.j.weaver12.mil@mail.mil>
Subject: Costs of CM's

CLASSIFICATION: UNCLASSIFIED

Sir,

As we head back to the Legislature in January to ask them to pass a new code of military justice, the question of costs has again surfaced. Our new JAG, LTC Weaver, has pointed out that in California, where he is from, they have been able to use federal funds-- Title 32 funds-- to pay for Courts-Martial.

I was wondering, has that been the case for Washington as well? Beyond CM's, have the costs of implementing the code in Washington in general been paid using federal funds? Thank you for your time!

V/R,

CPT Forrest Dunbar
Assistant Judge Advocate
AKARNG
(907)-428-6852

-----Original Message-----

From: Straub, Alexander M (Alex) MAJ USARMY NG WAARNG (US)
Sent: Wednesday, December 23, 2015 1:11 PM
To: Dunbar, Forrest CPT USARMY NG AKARNG (US)
<forrest.dunbar2.mil@mail.mil>
Cc: Weaver, Christopher J LTC USARMY NG AKARNG (US)
<christopher.j.weaver12.mil@mail.mil>; Bennett, Donald A
COL USARMY NG
WAARNG (US) <donald.a.bennett8.mil@mail.mil>
Subject: RE: Costs of CM's (UNCLASSIFIED)

CLASSIFICATION: UNCLASSIFIED

Forrest,

It has been a very long time--many, many years--since we

have actually convened a courts-martial. That being said, we do have one coming up at the beginning of the new year. Here are my thoughts on your questions.

First, I believe T32 funds are appropriate to pay for courts-martials covering offenses committed by a subject while he or she was on T32, including M-Day, status. If the subject was on state active duty (SAD), then I believe it would be appropriate to convene the courts-martial in a SAD status using state funds. I am copying my SJA so he can opine if he believes differently.

Second, our code was enacted many years ago into state law-long before me. That being said, we still seek amendments to it on occasion. that typically involves our JAG office (T32 personnel), the state Attorney General's Office (state, obviously), and Military Dept. legislative staff (state employees) working on the legislation. If necessary, our TAG, or an individual designated by him, will testify and represent our agency's position on the legislation.

Hopefully I have answered your questions, but let me know if there was something I missed.

V/r,

Alex M. Straub
Major, Judge Advocate
Deputy Legal Counsel

Washington Army National Guard
Office of the Staff Judge Advocate
Legal Office, Bldg 21
Camp Murray (Tacoma), WA 98430
Office: 253-512-8262

* Please note that my office has moved to a 4-10 work schedule and is now closed Mondays (subject to change depending on mission requirements).

-----Original Message-----

From: Dunbar, Forrest CPT USARMY NG AKARNG (US)
Sent: Wednesday, December 23, 2015 10:58 AM
To: Libel, Bryan J LTC USARMY NG ORARNG (US)
<bryan.j.libel.mil@mail.mil>
Cc: Weaver, Christopher J LTC USARMY NG AKARNG (US)
<christopher.j.weaver12.mil@mail.mil>
Subject: Cost of CM's

Sir,

As we head back to the Legislature in January to ask them to pass a new code of military justice, the question of costs has again surfaced. Our new JAG, LTC Weaver, has pointed out that in California they have been able to use federal funds-- Title 32 funds-- to pay for Courts-Martial. I was wondering, has that been the case for Oregon as well? Beyond CM's, have the costs of implementing the code in Oregon general been paid using federal funds?
Thank you for all your assistance during this process!

V/R,

CPT Forrest Dunbar
Assistant Judge Advocate
AKARNG
(907)-428-6852

-----Original Message-----

From: Libel, Bryan J LTC USARMY NG ORARNG (US)
Sent: Monday, December 28, 2015 2:47 PM
To: Dunbar, Forrest CPT USARMY NG AKARNG (US)
<forrest.dunbar2.mil@mail.mil>
Cc: Weaver, Christopher J LTC USARMY NG AKARNG (US)
<christopher.j.weaver12.mil@mail.mil>
Subject: RE: Cost of CM's

Forrest -

Although a state military justice code, if Oregon convened a court-martial for misconduct that occurred in a T32 status, it would be federally funded--just like NJP.

Directly linked to maintaining good order and discipline, cost of implementation is also federally-funded.

Keep the questions coming.

BRYAN LIBEL
Lieutenant Colonel
Joint Force Headquarters
Staff Judge Advocate
Oregon National Guard

(503) 584-3571 (o)

(503) 932-2681 (c)

Daniel George

Subject: Comment on HB126 from Kevin Kastner

From: Kevin Kastner [mailto:kkastner@alaskazone.com]

Sent: Tuesday, April 12, 2016 9:55 AM

To: Daniel George <Daniel.George@akleg.gov>

Subject: Comment on HB126 from Kevin Kastner

To the Chairman Stoltze and members of the Committee.

Thank you for taking a moment to read my comments in regard to the adoption of HB 126. (CODE OF MILITARY JUSTICE)

Speaking both as the Executive Director of the Iron Dog and for myself, I urge your support of HB 126. I understand the gravity of the changes to this code of justice and reiterate the value of giving our Alaska National Guard the tools necessary to regain the trust of the public and facilitate more swift justice for bad actors.

From the perspective of the affiliation with the Iron Dog organization, we have been partners with the Alaska National Guard for nearly 8 years with the specific goal of assisting in building community support, developing a stronger force and outreach to both urban and rural students via our educational programs. Since the bad actions of a few members of the Guard in the past, the challenge of reaching quality recruits and retaining quality Guard members has been very difficult. Despite this struggle, we have had some successes, but believe strongly that we would have much better success through the confidence gained by passage of this bill. There are many stellar members who deserve our support in their efforts to rebuild the image and ranks of the Alaska National Guard.

As an individual, I have had the privilege of working side by side with members of our Guard community and fully commiserate with the uphill battle they have faced while working to rebuild their own image as service member in Alaska. Again, the few bad actors who have essentially walked away unscathed and left a wake of negative sentiment for the men and women of our Guard who continue to soldier on. This bill sends a signal that their suffrage has been worth the effort to stay strong.

Again, my thanks for your consideration. Please consider a YEA vote for HB 126 or amend as you believe is necessary to get this bill out of committee and to the floor for consideration.

Many thanks,
Kevin Kastner

Kevin Kastner

contact | kkastner@alaskazone.com | 907.854.6060

network | <http://www.linkedin.com/in/kevinkastner>

###

LEGAL SERVICES

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Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

January 14, 2016

SUBJECT: Military Code of Justice
(CSHB 126 () ; Work Order 29-LS0473\S)

TO: Representative Gabrielle LeDoux
Attn: Kalyssa Maile

FROM: Megan A. Wallace 
Legislative Counsel

Attached please find the draft bill you requested. I made the changes you requested, but please be aware of the following drafting issues:

1. You requested that "before" precede "the imposition of nonjudicial punishment" under AS 26.05.485, relating to the statute of limitations. It is still unclear, however, whether "not later than three years" applies to "before the imposition of nonjudicial punishment." I recommend that you revise to clarify by reversing the order of the clauses.
2. I made your requested change to AS 26.05.513 relating to classification of felonies and misdemeanors. Please be advised, however, that crimes are generally classified based on the sentence authorized, not the sentence actually imposed. This new approach makes it uncertain as to classification prior to conviction, and even after conviction, it is unclear how a court would interpret this classification system since it is so different from classification of AS 11 crimes.
3. You requested several changes to AS 26.05.611 relating to drunken or reckless operation of a vehicle, aircraft, or vessel, including changing the term "careless" to "negligent" in both (a) and (b) and adding related punishments in (a). Please be advised that I made technical changes to accommodate this change, so subsection (a) now exclusively relates to the negligent or reckless operation offenses, and subsection (b) relates to the impaired operation offenses. All other subsections were relettered accordingly. Please review this section carefully to ensure I have captured your intent.
4. In addition, while you requested that the term "careless" be changed to "negligent" in both AS 26.05.611(a) and (b), you only requested that the punishments for negligent or reckless operation be added to (a). Per my discussion with Ms. Maile in your office, it is

my understanding that you did not want punishments added to (b), so the punishments for negligent or reckless operation will be the same as for the impairment offenses in (b).¹

5. The changes made to AS 26.05.611(a) make it a crime to negligently operate a nonmilitary vehicle, even when not in active state duty. Please be advised that negligent operation of a vehicle is not a crime under AS 11 or AS 28, and is typically adjudicated civilly in district or superior court if a person negligently causes damage or injury to another person while operating a vehicle.

6. Also, the bill does not define any of the mental states used in the bill, including negligence or recklessness. You should consider defining the various mental states used in the bill so that they can be adequately described to the trier of fact. *See e.g.* AS 11.81.900(a). Also, it is usually not wise to assign two mental states to govern the same action by the defendant (for example, "knowingly" and "intentionally").

7. AS 26.05.611(e) (formerly AS 26.05.611(d)) makes it a felony if the person has been convicted under AS 26.05.611(b) two or more times. In this subsection, should "if the member of the militia is convicted under (b) of this section" read "if the member of the militia is convicted under (b) or (c) of this section", since both (b) and (c) are impairment offenses?

8. As previously mentioned in my August 10, 2015, memorandum, this draft contains criminal acts that are inconsistent with existing state law, including AS 26.05.611 and the most recent changes. This presents an issue, as the state is prosecuting the crimes under both AS 11 and under the code of military justice in AS 26.05. In one instance, the state prosecutes a civilian, and in another, the state (acting as the Alaska National Guard) prosecutes a militia member. Nevertheless, the same crime, depending on who is prosecuted, may have different elements, defenses, or levels of punishment. As a result, prosecution of these offenses may create unique and difficult double jeopardy and equal protection issues. These changes should be discussed with the Department of Law.

9. While I made the requested changes to the grand jury requirement under AS 26.05.444, as discussed in my August 10, 2015, memorandum, it is unclear how this procedure will be executed. Under Alaska law, only a prosecuting attorney may bring a case before a grand jury. *See* AS 12.40.070. AS 26.05.444(b) states that "with the consent of the attorney general, an attorney from the Department of Law *may* represent the convening authority at the grand jury." (emphasis added.) Does "represent" mean that you intend that a prosecuting attorney from the Department of Law will conduct the grand jury for the court-martial proceeding? If not, your grand jury provision requires additional changes to current law. Also, what happens if the attorney general declines consent? In that case it appears an additional change to current law is necessary. Further, the draft bill only refers to a grand jury "indicting" a member of the militia. I would recommend

¹ As a result of the technical changes discussed above, AS 26.05.611(b) is now AS 26.05.611(c) in the attached draft.

that you revise this provision to allow a grand jury to return an indictment or presentment, as both are provided for in the Constitution of the State of Alaska and in the Alaska Statutes.

In addition, as previously mentioned, this provision likely results in court rule changes. A court rule change would require a two-thirds vote in order to pass the measure under art. IV, sec. 15 of the Constitution of the State of Alaska, which reads:

Section 15. Rule-Making Power. The supreme court shall make and promulgate rules governing the administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. These rules may be changed by the legislature by two-thirds vote of the members elected to each house.

Rule 39(e) of the Uniform Rules requires:

(e) If a bill or portion of a bill contains matter changing a supreme court rule governing practice and procedure in civil or criminal cases, the bill must contain a section expressly citing the rule and noting what change is being proposed. The section containing the change in a court rule must be approved by an affirmative vote of two-thirds of the full membership of each house. If the section effecting a change in the court rule fails to receive the required two-thirds vote, the section is void and without effect and is deleted from the bill. The fact that a bill contains a section which changes a court rule shall also be noted in the title of the bill.

Without additional information relating to how you intend the grand jury proceedings to be carried out, I cannot identify which rules might be subject to change.

10. Your request adds "bad conduct discharge" to sec. 26.05.263. Do you mean "dishonorable discharge"?

11. Finally, please be advised that the attached draft does not address the issue raised in item no. 6 of my November 5, 2015, memorandum relating to the draft bill.

If you have any questions or need further assistance, please advise.

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Attachment

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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FAX (907) 465-2029
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State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

April 11, 2016

SUBJECT: Military Code of Justice
(CSHB 126(JUD) am; Work Order No. 29-LS0473\F.A)

TO: Senator Bill Stoltze
Attn: Daniel George

FROM: Megan A. Wallace 
Legislative Counsel

You requested an opinion outlining any outstanding issues, as previously identified in my memorandum dated January 14, 2016, to Representative Gabrielle LeDoux, which is available on BASIS relating to the above-referenced bill. You have also asked for an opinion on the grand jury and jury constitutional issues raised in the memorandums you provided from Mr. Matthew Priksat and the Department of Law. This opinion is being provided to you on an expedited basis, per your request.

As it relates to the concerns addressed in my memorandum dated January 14, 2016, to Representative Gabrielle LeDoux, it is my opinion that the issues identified in item nos. 2, 3, 4, 5, 6, 7, 8, and 9 remain in Work Order No. 29-LS0473\F.A.

The memorandums you provided from Mr. Matthew Priksat and the Department of Law raise several constitutional issues with the above-referenced bill related to the provisions governing grand jury, unanimous verdict, and juror requirements. Lacking sufficient time to fully analyze the issues raised in both documents, this opinion is necessarily limited to an overview of the questions raised by the unsupported and definitive statement at page two of the letter from the Department of Law that the grand jury and jury requirements of the Constitution of the State of Alaska do not apply. Those issues have not been fully resolved by an Alaska Court and it is not clear to me that the Alaska Supreme Court will find that "the grand jury and jury requirements of the Alaska Constitution do not apply," as further discussed below.

Art. I, sec. 8, cl. 16 of the United States Constitution empowers Congress to "provide for . . . disciplining" and the authority "of training the militia according to the discipline prescribed by Congress." Currently, Congress prescribes the types of courts-martial and generally requires them to follow federal forms and procedures:

In the National Guard not in Federal service, there are general, special, and summary courts-martial constituted like similar courts of the Army

and the Air Force. They have the jurisdiction and powers, except as to punishments, and shall follow the forms and procedures, provided for those courts. Punishments shall be as provided by the laws of the respective States

32 U.S.C. 326.¹

However, at present federal law does not impose the model code or its provisions as a mandate. A state must comply with the state and federal constitutions.² It does not seem likely that a state will be able to invoke certain "military exceptions" to settled constitutional protections for criminal defendants including the right to a trial by jury.³

¹ A state statute that conflicts with federal law enacted under art. I, sec. 8, cl. 16 can be overturned as unconstitutional -- when it has prescribed a process or punishment, a conflicting state punishment will be overturned. *State ex rel. Games-Neely v. Sanders*, 575 S.E.2d 320, 324 - 25 (2002) (state statute providing mandatory jail time for "missing movement" invalidated under art. I, sec. 8, cl. 16 because 32 U.S.C. 327 - 330 in effect at the time the case was decided had specific sentencing limitations and did not authorize a mandatory jail term). Federal law preempts state action given "the supremacy of federal powers in military affairs." *Perpich v. Department of Defense*, 496 U.S. 334, 350 - 52 (1990) (a governor may not veto the federalization of a state's national guard; rights reserved to state under art. I, sec. 8, cls. 15 and 16 are subordinate).

² In a discharge case filed by an officer in the organized state militia challenging his termination from the militia on the grounds that his right to due process had been violated, the Alaska Supreme Court rejected the state's arguments that state courts lacked jurisdiction over the case -- which the court held was in fact a supremacy clause argument, that the officer's claims were preempted by federal law. *Bowen, supra*, 953 P.2d at 893 - 94. (*DMVA v. Bowen*), 953 P.2d 888, 893 - 94 (Alaska 1998). The Court noted:

While the federal government might have acted to regulate comprehensively the administration of the AGR program in the Alaska Air National Guard, it has not done so. Examination of two federal laws shows this. First, 32 U.S.C. § 324(b) allows termination of a National Guard officer "as provided by the laws of the State." Congress has chosen to affirm, rather than abridge, the states' role in terminating officers of their National Guards. This is clear recognition that state law may provide additional termination requirements.

Id. at 894 - 95.

³ The "military exception" is a federal doctrine. Under it, among other things, a defendant in a court-martial is not entitled to a jury trial under the Sixth Amendment. The doctrine is built on the military exception to the grand jury requirement expressly

This seems especially so in light of the fact that many servicemembers will be serving part time, not subject to military jurisdiction for most of their daily lives. A state undertaking to adopt the model code is acting under color of state law, and is likely to be required to comply with the state and federal constitutions, even if it adopts federal law and procedure verbatim.⁴

Courts-martial procedure does provide many of the constitutional safeguards afforded criminal defendants in civilian courts.⁵ Further, a court-martial may be held for conduct

provided in the Fifth Amendment, but is generally explained as judicial deference to Congress in enacting laws governing the military, (the "make rules" clause of art. I, sec. 8, cl. 14) and the need of the military to maintain order and discipline. *Solorio v. U.S.*, 483 U.S. 435, 439 - 41, 447 - 49 (1987) (court-martial had jurisdiction to try sexual abuse charges committed off base because of defendant's status as a servicemember; overruled prior requirement that a crime must be service-connected to be tried in a court-martial). The exception has been criticized as inadequate to support the deprivation of constitutional rights even for members of the regular armed forces. Stephen I. Vladek, "Military Courts and Article III," 103 *Georgetown Law Journal*, 2015, Forthcoming. (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2419342). See also Frederick Bernays Wiener, "Courts-Martial and the Bill of Rights: The Original Practice?," 1975 *Mil. L. Rev.* 171 (September, 1975).

Some states apparently follow the federal lead with respect to the military exception. *State v. Davis*, 2010 WL 4278277 at 5 - 6 (La. Ct. App. November 1, 2010) (unreported). However, the Alaska Supreme Court has rejected such deference with respect to constitutionally guaranteed due process, at least in a civil matter. *Bowen, id.* at 896 (finding that a determination whether a state agency had violated the rights of a state employee was not a matter "of military expertise or one which causes interference with a military mission").

⁴ See *Gilliam v. Miller*, 973 F.2d 760, 763 - 64 (9th Cir. 1992) (Oregon adjutant general acting under color of a state statute when he terminated National Guard members for failing to meet federal training standards adopted by the Oregon legislature for Oregon guard members).

⁵ In commentary to the model code, the drafters suggest that because the court-martial is a statutory court, some state constitutional protections may not apply. Model Code, Annotations to Article 52. The United States Supreme Court has held that the Sixth Amendment guarantee of the right to counsel does not apply to summary courts-martial in light of the opportunity to object (which carries with it the risk that higher penalties may be imposed in a general or special court martial), and that the Fifth Amendment guarantee of due process does not require the advice of counsel to assist in articulating defense or mitigating circumstances; the Court noted that Congress's determination not to provide for a summary court-martial was entitled to deference under art. I, sec. 8. *Middendorf v. Henry*, 425 U.S. 25, 34, 43 and 46 - 47 (1976) (enlisted

that is not criminal, or a purely disciplinary purpose.⁶ And some conduct must be addressed during a military mission, or to protect the safety of others. However, for some cases, the provisions of the model code incorporated in this draft or in the code to be adopted into regulation, may implicate the rights of state militia members under the state and federal constitutions who are tried by a court-martial for offenses for which a jail term is a possibility.

Grand Jury; Fifth Amendment of the U.S. Constitution and art. 1, sec. 8 of the Constitution of the State of Alaska. Both the state and federal constitutions require a grand jury indictment for a serious crime, but contain exceptions for the armed forces.⁷

Marines who agreed to summary courts-martial for unauthorized absences that resulted in sentences of confinement to a summary court-martial could not object to the results). It is not clear whether an Alaska court will agree.

⁶ The purpose of nonjudicial punishment has been held to be noncriminal in nature:

As noted, "[n]onjudicial punishment provides commanders with an essential and prompt means of maintaining good order and discipline and also promotes positive behavior changes in service members without the stigma of a court-martial conviction." Thus, a primary purpose of NJP is to maintain military order, a purpose distinct from those underlying traditional criminal punishment.

Indeed, military "discipline is not achieved exclusively or even primarily through use or threat of the military criminal law process, the court-martial." "Commanders use a combination of tools to maintain discipline, including leadership by example, training, corrective measures, administrative actions authorized by applicable regulations, and NJP. . . ."

United States v. Reveles, 660 F.3d 1138, 1145 (9th Cir. 2011) (citations omitted).

⁷ The Fifth Amendment provides:

Amendment V. No person shall be held to answer for a capital, or otherwise infamous crime, *unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger*; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. [Emphasis added.]

Both provisions refer to the exception in connection with a time of war or public danger. Federal case law does not seem to apply "when in actual service in time of war or public danger" as a modifier of the land and naval forces provision; however, it does modify the militia provision.⁸ The state provision is clearly tied to periods of war and public danger, which suggests that a felony level charge may not withstand a challenge unless it occurs during a military operation that meets the condition. It is worth noting, though, that the model code has a relatively thorough investigatory process in which, unlike a grand jury proceeding, the defendant can be represented, present evidence, and examine witnesses. Model Code, Article 32.

Right to jury trial: Sixth Amendment to the United States Constitution; art. I, sec.11, Constitution of the State of Alaska. A general or special court-martial is like a jury trial in that the finder of fact composed of a group of servicemembers, subject to

Art. I, sec. 8 provides:

SECTION 8. Grand Jury. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases *arising in the armed forces in time of war or public danger*. Indictment may be waived by the accused. In that case the prosecution shall be by information. The grand jury shall consist of at least twelve citizens, a majority of whom concurring may return an indictment. The power of grand juries to investigate and make recommendations concerning the public welfare or safety shall never be suspended. [Emphasis added.]

⁸ *Johnson v. Sayre*, 158 U.S. 114 - 15 (1895). However, this likely refers to the militia when in federal service:

This provision is intended "to prevent persons not subject to the military law from being held to answer for a capital or otherwise infamous crime without presentment or indictment by a grand jury," the words "when in actual service," etc., referring to the militia and not to "land or naval forces," because, as said by Mr. Justice Gray, "All persons in the military or naval service of the United States are subject to the military law, the members of the Regular Army and Navy at all times -- the militia so long as they are in such service." *Johnson v. Sayre*, 158 U. S., 109, 114. And a reason for referring the clause "when in actual service in time of war or public danger" to the militia and not to the Army or Navy is said to be found in the fact "that it is only at those times that the militia are under the jurisdiction and control of the General Government," while the Army and Navy of the United States are always in the service of the Government.

Alabama Great S. R. Co. v. United States, 49 Ct. Cl. 522, 534 - 35 (1914).

challenge by the parties, who hear the facts and determine guilt. Model Code, Articles 25 and 41. However, the members are selected by the convening authority, Model Code, Article 25(f). Under federal law, the right to a jury trial under the Sixth Amendment does not apply to courts-martial.⁹ Under art. I, sec. 11 of the Constitution of the State of Alaska, a defendant subject to criminal prosecution is entitled to the unanimous verdict of a jury.¹⁰ While some offenses under the model code may not be considered criminal

⁹ *Reid v. Covert*, 354 U.S. 1, 35 - 40 and notes 44 and 68 (1957) (case concerned limitations on ability of military courts to try civilians; noting that in contrast military justice was substantially different, that military courts did not provide the right to a jury trial at common law, and that the application of the bill of rights was uncertain). At least one state court has observed that a member of a state militia is not entitled to a jury trial under the state constitution because it was unavailable in a military court at common law. *Application of Palacio*, 238 Cal.App.2d 545, 551 (1965) (dicta) (petitioner released because not afforded opportunity to demand a special or general court-martial before confined after summary court-martial.) See also *Miller v. Rockefeller*, 327 F.Supp. 542, 547, n. 5 (S.D.N.Y. 1971).

¹⁰ Art. I, sec. 11 provides:

SECTION 11. Rights of Accused. In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury of twelve, except that the legislature may provide for a jury of not more than twelve nor less than six in courts not of record. The accused is entitled to be informed of the nature and cause of the accusation; to be released on bail, except for capital offenses when the proof is evident or the presumption great; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

(Emphasis supplied.) In *Baker v. City of Fairbanks*, 471 P.2d 386 (Alaska 1970) the Alaska Supreme Court held that the right to a jury trial to any criminal prosecution of an offense that includes:

a direct penalty for which may be incarceration in a jail or penal institution. It also includes offenses which may result in the loss of a valuable license, such as a driver's license or a license to pursue a common calling, occupation, or business. It must also include offenses which, even if incarceration is not a possible punishment, still connote criminal conduct in the traditional sense of the term.

Excluded from the requirement of jury trial are such relatively innocuous offenses as wrongful parking of motor vehicles, minor traffic violations, and violations which relate to the regulation of property, sanitation, building codes, fire codes, and other legal measures which can be

Senator Bill Stoltze
April 11, 2016
Page 7

prosecutions, the prosecution of a violation of state law or regulation that has incarceration as a potential result is likely governed by art. I, sec. 1, Constitution of the State of Alaska.

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considered regulatory rather than criminal in their thrust, so long as incarceration is not one of the possible modes of punishment.

Id. at 402 - 03. The revocation of a valuable license is subject to trial by jury if the court, rather than an administrative agency is required to revoke a license on conviction of certain offenses. *State v. District Court*, 927 P.2d 1295, 1296 - 97 (Alaska Ct. App. 1996). A unanimous jury is constitutionally required. *Khan v. State*, 278 P. 3d 893, (Alaska 2012); *Andres v. United States*, 333 U.S. 740, 748-49 (1948). The model code language has been altered to provide for a unanimous verdict. Sec. 26.05.505.



THE STATE
of **ALASKA**
GOVERNOR BILL WALKER

Department of Law

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April 11, 2016

Via E-Mail:

Senator.Bill.Stoltze@akleg.gov

Re: HB 126

Dear Senator Stoltze:

The Department of Law has reviewed the correspondence from Staff Judge Advocate Matthew Prieksat, and we do not share his concerns regarding the constitutionality of the proposed Military Justice Code for Alaska, HB 126. Mr. Prieksat raises several issues, including those that touch on the Alaska Constitution. He states the proposed UCMJ is inconsistent in that it includes grand jury requirement and unanimous verdict requirement, but not 12/6 jurors requirement.

The main constitutional concerns come from the interplay between Section 8 and Section 11 of Article 1 of the Alaska Constitution. Section 8 provides, in relevant part, that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the armed forces in time of war or public danger." Section 11 states that "in all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury of twelve..." These provisions mirror the Fifth and Sixth Amendments to the United States Constitution. The Fifth Amendment provides that no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger. The Sixth guarantees the right to trial by jury. The United States Supreme Court has long held that the right to trial by jury is limited to those persons who are subject to indictment or presentment under the Fifth amendment. Therefore, in a case arising in the land or naval forces, or in the militia when in actual service in times of war or public danger, the accused is not entitled to a jury trial. *Ex Parte Milligan*, 71 U.S. [4 Wall.] 2, 123, 18 L.Ed. 281 (1866).

In *Johnson v. Sayre*, 158 US 114 (1895) the Court held that in the Fifth amendment the modifier "when in actual service in time of war or public danger" is added to the militia (but not the land or naval forces) because that is the only time that the militia are under the control or jurisdiction of the government. In contrast, the Army and

Navy are always in the service of the government. *See Also Alabama Great S.R. Co. v. United States*, 49 Ct.Cl. 522, 534-35 (1914). Because this interpretation of the federal language long predates the Alaska Constitution, the Alaska Constitution must be read with this history in mind. Therefore, the Department of Law believes that exception to the grand jury requirement in Article 1 § 8 of the Alaska Constitution should be read to apply to any person who is actually serving on active duty with the Guard, because that person is under the control and jurisdiction of the Alaska government.

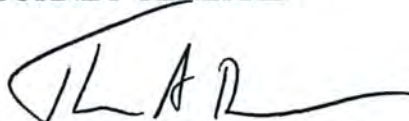
HB 126 will most likely pass constitutional muster. Mr. Priksat recommends making things constitutionally "consistent" by including a grand jury requirement, removing the preliminary hearing, increasing the number of jurors to 8 and requiring a unanimous verdict. Because the grand jury and jury requirements of the Alaska Constitution do not apply, there is no lack of constitutional consistency. If they did apply, their exact terms and requirements must be met, including the requirement that a unanimous verdict by a jury of 12 is required for conviction. But, because these provisions do not apply in the military context, the exact composition of the jury and the grand jury and preliminary hearing procedures can be established in statute, as long as basic due process requirements are met. And, HB 126 provides much more than the minimum due process.

While the courts will be the ultimate arbiters of constitutionality, we believe that if challenged, HB 126 will be found to be fully compliant with both the United States and Alaska Constitutions.

Sincerely,

CRAIG W. RICHARDS
ATTORNEY GENERAL

By:



Thomas Dosik
Assistant Attorney General

TAD/aec

Oren Brown

From: Daniel George
Sent: Monday, March 28, 2016 4:22 PM
To: craig.richards@alaska.gov
Cc: Sen. Bill Stoltze
Subject: HB 126 (ACMJ) Constitutional Concerns
Attachments: Updated ACMJ Bullet Points.pdf

Good afternoon Attorney General Richards,

Senator Stoltze requests that your office review the attached messages from Mr. Prieksat regarding HB 126 and several issues it raises. Thank you in advance for your assistance in this matter.

Respectfully,

Daniel George

*Staff to Senator Bill Stoltze
Chair, Senate State Affairs Committee
(907) 465-4958
Daniel.George@akleg.gov*

From: Matthew Prieksat [<mailto:mprieksat@gmail.com>]
Sent: Thursday, March 17, 2016 4:15 PM
To: Sen. Bill Stoltze <Sen.Bill.Stoltze@akleg.gov>; Sen. Charlie Huggins <Sen.Charlie.Huggins@akleg.gov>
Subject: HB 126 (ACMJ) Constitutional Concerns

Gentlemen,

I am an Assistant Staff Judge Advocate for the 176 WG/AKANG, current Air Force attorney, and former Assistant District Attorney, writing to express concerns with the current version of HB 126. Bottom line up front: Sec.26.05.433, Courts-Martial Classified, is likely unconstitutional because it does not provide for the number of members required by Art 1, Sec 11 of the AK Constitution, and there is no state "military exception" to juries like there is at the federal level. That and other concerns are included in the attachment for your reference.

I have attempted to address these concerns with the Dept of Law and Forrest Dunbar, but neither has been responsive. My concern is that the legislature is not getting good information. The individuals involved in this project have not tried criminal cases in the military or the civilian world, and do not understand how these provisions work together and are required for a functioning system. For example, Capt Dunbar testified that there would never be a need for a Grand Jury and a Preliminary Hearing in the same case, yet as the statute reads it would require both in every felony/General Court Martial proceeding. He has also testified that the AK Constitution "absolutely" applies to this bill, and included a grand jury requirement as a result, but refuses to address the jury issue; an issue that Legislative Legal also brought up in its February 23, 2015 memo to Rep LeDoux.

It is my hope that the Guard will continue to take steps to regain the trust of the public. This bill is an important step in that process, but as it currently reads, it sets the Guard up for future failure. Together we can make sure that that does not happen.

I look forward to your response and would appreciate the ability to discuss these issues with you in depth, and answer any questions you might have.

V/R,

Matt Prieksat
308.380.1663



14 April 2015

Maximum Punishments Matrix: A Comparison between Maximum Allowable Punishments in the Alaska Code of Military Justice, the Federal UCMJ, and offenses cognizable under civilian law as modified by SB 91.

Note: These punishments available in Courts-Martial, NOT in Nonjudicial Punishment.

From the Sectional Analysis of SB 91

Section 72 *12.55.125(c) - Sentences of Imprisonment for Felonies (Amended)*

Maintains the maximum sentence for non-sex Class A felonies at 20 years, while reducing the presumptive range for a first felony conviction to three to six years, a first felony conviction if the defendant uses a dangerous instrument or the offense is directed at a first responder to five to nine years, a second felony conviction to eight to twelve years, and a third felony conviction to thirteen to twenty years. Conforms to refer to the realigned misconduct involving controlled substances statutes.

Section 73

12.55.125(d) - Sentences of Imprisonment for Felonies (Amended)

Maintains the maximum sentence for non-sex Class B felonies at 10 years, while reducing the presumptive range for a first felony conviction to zero to two years, a second felony conviction to two to five years, and a third felony conviction to four to 10 years. Conforms to refer to the realigned misconduct involving controlled substances statutes.

Section 74

12.55.125(e) - Sentences of Imprisonment for Felonies (Amended)

Maintains the maximum sentence for non-sex Class C felonies at 5 years, while reducing the presumptive range for a first felony conviction to a suspended term of imprisonment of up to eighteen months, a second felony conviction to one to three years, and a third felony conviction to two to five years.

Section 77

12.55.135 – Sentences of Imprisonment for Misdemeanors (Amended)

Provides that the court may not impose a sentence of imprisonment or suspended imprisonment for a person convicted of theft in the fourth degree; concealment of merchandise ; removal of identification marks; unlawful possession; **issuing a bad check**; or criminal simulation who has not been convicted of one of these theft offenses at least twice.

<u>Offense</u>	<u>Maximum</u>	<u>Maximum</u>	<u>Maximum Punishments</u>
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ALASKA NATIONAL GUARD
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	<u>Punishment ACMJ</u> (years refer to years of confinement)	<u>Punishment UCMJ</u> (years refer to years of confinement)	<u>Civilian Law: SB 91</u>
Drunken or reckless operation of a vehicle, aircraft, or vessel (first two offenses)	1 years; Dishonorable Discharge	18 months; Dishonorable Discharge	SB 91 Provision highlighted in bold. Other verbiage already in Alaska Statutes. “(b) Except as provided under (n) of this section, driving while under the influence of an alcoholic beverage, inhalant, or controlled substance is a class A misdemeanor. ... “(1) the court shall impose a minimum sentence of imprisonment of (A) not less than 72 consecutive hours and a fine of not less than \$1,500 if the person has not been previously convicted; (B) not less than 20 days and a fine of not less than \$3,000 if the person has been previously convicted once...” SB 91: (a) A defendant convicted of a class A misdemeanor may be sentenced to a definite term of imprisonment of not more than (1) one year, if the (A) conviction is for a crime with a mandatory minimum term of 30 days or more of active imprisonment;



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			(B) trier of fact finds the aggravating factor that the conduct constituting the offense was among the most serious conduct included in the definition of the offense; (C) defendant has past criminal convictions for conduct violative of criminal laws, punishable as felonies or misdemeanors, similar in nature to the offense for which the defendant is being sentenced; or ... (2) 30 days.
Drunken or reckless operation of a vehicle, aircraft, or vessel (third and subsequent offenses)	5 years; Dishonorable Discharge	18 months; Dishonorable Discharge	“A person is guilty of a class C felony if the person is convicted under (a) of this section and either has been previously convicted two or more times since January 1, 1996, and within the 10 years preceding the date of the present offense...” SB91: “(1) if the offense is a first felony conviction and does not involve circumstances described in (4) of this subsection, probation, with a suspended term of imprisonment of zero to 18 months...”
Wrongful use, possession, etc.,	1 year; Dishonorable Discharge	5 years; Dishonorable Discharge	



ALASKA NATIONAL GUARD
JOINT FORCES HEADQUARTERS
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of controlled substance (possession)			
Wrongful use, possession, etc., of controlled substance (manufacturing, distributing, importing)	5 years; Dishonorable Discharge	15 years; Dishonorable Discharge	
Wrongful use, possession, etc., of controlled substance (Marijuana)	No confinement; Dishonorable Discharge	2 years for possession; 10 years for production/distribution; Dishonorable Discharge	
Riot or breach of peace	1 year; Dishonorable Discharge	10 years; Dishonorable Discharge	(b) Riot is a class C felony SB 91: "if the offense is a first felony conviction and does not involve circumstances described in (4) of this subsection, probation, with a suspended term of imprisonment of zero to 18 months"
Sex assault (sexual act)	10 years; Dishonorable Discharge	30 years; Dishonorable Discharge	
Sex assault (sexual contact)	5 years; Dishonorable Discharge	Aggravated sexual contact: 20 years; Dishonorable Discharge Abusive Sexual contact: 7 years; Dishonorable Discharge	
Stalking	3 years; Dishonorable Discharge	3 years; Dishonorable Discharge	(c) Stalking in the second degree is a class A misdemeanor.



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			SB 91: (a) A defendant convicted of a class A misdemeanor may be sentenced to a definite term of imprisonment of not more than (1) one year, if the (A) conviction is for a crime with a mandatory minimum term of 30 days or more of active imprisonment; (B) trier of fact finds the aggravating factor that the conduct constituting the offense was among the most serious conduct included in the definition of the offense; (C) defendant has past criminal convictions for conduct violative of criminal laws, punishable as felonies or misdemeanors, similar in nature to the offense for which the defendant is being sentenced; or ... (2) 30 days.
Other sexual misconduct (indecent viewing, visual recording, or broadcasting)	1 year; Dishonorable Discharge	Viewing:1 year; Dishonorable Discharge Recording: 5 years; Dishonorable Distributing:7 years; Dishonorable	(1) Class C felony if the person viewed or shown in a picture was, at the time of the viewing or production of the picture, a minor; SB91: “(1) if the offense is a first felony conviction and does not involve circumstances described



ALASKA NATIONAL GUARD
JOINT FORCES HEADQUARTERS
PO BOX 5800
JOINT BASE ELMENDORF - RICHARDSON AK 99505-0800

			in (4) of this subsection, probation, with a suspended term of imprisonment of zero to 18 months...” (2) Class A misdemeanor if the person viewed or shown in a picture was, at the time of the viewing or production of the picture, an adult. SB91: 1 year or 30 days.
Other sexual misconduct (compelling another to engage in prostitution)	10 years; Dishonorable Discharge	12 years; Dishonorable Discharge	Promoting Prostitution in the First Degree is a class A Felony (except if against a child). SB 91 does not alter the sentencing for this type of sex offense. Section (i) of AS 12.55.125: (A) if the offense is a first felony conviction, the offense does not involve circumstances described in (B) of this paragraph, and the victim was (i) less than 13 years of age, 25 to 35 years; (ii) 13 years of age or older, 20 to 30 years; Promoting Prostitution in the Second Degree is a Class B Felony. SB 91: (d) Except as provided in (i) of this section, a defendant convicted of a class B



ALASKA NATIONAL GUARD
 JOINT FORCES HEADQUARTERS
 PO BOX 5800
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			felony may be sentenced to a definite term of imprisonment of not more than 10 years... (1) if the offense is a first felony conviction and does not involve 19 circumstances described in (2) of this subsection, zero [ONE] to two [THREE] years...
Other sexual misconduct (indecent exposure)	1 year; Dishonorable Discharge	1 year; Dishonorable	
Larceny and wrongful appropriation (permanent)	1 year; Dishonorable Discharge	5 years; Dishonorable Discharge	
Larceny and wrongful appropriation (temporary)	6 months; Dishonorable Discharge	2 years; Dishonorable Discharge	
Forgery	1 year; Dishonorable Discharge	5 years; Dishonorable Discharge	
Making, drawing, or uttering check, draft, or order without sufficient funds	1 year; Dishonorable Discharge	5 years; Bad Conduct Discharge	SB 91: Section 77 12.55.135 – Sentences of Imprisonment for Misdemeanors (Amended) Provides that the court may not impose a sentence of imprisonment or suspended imprisonment for a person convicted of... issuing a bad check...
Perjury	1 year; Dishonorable Discharge	5 years, Dishonorable Discharge	

Daniel George

From: Daniel George
Sent: Friday, April 15, 2016 1:21 PM
To: Dianne Blumer (Dianne.Blumer@akleg.gov)
Subject: SJUD today / HB 126 Additional Issues

Hello Dianne,

Do you think Senate Judiciary will meet today? I saw the joint session is recessed to 2:00 pm, when they have 6 more confirmation votes. Last I saw, the senate is still scheduled to go in at 4:00 pm.

As for HB 126:

Two concerns which have been brought to my attention by callers recently, which to my knowledge have not been brought to the sponsor or the department:

You may wish to send these to Lt. Col Weaver / DMVA, or if appropriate, either Legal Services or Department of Law for comment.

- There are "dual status technicians" who work in/for the Alaska National Guard. This is not a concept I am familiar with, but the following links may be helpful:
 - <http://www.angelfire.com/ak4/MidnightSun/>
 - <http://www.actnat.com/index.cfm>
 - <http://www.fedsmith.com/2013/07/01/the-uniquely-unionized-national-guard/>

They are members of the Alaska Chapter of the Association of Civilian Technicians. They are a unionized group of civilians, who wear military uniforms, work for the guard under Title 32, and can be called up and federalized under Title 10, according to the gentleman who contacted me today. He said that their personnel fall under a labor management agreement (LMA), and fall subject to the National Labor Relations Board. He wanted to remain anonymous, however I will provide his identity and contact information to you upon request. He said that he and his fellow members were not aware of HB 126 until just now, and believe it will subject them to an ACMJ. He said that in other states that tried to subject Dual Status Technicians / Civilian Technicians within state guards, there had been UCMJ proceedings which were thrown out in court because of lack of jurisdiction. I do not have case reference or citation I can provide.

- *Long story short, the constituent felt that the union should have been consulted before proposing subjecting these members to a new legal system / statutory code.* This probably should be addressed by the AKNG/DMVA formally.
- A man named Jim Rehman () noted that victims of assault, if brought under this military system, would be ineligible to file complaints with the Alaska Commission on Human Rights or the Anchorage Equal Rights Commission. There would need to be jurisdictional clarification to resolve this issue. Is it the intent of the AKNG to preclude victims from the recourse offered by the AK-HRC or the AERC? I do not believe that the state / muni can sue the federal government, so there may be no recourse for these entities to otherwise assert jurisdiction in the future should this become an issue.

Daniel George

*Staff to Senator Bill Stoltze
Chair, Senate State Affairs Committee
(907) 465-4958
Daniel.George@akleg.gov*

Daniel George

From: Dianne Blumer
Sent: Saturday, April 16, 2016 11:51 AM
To: Daniel George
Subject: FW: HB 126 Questions

Follow Up Flag: Follow up
Flag Status: Completed

From: Clarke, Ron G (MVA) [mailto:ron.clarke@alaska.gov]
Sent: Saturday, April 16, 2016 8:05 AM
To: Dianne Blumer <Dianne.Blumer@akleg.gov>; Forrest Wolfe <Forrest.Wolfe@akleg.gov>; Sen. Lesil McGuire <Sen.Lesil.McGuire@akleg.gov>
Cc: Weaver, Christopher J LTC USARMY NG AKARNG (US) <christopher.j.weaver12.mil@mail.mil>; Kalyssa Maile <Kalyssa.Maile@akleg.gov>
Subject: HB 126 Questions

Hi All,

Here's what our legal team has come up with in response to the questions your received yesterday. Please let me know if you have questions or need anything further.

Ron

I. NLRB Jurisdiction is Lacking

The anonymous constituent cites no cases to support the assertion that the courts have thrown out state code of military justice jurisdiction. Throughout the process of developing the Alaska Code of Military Justice, we have been in contact with lawyers across the nation in the National Guards of the other 53 states and territories, as well as the National Guard Bureau. None of them have identified any court decision holding as described by the constituent. In fact, 9th Circuit controlling precedent holds contrary. In *Mier v. Owens*, 57 F.3d 747 (1995), the court rejected an attempt by a National Guard technician to apply federal civilian employment protections of Title VII of the Civil Rights Act of 1964 to National Guard technicians because such protections do not apply to "challenge personnel actions integrally related to the military's unique structure."

As written, HB 126 unequivocally addresses unique aspects with which National Guard technicians must comply not as a part of their duties as civilian technicians, but as military service members. The Federal Labor Relations Authority (FLRA) addressed this issue directly in ACT, TX, 55 FLRA 1226, 1228 (2000). In consolidated cases brought by the chapters of the Association of Civilian Technicians of Texas and Wisconsin, the FLRA recognized:

The Authority has consistently held that National Guard technicians may not bargain concerning "the military aspects of civilian technician employment." *Association of Civilian Technicians, Schenectady Chapter and U.S. Department of Defense, National Guard Bureau, New York Air National Guard, Latham New York*, 55 FLRA 925, 932-33 (1999) (*ACT, New York*) (Member Cabaniss, concurring in part as to Proposal 6, and Member Wasserman, dissenting in part as to Proposal 6), *appeal filed sub nom. Association of Civilian Technicians, Schenectady Chapter v. FLRA*, No. 99-1476 (D.C. Cir. Dec. 28, 1999); *National Federation of Federal Employees, Local 1669 and U.S. Department of Defense, Arkansas Air National Guard, 188th Fighter Wing, Fort Smith, Arkansas*, 55 FLRA 63, 65 (1999) (*ACT, Arkansas*), *enforced sub nom. Arkansas National Guard v. FLRA*, No. 99-1563, 99-1974 (Oct. 14, 1999); *Association of Civilian Technicians, Montana Air Chapter and Department of the Air Force, Montana Air National Guard, Headquarters, 120th Fighter Interceptor Group, (ADTAC)*, 20 FLRA 717, 739 (1985) (*ACT, Montana*). This holding arises only in the unique employment situation of dual status employees. In addressing this issue, the U.S. Court of Appeals for the District of Columbia Circuit explained that "National Guard technicians are both civilian employees and enlistees in National Guard units. The two worlds they simultaneously inhabit are understandably governed by very different rules of employee-employer relations." *NFFE, Local 1623*, 852 F.2d at 1350.

Authority precedent holding that National Guard technicians may not bargain concerning military aspects of civilian technician employment has been based on three distinct rationales. First, it has been based on a statutory analysis of 10 U.S.C. § 976(c) [n2] , which prohibits bargaining with, or on behalf of, members of the military. [n3] Second, it has been based on a statutory analysis of the National Guard Technicians Act of 1968, 32 U.S.C. § 709 *et seq.* (Technicians Act) [n4] , which provides, among other things, that as a condition of civilian employment, technicians must be members of the National Guard. [n5] Third, it has been based on the conclusion that military matters do not concern conditions of employment within the meaning of section 7103(a)(14) of the Statute. [n6]

In short, ACT lacks standing to be consulted on implementation of the ACMJ because it pertains to military matters to which they are statutorily barred from negotiating. There is no known legal precedent for limiting ACMJ jurisdiction as they seek to do.

II. Alaska Commission on Human Rights and Anchorage Equal Opportunity Commission Jurisdiction is Lacking

For the second item, Mr. Rehman is apparently concerned that an ACMJ action will foreclose seeking recourse from Alaska Commission on Human Rights or the Anchorage Equal Rights Commission. This concern fails to recognize that the National Guard is already outside of the jurisdiction of these entities because it is considered a federal military entity. These two agencies have both recognized this jurisdictional limitation and declined to accept cases against the Alaska National Guard. These entities both have local jurisdiction derivative of the Title VII of the Civil Rights Act of 1964. As noted above in *Mier*, the courts have already rejected jurisdiction under Title VII to the National Guard. Besides the lack of personal jurisdiction over the National Guard, Mr. Rehman's concern is also misplaced because of the lack of subject matter jurisdiction for these entities. Alaska Statute 18.80.220-.255 spells out the illegal actions under the Alaska Human Rights Commission's jurisdiction; assault is not identified as a basis for an action before this Commission. Similarly, the enabling code provisions for the Anchorage Equal Opportunity Commission do not recognize assault as a basis for a complaint.