

**MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON GOVERNMENT AFFAIRS**

**Seventy-Seventh Session
May 1, 2013**

The Committee on Government Affairs was called to order by Chairwoman Teresa Benitez-Thompson at 9:07 a.m. on Wednesday, May 1, 2013, in Room 3143 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4406 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda ([Exhibit A](#)), the Attendance Roster ([Exhibit B](#)), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at nelis.leg.state.nv.us/77th2013. In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

COMMITTEE MEMBERS PRESENT:

Assemblywoman Teresa Benitez-Thompson, Chairwoman
Assemblywoman Dina Neal, Vice Chairwoman
Assemblyman Elliot T. Anderson
Assemblywoman Irene Bustamante Adams
Assemblyman Skip Daly
Assemblyman John Ellison
Assemblyman James W. Healey
Assemblyman Pete Livermore
Assemblyman Harvey J. Munford
Assemblyman James Oscarson
Assemblyman Lynn D. Stewart
Assemblywoman Heidi Swank
Assemblywoman Melissa Woodbury

COMMITTEE MEMBERS ABSENT:

Assemblywoman Peggy Pierce

GUEST LEGISLATORS PRESENT:

None

Minutes ID: 1003



STAFF MEMBERS PRESENT:

Jennifer Ruedy, Committee Policy Analyst
Jim Penrose, Committee Counsel
Bonnie Hoeffcker, Committee Manager
Lori McCleary, Committee Secretary
Jennifer Dalton, Committee Secretary
Cheryl Williams, Committee Assistant

OTHERS PRESENT:

Captain Scott F. Katherman, Assistant Judge Advocate, Office of the
Staff Judge Advocate, Nevada National Guard

Chairwoman Benitez-Thompson:

[Roll was called. Rules and protocol were explained.] We have one bill today, Senate Bill 18 (1st Reprint). I will open the hearing and welcome Captain Katherman to the witness table.

Senate Bill 18 (1st Reprint): Makes various changes to provisions governing the Office of the Military, Nevada National Guard, Nevada National Guard Reserve and volunteer military organizations licensed by the Governor. (BDR 36-316)

Captain Scott F. Katherman, Assistant Judge Advocate, Office of the Staff Judge Advocate, Nevada National Guard:

I am here on behalf of Brigadier General William Burks, who is the Adjutant General for the State of Nevada. I am here today to provide testimony and field questions regarding Senate Bill 18 (1st Reprint) from the Office of the Military.

[Captain Katherman continued reading from written testimony ([Exhibit C](#)).]

Chairwoman Benitez-Thompson:

This is a pretty big bill with many sections. Would you be willing to walk us through section by section and then take questions from Committee members within that section? That might keep us from hopping around the bill. Is that something you would be comfortable with, or would you rather take questions from Committee members as they pop up?

Scott Katherman:

Whatever works best for this body.

Chairwoman Benitez-Thompson:

Then we will go ahead and walk through section by section. Section 1 is just naming the chapter. Section 2 defines "nonjudicial punishment." Could you clarify nonjudicial punishment?

Scott Katherman:

Something not found in the civilian community is nonjudicial punishment. It is the purview of a commander of a unit to take action against an individual, usually for lesser offenses—offenses that are not deemed sufficiently egregious to warrant a court-martial, although they could be. It is a more expedient way for a commander to handle matters. For example, if an active duty individual receives an Article 15, which is what we call a nonjudicial punishment in the military, he could have money taken away, lose liberty, or lose rent. This is for active duty. It is not very effective for National Guardsmen who drill one weekend a month. Typically, in nonjudicial punishment arenas, there is no restraint-of-freedom, unless you are on active duty and get restrained to the confines of the base.

The changes we have proposed mimic the *Uniform Code of Military Justice* (UCMJ) for active duty individuals, which found its way into the model code that we have taken and massaged so it would meet the intent for Nevada. All it really does is give us more ability to address certain crimes or misconduct. The original, as it presently stands, is outdated and outmoded, so it was time for it to be updated.

Assemblyman Elliot Anderson:

I have a couple of questions regarding the nonjudicial punishment sections. Section 11, subsection 3, paragraph (b) talks about superior officers not being able to issue regulations or guidelines which suggest certain categories be disposed of by nonjudicial punishment. However, in section 13, subsection 1, it says it can be limited or withheld by a superior officer. It seems those two provisions are contradictory.

Chairwoman Benitez-Thompson:

I am going to ask Assemblyman Anderson to hold that question. I do want to go through the bill section by section.

Are there any questions from Committee members regarding section 3? [There were none.] Section 4 defines "restraint-of-freedom punishments" as restriction and arrest in quarters. Could you explain that a little more? You referenced that earlier in section 2 with confinement to the base.

Scott Katherman:

Restraint-of-freedom is not the kind of restraint you would have on your wrists. It is really a restraint from the ability to move from place to place on active duty. It is almost inapplicable in our arena because we do not have soldiers who work full time. We have some, but it would probably still not be a great means by which to address an issue. On active duty, the individual would be kept on base. A restraint-of-freedom in the context of a court-martial would be confinement.

Chairwoman Benitez-Thompson:

Is "arrest in quarters" along the same concept of keeping a person limited to a defined area?

Scott Katherman:

That is correct. Again, you would have to have some kind of quarters, such as a barracks, which we do not have. It is nominally in the code, and I suppose in a situation in the future, it may have some applicability. It is there as an exigency, so to speak. It has more to do with active duty than anything else.

Chairwoman Benitez-Thompson:

Any other questions on section 5 from the Committee members? [There were none.] Any questions regarding section 6?

Assemblyman Ellison:

Has the Governor or his staff seen the changes proposed in this bill?

Scott Katherman:

I believe that is the case. It went through the Office of the Governor first and then came here.

Chairwoman Benitez-Thompson:

Are there any questions on section 7? [There were none.] I have a question on section 8. Could you tell me the difference between paragraphs (a) and (b)? Paragraph (a) is any person who is a member of the state military forces, and I believe that means specifically National Guardsmen and volunteers. Paragraph (b) is any person who is in the custody of state military forces before trial. When it says "any person," could that be a nonmilitary person? Could you explain the difference between those two paragraphs?

Scott Katherman:

My understanding is if, for example, a military member was confined while they were in military service, they would then be in confinement beyond their end of time in service. They would still be in the situation if they had done something

while they were confined that would be construed as illegal. At that point, we would have the ability to also address whatever that illegality was. That jurisdiction would continue while they were in confinement. That is how I read it.

Chairwoman Benitez-Thompson:

That is the intent. I know section 8, subsection 2 is specific to someone whose service has been terminated. So paragraph (b) is if someone is coming to the end of their service, but there would be a process in place to hold them throughout that process.

Scott Katherman:

I believe that is correct.

Assemblywoman Neal:

Section 8 deals with subject matter jurisdiction and personal jurisdiction, which also falls into later sections of the bill. This is new language, so I would like to know what was going on that you needed to enlarge the subject matter jurisdiction. Clearly, you are trying to include any person who was in custody, in active service, and had been terminated. Paragraph (a) says any person described in subsection 1 of *Nevada Revised Statutes* (NRS) 412.254. *Nevada Revised Statutes* 412.254 are members of the Nevada National Guard, whether or not they are in training, or other persons lawfully ordered to duty in or with the Nevada National Guard. To me, this is personal jurisdiction. What is the point of now including those individuals? What is happening in military life where we needed to include these individuals now?

Scott Katherman:

I cannot give you any Nevada specifics. Again, a lot of what is before us today is part of what was created for the model code at the behest of Congress. The intent behind it is if someone is confined through a court-martial proceeding and their end of active service happens while they are confined, that jurisdiction remains because they are still confined under the auspices of the court-martial proceedings. The personal jurisdiction is technically extended because the original reason why they were confined came from a court-martial proceeding.

Assemblywoman Neal:

Nationally, we found ourselves in a situation where we were holding an individual and their service had expired, then we had a legal question of continued jurisdiction over that person needing to go through an adjudication process. Is that what was happening?

Scott Katherman:

Yes, I believe so.

Assemblyman Elliot Anderson:

To follow up on Assemblywoman Neal's comment, I am looking through NRS Chapter 412 right now. Section 8 is adding a personal jurisdictional element to the chapter. I do not even see an existing statute that appears to specifically lay out who is subject to the Nevada Code of Military Justice. Is that your understanding?

Scott Katherman:

I believe that the subject matter and personal jurisdiction parameters are outlined in the code itself. I just do not think we have gotten there yet.

Assemblywoman Neal:

For clarification, the way I read section 8, subsection 1, paragraph (a), the insertion of NRS 412.254 is the inclusion of those individuals described under NRS 412.254. Clearly, this is a big bill, but there is an overlap in terms of what is described in the Legislative Counsel's Digest on page 1 as subject matter jurisdiction, which is really personal jurisdiction. You are including the additional people by inclusion of that statute under section 8 because it says "any person." If there is a subject matter that is related to these individuals, you will now have personal jurisdiction over them under the code.

Scott Katherman:

I am not sure where you are getting subject matter jurisdiction.

Assemblywoman Neal:

Section 8, subsection 1 lists persons subject to jurisdiction under this code. However, the Legislative Counsel's Digest on page 1, regarding section 8, says, "Sections 8, 65 and 66 of this bill specify personal and subject matter jurisdiction under the Code."

Scott Katherman:

I believe there is another section in this code that specifically addresses subject matter jurisdiction.

Chairwoman Benitez-Thompson:

I think that conversation covered sections 8 and 9. Are there any other questions? [There were none.] Are there any questions on section 10? [There were none.] We will move on to section 11. Assemblyman Anderson, I believe this is where you had your question.

Assemblyman Elliot Anderson:

That is correct, Madam Chairwoman, and I apologize because I also have to jump into another section.

Chairwoman Benitez-Thompson:

Go ahead and restate it because I am marking the bill as we go. Which line in section 11 did you have questions about?

Assemblyman Elliot Anderson:

Section 11, subsection 3, paragraph (b) on lines 40 through 43, states no superior may "Issue regulations or guidelines which suggest to subordinate authorities that certain categories of minor offenses be disposed of by nonjudicial punishment instead of court-martial" However, when I look at section 13, subsection 1, line 32, it says, "The authority of a commanding officer to impose nonjudicial punishment . . . may be limited or withheld by a superior officer." That seems to be contradictory because it says they can impose certain types of punishment or the nonjudicial punishment can be limited.

Scott Katherman:

I believe these are two separate issues. Regarding section 13, typically, in military justice, a superior commanding officer, such as a brigade commander, can limit what the battalion commander, for example, can impose as punishment for a specific offense. That is inherent in a commander's abilities as a commander. It really has less to do with this and more to do with the fact that a commander has that authority.

If you could, give me a moment to read section 11, subsection 3, paragraph (b), please.

Assemblyman Elliot Anderson:

The more I drill down into this and hear your intent, it seems like section 11 is a categorical bar against issuing regulations and section 13 relates to specific cases that a higher superior thinks has gone too far. Is that correct?

Scott Katherman:

Yes. An example from active duty is when the base commander at Fort Irwin removed the ability of any of his subordinate commanders to address any issues that involved drunk driving. Those would be handled at the very top. If that came in front of a company commander or battalion commander, their hands would be tied because it would have to be pushed all the way up, with recommendations, to the base commander. That is just an example of what the difference is here.

Chairwoman Benitez-Thompson:

I have a question regarding section 11, subsections 4 and 5. It looks like subsection 4 lays out some guidelines for what is to be considered a minor offense. In section 5, it says a minor offense is a matter of discretion for the commanding officer. Can you talk about the scope of that discretion and how big of a scope, with this language, the commanding officer is going to have for determining what a minor offense is?

Scott Katherman:

Subsection 4 enumerates what a commander would typically look at in order to determine a minor offense. At the end of the day, because a commander is a commander, they have the right to make that decision. This is a guidepost for them to utilize. I do not think there is a large change between the way the code presently is and this language. I think they are very similar. I would have to say most nonjudicial punishments in Nevada are going to be for things that are very typical, along the lines of insubordination to a superior commissioned officer, failure to be at formation on time, failing to show at the appointed duty station for a drill weekend, or other things like that.

Chairwoman Benitez-Thompson:

Thank you for putting that on the record.

Scott Katherman:

What is also important under paragraph (b) is age, rank, and duty assignment. Commanders will take into account if someone's rank is E3, for example, as opposed to an E5, which is a sergeant, or an E6, which is a staff sergeant. The longer you have been in the military, the more you should know you should not do certain things. If someone is brand new to the organization, they will be given more leeway and the commander may handle things through corrective training. Corrective training is absolutely not a punishment, but how you teach someone. When they cannot be taught, that is when you go to nonjudicial punishment.

Chairwoman Benitez-Thompson:

For the record, and because I am not military savvy at all, what is corrective training?

Scott Katherman:

For example, if I were consistently late for formation, corrective training could mean I would be 15 to 20 minutes early to every formation until I could figure out how to operate my watch.

Assemblyman Elliot Anderson:

I would like to make the comment that I think it is good to leave it open to discretion. When you use nonjudicial punishment, although it is not as serious as a court-martial, it is pretty serious. It is not like the old days when you would go to the brig for a few days and still become a general. To allow discretion with noncommissioned officers or commissioned officers, it is better so you do not ruin someone's career. There are many things that could be done, such as putting individuals on extra working parties, having them be the working party person repeatedly. I do not think it is necessary to explicitly define when to use nonjudicial punishment.

Scott Katherman:

I completely agree.

Chairwoman Benitez-Thompson:

Are there any questions regarding section 12? [There were none.] Are there any questions regarding section 13? [There were none.] Are there any questions regarding section 14?

Assemblyman Elliott Anderson:

In section 14, the first few lines, lines 14 through 17, how does a commanding officer know when they are going to impose restraint-of-freedom provisions? I thought someone who is facing nonjudicial punishment always, at least under the *Uniform Code of Military Justice* (UCMJ), has the right to ask for a court-martial. I have known of a few cases where there was no evidence that something had happened, so they wanted to go to court-martial rather than nonjudicial punishment. Is that consistent with what is normally done at the federal level with the UCMJ? Is that the same language, where there has to be restraint-of-freedom punishments contemplated before you can waive nonjudicial punishment?

Scott Katherman:

I wish I had brought my *Manual for Courts-Martial* (MCM) with me to double-check the language. This is a little bit different from the active duty UCMJ provision. The restraint-of-freedom punishment provision in the bill was discussed at length when they were putting together the model code. Because of a very distinct difference between active duty and National Guard, there are some almost ineffable differences. A restraint-of-freedom punishment in the guard is almost nonexistent. In order for us to actually confine someone, we would have to get our own federally appropriated operations and maintenance funds and pay for it. We do not have barracks in which to restrain someone.

A restraint-of-freedom typically does not come forward. Because that is really a life, liberty, and property deal, for whatever reason, people much smarter than I am do not believe an individual's rank or military pay is considered property under that auspice. I would state that the model code drafters had considered this. They believe that, as long as you take the restraint-of-freedom portion of it out, there is no need for a court-martial. The maximum you can get from an Article 15 is quite reduced. If they wanted to ask for a court-martial, that obviously raises the stakes much higher, up to a special or a general court-martial, depending upon what the offense was.

I do not have a good answer for you on that. I do not have my MCM with me and I wish I did because there is some commentary as to that provision. I am not sure if I even came close to answering your question.

Assemblyman Elliot Anderson:

The only reason I ask is because I have heard of a number of cases where someone was accused of something and it could have resulted in the loss of rank, which is serious in today's military. It used to be you could bounce back from something like that. If someone wants to take it to a court-martial, why not let them, even if it does not involve restraint-of-freedom. That is my only comment, and you do not need to respond if you do not want to.

Scott Katherman:

I will respond to the extent that nonjudicial punishment has its own built-in due process. It is not that they do not have any process at all. They can have witnesses brought forth, they can have documentary evidence brought forth, and they can have counsel speak for them in front of their commanding officer. The maximum punishment you can get from nonjudicial punishment, balanced by the due process that you receive through nonjudicial punishment, makes it equitable. If you were to request a court-martial, obviously, it would be something graver and the commanding officer would have to let you know that they are considering restraint-of-freedom in the nonjudicial punishment proceedings. If I were to actually restrain someone's freedom in the nonjudicial punishment proceedings, then it has to be something grave. It would probably be something you would be considering court-martial for anyway.

Chairwoman Benitez-Thompson:

In order to expedite this, sections 10 through 17 all deal with nonjudicial punishment provisions, as well as sections 67 through 70, 107, and 110. If Committee members have questions about those sections, as long as we are in the nonjudicial punishment provisions, we will take those sections together.

Assemblywoman Neal:

You said what we are doing is basically trying to align our state code with what the national suggestions are. In section 67, subsection 3, it states, "After nonjudicial punishment has been imposed, it may not be increased, upon appeal or otherwise, unless the punishment imposed was not provided for in the Code." What are circumstances where a punishment is increased that was not in the code?

I can see you are stumped. I will ask you another question and you can think about that one. In section 67, subsection 4, it states, ". . . all such offenses arising from a single incident or course of conduct, must ordinarily be considered together, rather than being made the basis for multiple punishment." What have been the circumstances where you knew that the conduct or incidents were related, yet there were two different punishments given; a punishment given for the conduct and a punishment given for the incident. Clearly, there must have been an issue where we treated them separately rather than looking at them together. Could you give me an example of that?

Scott Katherman:

I can tell you that in certain instances commanders on active duty—and I do not have a lot of experience with them in the National Guard—would like to impose nonjudicial punishment on a soldier for an incident. Within that same common nucleus of operable fact, he would give the individual another nonjudicial punishment on top of it. The more expedient and just way to do it is to have multiple charges and multiple specifications under the same nonjudicial punishment. At the end of the day, there is a maximum you can get for a field grade Article 15 or a company grade Article 15, depending upon who the commanding officer is who is imposing the punishment, that allows them to give a maximum for all misconduct associated with a certain totality of the circumstances.

Assemblywoman Neal:

I get it. You actually gave me an example when you said they could impose an additional nonjudicial punishment that is related. You could say something happened on Tuesday and they were punished, and then something similar happened on Wednesday and a new punishment was derived, but they all came from the same common nucleus of operable fact or occurrence.

Scott Katherman:

Sometimes you will find someone who has been late for formation three days in a row. It would be separate specifications of the same charge. During that same time, while the individual was not in formation, he or she could have been

burglarizing a neighbor's barracks room. You could throw in another charge for larceny or something along those lines.

Assemblywoman Neal:

For section 67, subsection 5, I would like an example. It states, "Nonjudicial punishment may not be imposed for any offense which was committed more than 3 years before the date of imposition of punishment" What are the situations when an accused has waived this three-year limitation? Has anyone ever done that? Has anyone done something three years ago and then asked to be punished for it today?

Scott Katherman:

I believe this is only talking about nonjudicial punishment. I do not believe you would have the same statute of limitations applicable to a court-martial. If it was a choice between taking nonjudicial punishment or taking a court-martial, I think most reasonable minds would probably take the nonjudicial punishment and waive the three-year statute of limitations.

I still do not have an answer for subsection 3.

Assemblywoman Neal:

Okay, I will give up on that.

Assemblyman Stewart:

This bill mainly applies to the Nevada Army National Guard and the Nevada Air National Guard while they are either in Nevada on their weekends or on their two-week training. If they were deployed to Afghanistan or Iraq, then they would come under the *Uniform Code of Military Justice* (UCMJ) and the regular Army or regular Air Force commanders, is that correct?

Scott Katherman:

That is correct. Title 10 is completely governed by the UCMJ. The National Guard is Title 32. I am full-time Title 32, so I work full time for the Guard, but I am still not subject to the UCMJ because I am still a State Guardsman as opposed to being brought into federal service by the President or Congress.

Assemblyman Stewart:

If you were deployed out of the country, then you would come under the UCMJ, correct?

Scott Katherman:

That is correct.

Assemblyman Stewart:

These regulations have been brought by other states and you are patterning this bill after them, is that correct?

Scott Katherman:

That is correct. The initial incarnation of this came from the U.S. Department of Defense (DOD) after they were asked by Congress to create a model code. They sold that to different states. So far, 32 states have actually taken wholly what the model code drafters had created.

Assemblyman Stewart:

You might have slight variations, but you are basically going with what DOD suggested, correct?

Scott Katherman:

That is correct.

Assemblyman Ellison:

Based on the DOD, state by state is different, but these are all still pretty common and updated as they go. Not every state is totally different, is that correct?

Scott Katherman:

That is correct. If you were to take what we have here as our new draft and compare it to what we had previously, you will find that most of the provisions are the same. Certain changes have just brought it up to date. I will give you an example. Under NRS Chapter 412.314, the summary court-martial, which is the least of all court-martials, has a maximum fine of \$25. That is nothing. It would not be a means by which to keep soldiers and airmen from doing bad things. If they do, they will do them again, because \$25 is not that big of a deal. The new version brings it up to a modern level. That is what most of this is. There are some provisions that are brand new, and I am more than happy to address those. However, if there was an issue with something that existed previously, it is in there because when we originally drafted it, we took it from the UCMJ, as well. A lot of the language is very similar if you were to compare it to what the UCMJ looks like today.

Assemblyman Ellison:

Thank you, because that is exactly what I wanted to know. It looks like most of this is the rank of E5 and below, is that correct?

Scott Katherman:

That is correct. There is a differentiation in the rank. The more rank you have, the more due process you have. If you were an E7, you cannot have your rank taken away by a company commander or a battalion commander. It actually has to be the Adjutant General or a general officer. As you go up in rank, your rank is more protected. An E5 or below can have more rank taken away from them by a lower-level commander.

Assemblywoman Neal:

In section 68, you treat the traditional guard members of the National Guard differently than the active reserve members of the National Guard. Why the difference in penalty?

Scott Katherman:

As I said before, a traditional guardsman does his one weekend a month and two-week training, assuming he is not activated for any reason. It is hard to take away a week's pay from someone who is only drilling one weekend a month. I work the entire week. In fact, I work 24 hours a day. If I were to be punished, it would make sense to take that time away from me because I am paid by the military full time. They are paid by the military one weekend a month. I think the balancing act has to do with how much time they spend in uniform and how much they are actually being paid.

Assemblywoman Neal:

Have these penalties been enacted for the traditional guardsmen who do one weekend a month? Has it been effective? Have we applied it? I am asking these questions to get intent on the record and because I have friends in the National Guard. If I am imposing this on them, I would like to be able to explain it.

Scott Katherman:

I know, in many instances, I have been unable to do sufficiently what I believe should be done to someone who is involved in certain misconduct. We tend to take away rank and do not tend to take away money all that often because it is a pain for the accounting folks, and the present language makes it more difficult because it does not have the differentiation. When you are talking about taking away one-half or one-third pay for two months, what does that really look like for a guardsman and what does that look like for an active duty member? I think this language not only assists the organization, but also the soldiers and airmen. They have a better understanding. If they read this, they know definitively what happens if they do X. For a soldier and airman to have that knowledge is actually power at the end of the day. It is not just a sword, but also a shield to keep a soldier on the straight and narrow.

Chairwoman Benitez-Thompson:

I am going to allow us to take questions for 15 more minutes. Because this is such a big bill with different pieces, we will find the time to do an informal work group to work through the different chapters of the bill. Because the legislators have busy committee schedules, especially in the afternoon, it will probably be an evening, perhaps 7 to 9 p.m. I will get a date and email it to Committee members. Captain Katherman, is that something you might be able to be available for if it were later this week or early next week?

Scott Katherman:

I absolutely am here for you. I have a number of things this week, but next week I believe I am available.

Chairwoman Benitez-Thompson:

That would help the Committee members. We have time for a couple more questions.

Assemblywoman Neal:

Does this mean we can skip into other sections?

Chairwoman Benitez-Thompson:

Yes.

Assemblywoman Neal:

In section 102, subsection 2, there is new language that states, "If the sentence approved after the first court-martial was in accordance with a pretrial agreement and the accused at the rehearing changes a plea with respect to the charges or specifications upon which the pretrial agreement was based or otherwise does not comply with the pretrial agreement" Is all of this happening without there being further adjudication? If I agreed to something at pretrial and then I changed my mind, what is the other part of the process that should happen or could happen? I do not see it there. Would I get another pretrial hearing or would I just get an additional sentence?

Scott Katherman:

Can I have a moment to read the section?

Assemblywoman Neal:

I can talk to you offline about that one.

Scott Katherman:

I would appreciate that.

Assemblywoman Neal:

In section 106, there is new language that says, ". . . officer exercising general court-martial jurisdiction over the officer against whom the complaint is made. The officer . . . shall examine the complaint and take proper measures for redressing the wrong" Was there a situation where a person was being court-martialed and they had not even looked at the complaint?

Scott Katherman:

I have never heard of a situation like that, on active duty or otherwise. I believe the language was put in there to ensure that the complaint is examined and the proper procedures are taken.

Assemblyman Elliot Anderson:

I have a couple of things I thought we should get on the record before this bill is worked through. I am looking at page 12, section 25, subsection 2. It talks about the appeal in a court-martial. I was looking at the applicable *Nevada Rules of Appellate Procedure* on criminal appeals. I think the standard there is 30 days after a judgment of conviction, which I would take the same way as an order or a ruling as described in subsection 2. Is there any reason why 72 hours was picked for an appeal? Again, court-martials are almost like going up for a felony in the civilian court. Why not just go with the standard 30 days that the defense bar is used to going with?

Scott Katherman:

My contention is that is in here because it is probably language that came out of the active duty. I have to agree with you. I think 72 hours is something very suspect if we are going to talk about this in equivalency to state practice. Seventy-two hours seems more appropriate in a nonjudicial punishment, not in a court-martial. I have made note of that.

Assemblyman Elliott Anderson:

I would like to move on to section 34, which has to do with an actual substantive crime. I think, generally, I am okay with section 34, but I was looking at what it indirectly communicates and wanted to get some clear intent for line 10. In addition, I would like clarification on the "reason to believe" language in the *mens rea* element with the "intent or reason to believe" [line 9]. I want to talk about what "reason to believe" means and what "indirectly" means. It is also important for operational security to not put information on Twitter or Facebook. Is this about operational security? That concerns me. Someone tweeting is not intentionally communicating with a foreign government, which is very different from screwing up. I think screwing up needs to be punished as well when you are dealing with operational security. Can you talk about what "indirectly" and "reason to believe" means?

Scott Katherman:

Because we are military and because of our very different role in society, my contention is the language is in here because we are trying to be as broad as possible. The fact is, this is in here for an eventuality. I can tell you, in my tenure, it has not come forward at all. Of course, we have not had any court-martials in my 12 years with the Nevada Army National Guard. The Nevada Air National Guard periodically has court-martials. I am not trying to make a justification for it, or an excuse, but I believe, because of military exigencies, the language, especially in something like this, has to be as broad as possible in order for us to be able to address wrongs that may or may not be considered wrong in the civilian context.

Assemblyman Elliot Anderson:

Do not get me wrong. I certainly understand the need for operational security and certainly for anything intentional, where you are directly or indirectly communicating something to a foreign government. However, would you at least agree that it is a lot more serious if you are, with a clear, culpable mind, trying to get something to a foreign government versus maybe you talked about getting home on Twitter or Facebook a little too early, which revealed something that could be used by a foreign government?

Scott Katherman:

I will agree with you in part on that. You make a good point. The fact is, if this situation were to come forward, there is a very good chance that the federal authorities—not us—would be approaching the individual who is or is not guilty of the offense. We have a much lower ability to impose punishment on an individual for any of these things. I think we are proposing ten years as a maximum. We are nowhere near what the federal government could do. This is like the court of last resort for a situation like this. I believe if a situation occurred where information was leaked to a foreign nation with culpable intent, you would find the federal government would be involved in it well before we are. If, for whatever reason, they could not, then we want to be able to at least address it, even if the feds cannot because of the high threshold they have to meet. We want to at least have the ability to address it. Whether we would be able to or not, we would still want to be able to address it as a last resort. I hope that answers your question.

Assemblyman Elliot Anderson:

I think the purpose of why I asked that was to get intent on the record. I think the intent is pretty clear on that now. We can talk about that later when we are working through the bill.

Chairwoman Benitez-Thompson:

I have one last question about section 30, dealing with judicial process for the National Guard when dealing with folks who have mental health issues and the different processes where you involve the Division of Mental Health and Developmental Services and the Department of Health and Human Services (DHHS) and putting someone in the custody of DHHS. As I look through NRS Chapter 412, there does not seem to be a lot of language around this issue. Correct me if I am wrong; this is laying out a new process, correct?

Scott Katherman:

That is correct. I was not involved directly with the discussions when this was being put together. Captain Dana Grigg, who, unfortunately, is not here today, was more intimately involved with it. If we need clarification on this, it would definitely be good for a tabled session.

Chairwoman Benitez-Thompson:

I just want to make sure, when we talk about handing someone over to the custody of the Division of Mental Health and Developmental Services, of what "custody" actually means. This whole process, I think, is one that we will definitely walk through during the workshop. I have questions on clarification and how this process actually ends up looking, since we are putting it into statute. I do not know how frequently you end up using the vehicle, but when and if you do, we want to make sure it is a vehicle that runs properly.

Scott Katherman:

I do recall from the discussion that we have never had this situation come forward. Again, this is one of those eventualities we hope never happens. We want to have the ability to address an issue. I would have to say, especially since so many soldiers, airmen, marines, and navy personnel are coming home with post-traumatic stress disorder and things that need to be addressed separately, we need to have a provision that has some legs.

Chairwoman Benitez-Thompson:

I agree. With that, we will go ahead and stop the hearing on S.B. 18 (R1). I will be in touch with Committee members about a time to do a work group. I will also get in touch with you, Captain Katherman. Thank you for being here today and for answering the questions for the Committee. It is a big bill and there are Committee members who like to work through sections of the bills. The work group will be a good place to dig more into the sections for those who want to participate.

Do you have any final remarks before I close the hearing?

Scott Katherman:

Thank you for having me and I look forward to working with you in the future.

Chairwoman Benitez-Thompson:

I will close the hearing on S.B. 18 (R1). Is there any public comment here or in Las Vegas? [There was none.]

This meeting of the Assembly Committee on Government Affairs is adjourned [at 10:16 a.m.].

RESPECTFULLY SUBMITTED:

Lori McCleary
Committee Secretary

APPROVED BY:

Assemblywoman Teresa Benitez-Thompson, Chairwoman

DATE: _____

EXHIBITS

Committee Name: Committee on Government Affairs

Date: May 1, 2013

Time of Meeting: 9:07 a.m.

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
S.B. 18 (R1)	C	Captain Scott K. Katherman, Office of the Military, Nevada National Guard	Written testimony