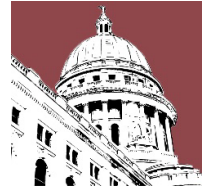

Wisconsin Legislative Council

MINUTES



STUDY COMMITTEE ON WISCONSIN NATIONAL GUARD SEXUAL MISCONDUCT PROCEDURES

300 Northeast, State Capitol
Madison, WI
November 17, 2022
10:00 a.m. – 12:26 p.m.

CALL TO ORDER AND ROLL CALL

Chair Kurtz called the meeting to order and a quorum was determined present.

COMMITTEE MEMBERS PRESENT: Rep. Tony Kurtz, Chair; Sen. Eric Wimberger, Vice Chair; Rep. Daniel Riemer; Sen. Melissa Agard; and Public Members Adam Gerol and Jacob Curtis.

COMMITTEE MEMBERS EXCUSED: Public Members Amy Arenz, Autumn Carroll, Gabriela Guzman, Melissa Inlow, and Jade La Sage.

COUNCIL STAFF PRESENT: David Moore, Senior Staff Attorney, and Tom Koss, Staff Attorney.

APPROVAL OF THE MINUTES OF THE OCTOBER 13, 2022, MEETING

The committee approved the minutes of the October 13, 2022, meeting by unanimous consent.

DESCRIPTION OF DISTRIBUTED MATERIALS AND DISCUSSION OF COMMITTEE ASSIGNMENT

Chair Kurtz explained his plan for the committee to review the bill drafts distributed to the committee and discuss whether any changes should be made. He told the committee that Legislative Council staff would incorporate any requested changes into the bill drafts for the committee's final meeting in December. In response to questions from committee members, David Moore, Senior Staff Attorney, and Tom Koss, Staff Attorney, explained that they consulted with staff from the Department of Military Affairs (DMA) while preparing the bill drafts and that various of the drafts incorporate refinements based on the department's technical expertise.

- LRB-6547/P4, relating to creating a punitive article under the Wisconsin Code of Military Justice prohibiting certain activities with a military recruit or trainee by a person in a position of special trust.

Mr. Koss explained that LRB-6547/P4 would create a punitive article in the Wisconsin Code of Military Justice (WCMJ) prohibiting certain members of the National Guard in a position of special trust from

engaging in sexual activity with a specially protected junior member of the armed forces. He explained that the article this bill draft creates is identical to an article added to the Uniform Code of Military Justice (UCMJ) by the National Defense Authorization Act (NDAA) of 2016, with one minor revision to omit language not relevant to the Wisconsin National Guard. The committee did not request any modifications to the bill draft.

- LRB-6548/P4, relating to creating a punitive article under the Wisconsin Code of Military Justice prohibiting certain retaliatory activities.

Mr. Koss explained that LRB-6548/P4 would create a punitive article under the WCMJ prohibiting a person subject to the code from wrongfully taking or threatening to take an adverse personnel action against a person or withholding or threatening to withhold a favorable personnel action against a person if done with the intent to: (1) retaliate against any person for reporting or planning to report a criminal or military offense; (2) retaliate against any person for making or planning to make a protected communication; or (3) discourage a person from reporting a criminal offense or making a protected communication. He explained that the article this bill draft creates is similar to one added to the UCMJ, but with modifications made to reference state officials and agencies. The committee requested that the bill draft be updated to protect communications to the state legislative service agencies.

- LRB-6549/P4, relating to a punitive article in the Wisconsin Code of Military Justice regarding sexual harassment.

Mr. Koss explained that LRB-6549/P4 creates a punitive article in the WCMJ that is identical to a punitive article recently added to the UCMJ prohibiting sexual harassment. He told the committee that the department advised that placing the new article near Article 134 would be beneficial to parallel the placement of the article under the UCMJ. The committee did not request any modifications to the bill draft.

- LRB-6551/P3, relating to a punitive article under the Wisconsin Code of Military Justice relating to sexual assault.

Mr. Moore explained that LRB-6551/P3 partially aligns Article 120 of the WCMJ with Article 120 of the UCMJ by providing that a person is guilty of a sexual assault if he or she commits a sexual act upon another person without the other person's consent. Additionally, because of the structure of the WCMJ, this article also provides that a person is guilty of abusive sexual contact if he or she commits sexual contact against another person without the other person's consent. There was consensus among committee members that this modification should be made to the WCMJ.

Mr. Moore then asked the committee if it would also like to make two additional changes to further align Article 120 of the WCMJ with Article 120 of the UCMJ. The first change would remove the issue of consent from the offense of sexual assault when a person commits a sexual act upon another person by doing any of the following:

1. Threatening or placing that other person in fear.
2. Causing bodily harm to that other person.
3. Making a fraudulent representation that the sexual act serves a professional purpose.
4. Inducing a belief by any artifice, pretense, or concealment that the person is another person.

The second change would remove "causing bodily harm to that other person," from the above list. Mr. Moore explained that together with the change in LRB-6551/P3, these changes would modify the

offense of sexual assault under the WCMJ so that the elements of that offense parallel the elements of sexual assault under the UCMJ. Committee members discussed the rationale behind the changes and requested that a future draft ensure that engaging in a sexual act and causing nonconsensual bodily harm remains punishable under the code.

- LRB-6552/P3, relating to reporting of sexual harassment and assault that occurs in the Wisconsin National Guard.

Mr. Koss explained that LRB-6552/P3 requires the Adjutant General to submit an annual report on several topics related to sexual assault and sexual harassment within the Wisconsin National Guard to the Governor and the appropriate standing committees of the Legislature and to publish the report on DMA's website. The committee requested that the bill draft be modified to require that the report indicate more specifically the type of conduct reported.

- LRB-6553/P3, relating to pretrial, trial, and post-trial procedures applicable to courts-martial cases under the Wisconsin Code of Military Justice.

Mr. Moore explained that LRB-6553/P3 modifies Article 36 of the WCMJ. Currently that article provides that the Governor may prescribe pretrial, trial, and post-trial procedures that apply to courts-martial cases under the WCMJ, which shall apply the principles of law and rules of evidence generally recognized in military criminal cases in the courts of the armed forces, so long as they are not inconsistent with the WCMJ. Mr. Moore explained that the bill draft instead requires the Adjutant General to prescribe pretrial, trial, and post-trial procedures, not otherwise specified in the code, in writing and to make these procedures publicly available on the department's website. He further explained that the bill draft incorporates suggestions from the department, and allows the National Guard to establish courts-martial procedures that draw from both state criminal procedure and military law. The committee did not request any modifications to the bill draft.

- LRB-6554/P2, relating to requiring the Department of Military Affairs to annually report to the legislature any changes to the Uniform Code of Military Justice.

Mr. Moore explained that LRB-6554/P2 requires DMA to submit a report annually to the appropriate standing committees of the Legislature that summarizes any substantive changes to the UCMJ's punitive articles in the prior federal fiscal year and compares those changes to the WCMJ. The committee requested the bill draft be amended to define "substantive change." Committee members agreed the term could be defined as "any change to the UCMJ that modifies the element of a punitive article, creates a punitive article, or repeals a punitive article." The committee also requested the bill draft be amended to provide that the report shall include the department's recommendations regarding whether the substantive changes to the UCMJ's punitive articles identified in the report should be incorporated into the WCMJ.

- LRB-6556/P2, relating to a case management system for tracking misconduct within the Wisconsin national guard.

Mr. Moore explained that LRB-6556/P2 requires DMA to establish and maintain a case management system that allows the National Guard to manage and track case-related information for cases of misconduct within the National Guard. In response to questions from committee members, Mr. Moore confirmed the department would have discretion, under the bill draft, with respect to the type of case management system it used to satisfy the bill draft's requirements. The committee did not request any modifications to the bill draft.

- LRB-6557/P4, relating to the rights of victims of an offense under the Wisconsin Code of Military Justice.

Mr. Moore explained that LRB-6557/P4 provides that the victim of an offense under the WCMJ has the rights that the Wisconsin Constitution provides to crime victims under Article 1, Section 9m (2) of the Wisconsin Constitution. Committee members discussed potential practical implications of applying these rights to the WCMJ and whether rights that were drafted within the context of the criminal justice system could be implemented within the military justice system. Committee members also noted that the National Guard currently provides a variety of services to victims, and that the Guard's current practices could inform what requirements the committee might consider recommending. Committee members requested that Legislative Council staff consult with DMA to ascertain which rights provided by LRB-6557/P4 could be harmonized with the military justice system.

- LRB-6559/P3, relating to military offenses under the Wisconsin Code of Military Justice, punishments for violations of the Wisconsin Code of Military Justice, and the removal of gender-specific language from the Wisconsin Code of Military Justice.

Mr. Koss explained that LRB-6559/P3 makes three changes to the WCMJ. He explained that the first change modifies the definition of "military offense" and repeals the definition of "nonmilitary offense" in the WCMJ to clarify that civilian criminal courts have primary jurisdiction over certain offenses that have analogues within the state criminal code. He explained the second change provides that the limits of punishment under the WCMJ are those under the UCMJ, unless otherwise prescribed by the Governor. He explained that the third change removes the words "and a gentleman" from the punitive article titled "Conduct Unbecoming an Officer and a Gentleman" to remove gender-specific language and align the article with Article 133 of the UCMJ. The committee did not request any modifications to the bill draft.

PLANS FOR FUTURE MEETINGS

The next meeting of the study committee is scheduled for December 12, 2022.

ADJOURNMENT

The meeting adjourned at 12:26 p.m.

DM:TK:ksm