

HOUSE BILL REPORT

SHB 1036

As Passed Legislature

Title: An act relating to the Washington code of military justice.

Brief Description: Concerning the Washington code of military justice.

Sponsors: House Committee on Judiciary (originally sponsored by Representatives Kelley, Morrell, Moeller, Rodne, Seaquist, McCoy, Green, Goodman, Kirby, McCune, Hurst, Miloscia, Hunt, Appleton, Chase, Conway, Williams, Campbell, Ross and Bailey; by request of Washington Military Department).

Brief History:

Committee Activity:

Judiciary: 1/15/09, 1/29/09 [DPS].

Floor Activity:

Passed House: 2/13/09, 95-0.

Senate Amended.

Passed Senate: 4/7/09, 47-0.

House Concurred.

Passed House: 4/18/09, 97-0.

Passed Legislature.

Brief Summary of Substitute Bill

- Applies the Washington Code of Military Justice (WCMJ) to members of the Washington State Guard and Washington National Guard committing military offenses, whether or not they are on "duty status."
- Specifies when the military has jurisdiction over certain offenses.
- Specifies procedures and authority of the different courts-martial.
- Adds new offenses to the WCMJ and clarifies the offense of drunk driving.
- Makes other changes to criminal procedures under the WCMJ.

HOUSE COMMITTEE ON JUDICIARY

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 11 members: Representatives Pedersen, Chair; Goodman, Vice Chair; Rodne, Ranking Minority Member; Shea, Assistant Ranking Minority Member; Flannigan, Kelley, Kirby, Ormsby, Roberts, Ross and Warnick.

Staff: Trudes Tango (786-7384)

Background:

The Washington Code of Military Justice (WCMJ) governs the organization, administration, and duties of the state militia, which consist of the Washington State Guard and the Washington National Guard. The Washington National Guard is a component of the U.S. Armed Forces and serves both the Governor under state law and the President under federal law. Unless called into federal service, the Washington National Guard remains under the control of the state and is not subject to the federal Uniform Code of Military Justice. Instead, members of the guard, when not called into federal service, are subject to the WCMJ. The WCMJ was adopted in 1963 and, except for some amendments in 1989, the Legislature has not made significant changes to the WCMJ since its adoption.

Whether a guard member is subject to the WCMJ depends on whether the member is on "duty status." The WCMJ applies to a guard member if the member commits an offense prohibited by the WCMJ while on duty status — meaning, the member is on full-time active duty or inactive duty, which includes weekend drills and periodic training, and travel to and from duty. The offenses in the WCMJ are generally military offenses — being absent without leave, disrespecting officers, theft of military property, and breach of the peace are examples. Offenses such as murder, rape, and assault are excluded from the WCMJ and are left to the state courts.

Serious offenses are tried by general or special court-martial, which must have a minimum number of members sitting on the court-martial. Less serious offenses are generally handled by summary courts-martial. The different levels of courts-martial may impose different types of punishment. General and special courts-martial may impose punishment that includes fines, forfeiture of pay, dismissal or dishonorable discharge, and reduction in rank. The WCMJ addresses procedures for providing military counsel to the accused, pretrial and trial procedures, and other procedural matters.

Summary of Substitute Bill:

Various changes are made to the WCMJ addressing: (1) when the WCMJ applies to guard members; (2) the authority and procedures of the different courts-martial and punishments each can impose; (3) new offenses; and (4) other criminal procedures.

Jurisdiction of the WCMJ.

The WCMJ applies to members who commit military offenses, whether or not the member is on duty status. Military offenses are those offenses listed under the WCMJ. Nonmilitary offenses are all other offenses not listed in the WCMJ. It is made explicit that the military authority has primary jurisdiction over military offenses. The civilian courts have primary

jurisdiction over nonmilitary offenses. If an offense could be both military and nonmilitary, the military may proceed only after the civilian authorities decline to prosecute or dismiss the charge, provided jeopardy has not attached.

Offenses and Punishment.

New offenses are added to the WCMJ: (1) assault of one guard member against another member (except assault in the first degree, which remains under the jurisdiction of civilian courts); and (2) use, possession, or distribution of a controlled substance in an installation, vessel, vehicle, or aircraft used by or under the control of the military. The offense of drunk driving specifically uses the .08 blood or breath alcohol concentration (BAC) standard.

The fine that a general court-martial may impose is increased from \$200 to \$300. The amount of pay that may be docked as punishment by a summary court-martial is specified to be not more than one-half month's pay for two months.

Criminal Procedures.

While investigating a charged offense, if there is evidence that the accused committed an uncharged offense, the investigating officer may investigate that matter without first charging the offense if certain procedural and due process requirements are met.

The accused may be represented by military counsel of his or her own selection if that counsel is reasonably available, as determined by rules established by the state judge advocate. Defense counsel must assist the accused with submitting documents to the reviewing authorities if there has been a conviction.

Procedures are established for trial counsel and defense counsel exercising challenges for cause and peremptory challenges. If a challenge for cause reduces the court below the minimum number of members required, all parties must either exercise or waive any remaining challenge for cause before additional members are assigned to the court. The parties may exercise one peremptory challenge against the new members of the court who were not previously subject to peremptory challenge.

Who is authorized to convene general and specific courts-martial is specified. A military judge must be a judge advocate and may not be assigned nonlegal duties unless authorized by the state judge advocate. The Adjutant General must establish procedures for certifying, appointing, detailing, and removing military judges.

If charges are dismissed as defective or insufficient for any cause, and the statute of limitations has expired or will expire within 180 days after the dismissal date, new charges may be brought if the new charges are: (1) received by the summary court-martial within 180 days after dismissal of the charges; and (2) the charges allege the same acts or omissions that were alleged or included in the dismissed charges.

Notice to Enlisted Members.

Provisions of the WCMJ must be explained to newly enlisted members within 40 days, rather than 30 days, of their enlistment and must be explained to the members each time he or she re-enlists or extends enlistment, rather than every year.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In Support) Washington's Code of Military Justice (WCMJ) was designed to parallel the Uniform Code of Military Justice, but the Washington code has not been updated since the 1960s. This bill will allow the military to have jurisdiction over its members between drills. When a guard member commits an assault while off duty, that assault is still disruptive to troop morale. Yet, those offenses are currently omitted from the WCMJ. This bill modernizes the WCMJ by increasing the fines that can be charged, updating the drunk driving provision, and prohibiting the use or possession of illegal drugs. The general provision prohibiting conduct that is "unbecoming" is updated to align with the Uniform Code which prohibits conduct that would discredit the military. That general provision targets any guard member, not just commissioned officers. The general provision is used very sparingly and is meant to address conduct that is disruptive to the unit or the mission. There is a model military code written for states and some of the language in the bill came from the model code. The changes in this bill are similar to changes being made in other states. Regarding notice to newly enlisted members, the bill changes the time frame for practical matters. A judge advocate general is required to give enlisted members a briefing at the time the member takes the oath, but as a practical matter that does not always happen because there are limited number of judge advocate generals.

(Opposed) The general provision on conduct unbecoming (Section 27) is extremely vague and there is no guidance in the bill as to what it covers. It could lead to a court-martial for behavior that is constitutional. While it is understandable that the military needs discretion to respond to specific behavior, this general provision acts as a broad catch-all and could be used to punish persons in their private affairs. The bill also should require, not just permit, that defense counsel assist the defendant in filing documents for an appeal after conviction.

Persons Testifying: (In support) Representative Kelley, prime sponsor; Gordon Toney and Matt Cooper, Washington Military Department and the Washington National Guard; and Dennis Primoli, Veterans Legislative Coalition.

(Opposed) Shankar Narayan, American Civil Liberties Union of Washington.

Persons Signed In To Testify But Not Testifying: None.