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BILL ANALYSIS

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House Bill 4638 (Substitute H-1 as passed by the House)  
Sponsor: Representative John Garfield  
House Committee: Veterans Affairs and Homeland Security  
Senate Committee: Senior Citizens and Veterans Affairs

Date Completed: 6-15-05

## **CONTENT**

**The bill would amend the Michigan Code of Military Justice to do all of the following:**

- Apply the Code to all members of the State military forces when not in Federal service, and others called to duty with the State military forces, rather than to all members of the Michigan National Guard while on active State duty.**
- Revise provisions pertaining to disciplinary punishment imposed by a commanding officer, and allow a person to demand a trial by court-martial only if he or she were informed that correctional custody could be considered.**
- Set a deadline for the appeal of disciplinary punishment.**
- Revise requirements pertaining to the appointment of a military judge.**
- Allow an affirmative defense in a trial by court-martial for the accused's severe mental disease or defect.**
- Subject to a court-martial certain actions taken during the performance of duty in a peacetime emergency or civil disturbance operation.**
- Include being under the influence of a controlled substance in provisions that prohibit being under the influence of intoxicating liquor.**
- Prohibit a person subject to the Code from using contemptuous language against various public officials; wasting, spoiling, or destroying certain property; unlawfully taking, obtaining, or withholding certain**

**property or money; or falsely or fraudulently using a State- or Federally issued credit card, telephone, telephone calling card, or other access device.**

- Revise a prohibition against bringing discredit upon the armed forces.**
- Allow a local law enforcement officer to apprehend a person subject to the Code.**

### Scope of Code

The Code currently applies to all members of the Michigan National Guard while on active State duty. Under the bill, the Code instead would apply to all members of the State military forces when not in Federal service, and to all other people lawfully called, ordered, drafted, transferred, or inducted into, or ordered to duty in or with, the State military forces. It would apply from the date of their terms of call, order, or other directive. All people serving in the State military forces under Title 32 (National Guard) of the U.S. Code and all those in active service with the State military forces would be subject to the Michigan Code of Military Justice.

Under the Code, "active state duty" means the actual weekend, annual training, or special call-up duty in the State military forces, including travel to and from the duty site or station. "State military forces" means the National Guard of the State, as defined in Federal law (i.e., the Army National Guard and the Air National Guard), and any other military force organized under Michigan law.

Under the bill, "active state service" would mean military service in support of civil authorities ordered by the Governor or as provided by the Michigan Military Act. "Federal service" would mean military duty in the U.S. Armed Forces, including the U.S. Army National Guard and the U.S. Air National Guard, while subject to the Federal Uniform Code of Military Justice.

#### Disciplinary Punishment & Appeals

Punishment. The Code allows a commanding officer, in addition to or instead of an admonition or reprimand, to impose certain disciplinary punishments for a minor offense on an officer or other military personnel under his or her command, without a court-martial. The disciplinary punishment may include, for example, restriction to certain specified limits; correctional custody for up to seven consecutive active State duty days; extra duties; or reduction to the next inferior pay grade. The bill would remove from the list of allowed disciplinary punishments detention of pay for various amounts of time, while forfeiture of pay for set periods could continue to be imposed. The bill also specifies that disciplinary punishment could be imposed under regulations issued pursuant to the Code.

The Code provides that, before being informed of the disciplinary action to be taken, the person to be punished has the right to demand trial by court-martial. Under the bill, the person would have that right only if the commanding officer considering disciplinary action advised the person that correctional custody could be considered as a potential punishment.

Appeals. The Code allows a person who is punished to appeal to the next superior authority. The bill specifies that the appeal would have to be made within 45 days after the punishment was adjudged.

#### Judicial Appointment

Under the Code, the person convening a general or special court-martial must request the State Judge Advocate to detail as military judge of the court-martial a commissioned officer who is licensed to practice law in Michigan and is certified to be qualified for duty by the State Judge Advocate. The bill specifies, instead that the

person convening a general or special court-martial would have to request the State Judge Advocate General to appoint a military judge to the court-martial and that the State Judge Advocate General could appoint an assistant judge advocate who was a commissioned officer, licensed to practice law in Michigan, and certified for that duty by the State Judge Advocate.

The bill would repeal a provision that a person is not eligible to act as a military judge in a case if the person is the accuser or a witness for the prosecution or has acted as investigating officer or a counsel in the same case.

Under the Code, "state judge advocate general" means the commissioned officer responsible for supervising the administration of military justice in the State military forces. A "judge advocate" is an officer of the judge advocate general corps who is designated as a judge advocate. The bill would change that definition to an officer who is designated as a judge advocate by the State Judge Advocate General.

#### Defense of Mental Disease or Defect

Under the bill, it would be an affirmative defense in a trial by court-martial that, at the time of the offense, the accused was unable to appreciate the nature and quality or the wrongfulness of the acts, as a result of a severe mental disease or defect, and therefore lacked mental responsibility. Mental disease or defect would not otherwise constitute a defense. (An affirmative defense is new matter that constitutes a defense to a complaint, or evidence that outweighs the evidence against the defense.)

The accused would have the burden of proving the defense of lack of mental responsibility by clear and convincing evidence. Whenever the accused's lack of mental responsibility was properly at issue, the military judge, or the president of a court-martial without a military judge, would have to instruct the members of the court as to the defense of lack of mental responsibility and charge them to find the accused guilty, not guilty, or not guilty by reason of lack of mental responsibility.

The accused could be found not guilty by reason of lack of mental responsibility only if

a majority of the members of the court-martial present at the time the vote was taken determined that the defense had been established or, in the case of a court-martial composed of a military judge only, the military judge determined that the defense had been established.

#### Peacetime Emergencies & Civil Disturbance Operations

A person subject to the Code must be punished as directed by a court-martial for certain acts committed before or in the presence of the enemy, including, among others, running away; casting away arms or ammunition; and quitting a place of duty to plunder or pillage. Under the bill, this requirement also would apply if those actions were committed during the performance of duty in a peacetime emergency or civil disturbance operation, and the actions would include willfully failing to do the person's utmost to suppress civil disturbance while engaged in an emergency response operation.

The Code also provides that a person subject to it must be punished as directed by a court-martial if he or she, while in the hands of the enemy in time of declared State emergency, does either of the following:

- For the purpose of securing favorable treatment by the captors, acts without proper authority in a manner contrary to law, custom, or rule to the detriment of others, of whatever nationality, held by the enemy as civilian or military prisoners.
- While in a position of authority over those persons, maltreats them without justifiable cause.

Under the bill, this provision would apply to a person subject to the Code who was in the hands of a captor, rather than "the enemy", in time of declared State emergency or civil disturbance emergency. In addition, the bill would delete reference to others "of whatever nationality held by the enemy as civilian or military prisoners".

#### Controlled Substances

A person subject to the Code who is found under the influence of intoxicating liquor and disorderly while in uniform or while on State

military property must be punished as directed by a court-martial. The bill instead would prohibit a person subject to the Code, who was not a sentinel or a lookout, from being under the influence of intoxicating liquor or a controlled substance while in uniform and on military property or while on duty. The person would have to be punished as directed by a court-martial.

In addition, the Code provides that a sentinel or guard subject to the Code who is found under the influence of intoxicating liquor or sleeping upon his or her post or who leaves a post before being relieved must be punished as directed by a court-martial. The bill would add being under the influence of a controlled substance.

Under the bill, "controlled substance" would mean opium, heroin, cocaine, amphetamine, LSD, methamphetamine, phencyclidine, barbituric acid, marihuana, any compound or derivative of any such substance, and any other substance that is listed in Schedules I through V of the Federal Controlled Substances Act (21 USC 812), including any subsequent amendments to those schedules.

#### New Prohibitions

Contemptuous Language. The bill would prohibit a person subject to the Code from using contemptuous words against the President, Vice President, Congress, Secretary of Defense, a secretary of a military department, the Director of the Michigan Department of Military and Veterans Affairs, or the Michigan Governor or Legislature while he or she was on duty, or against the governor or legislature of any other state, territory, commonwealth, or possession while he or she was on duty and present in that state, territory, commonwealth, or possession. A violator would be guilty of an offense punishable as directed by a court-martial, subject to all recognized common law or constitutional immunities within Michigan.

Wasting, Spoiling, or Destroying Property. The bill would prohibit a person subject to the Code, while on duty or in the course of duty, from willfully or recklessly wasting, spoiling, or destroying any property that was not the property of the State or the United States. A violator would have to be punished as directed by a court-martial.

Larceny. The bill specifies that a person subject to the Code would be guilty of larceny if he or she unlawfully took, obtained, or withheld from the United States, this State, or any other state, any property, money, or article of any kind with the intent to deprive the owner permanently of the property, money, or article. A violation would be punishable as directed by a court-martial.

False or Fraudulent Phone or Credit Card Use. The bill would prohibit a person subject to the Code from making a false or fraudulent use of a credit card, telephone, telephone calling card, or other access device issued by the State or the United States. A violator would have to be punished as directed by a court-martial.

#### Bringing Discredit upon the Armed Forces

The Code provides that, though not specifically mentioned in it, a disorder and neglect to the prejudice of good order and discipline in the State's military forces, other than an offense reserved for punishment to the civil courts under the Code, must be taken cognizance of by a general, special, or summary court-martial, pursuant to the nature and degree of the offense, and punished in the discretion of the court.

The bill would delete that provision and instead prohibit a person subject to the Code from bringing discredit upon the State or U.S. Armed Forces through his or her conduct or through disorder or neglect to the prejudice of good order and discipline. A violator would have to be punished by a general, special, or summary court-martial as determined by the nature and degree of the violation.

#### Other Provisions

Apprehension. A person authorized under rules issued pursuant to the Code to apprehend a person subject to the Code, a marshal of a court-martial appointed pursuant to the Code, or a law enforcement officer of the State may apprehend a person subject to the Code upon reasonable belief that an offense has been committed and that the person apprehended committed the offense. Under the bill, a law enforcement officer of a political subdivision of the State also could apprehend such a person.

Bail. Except as provided in the State Constitution, all offenses under the Code are bailable. Before conviction, a person is bailable as determined by the military judge. Under the bill, instead, a person charged with a violation under the Code would be entitled to bail and, before trial, would be entitled to bail in an amount determined by the military judge.

Types of Court-Martial. There are three kinds of courts-martial in the State military forces:

- General courts-martial, consisting of a military judge and at least five members; or only a military judge, if the accused requests in writing a court composed only of the military judge and the military judge approves.
- Special courts-martial, consisting of a military judge and at least three members; or only a military judge, if the accused requests a court composed only of the military judge.
- Summary courts-martial, consisting of one commissioned officer who is not a member of the accused's unit.

Under the bill, the commissioned officer in a summary court-martial would have to be of field grade rank or above and certified for that duty by the State Judge Advocate General.

MCL 32.1002 et al.

Legislative Analyst: Patrick Affholter

#### **FISCAL IMPACT**

The bill would have no fiscal impact on State or local government.

Fiscal Analyst: Bruce Baker

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.