

GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2009

HOUSE BILL 1412  
RATIFIED BILL

AN ACT TO MAKE VARIOUS CHANGES TO THE STATUTES RELATING TO  
NATIONAL GUARD COURTS-MARTIAL.

The General Assembly of North Carolina enacts:

**SECTION 1.** G.S. 127A-47 reads as rewritten:

**"§ 127A-47. Courts-martial for ~~national guard~~ National Guard.**

Courts-martial for organizations of the ~~national guard~~ National Guard not in the service of the United States shall be of three kinds, namely, general courts-martial, special courts-martial, and summary courts-martial. They shall be constituted, have cognizance of the same subjects, and possess like powers, ~~except as to punishments, powers~~ as similar courts provided for by the law and regulations governing the armed forces of the United States, and the Uniform Code of Military Justice and Manual for Courts-Martial, United States. The proceedings of courts-martial of the ~~national guard~~ National Guard shall follow the forms and modes of procedure prescribed for such similar courts."

**SECTION 2.** G.S. 127A-48 reads as rewritten:

**"§ 127A-48. General courts-martial.**

General courts-martial of the ~~national guard~~ National Guard not in the service of the United States may be convened by orders of the Governor of the State or of the Adjutant General, and such courts shall have the power to impose ~~finer not exceeding two hundred dollars (\$200.00); sentence to forfeiture of pay and allowances; to a reprimand; to dismissal or dishonorable discharge from the service; to reduction of enlisted personnel to the ranks; or any two or more of such punishments may be combined in the sentences imposed by such courts.~~ punishments in like manner and to the extent prescribed by the Uniform Code of Military Justice and Manual for Courts-Martial, United States, as shall be in use by the armed forces of the United States at the time of the offense, except that (i) no court shall have the authority to impose confinement as part of the sentence unless the court consisted of a military judge and not less than five members, except that a defendant who requests a military judge alone may be sentenced to confinement, and (ii) no court shall have the authority to impose confinement in excess of one year and one day as part of a sentence."

**SECTION 3.** G.S. 127A-49 reads as rewritten:

**"§ 127A-49. Special courts-martial; appointments, power and authority.**

In the ~~national guard~~, National Guard, not in the service of the United States, special courts-martial may be appointed by any of the following:

- (1) The commander of a brigade, regiment, comparable or higher command of the North Carolina ~~army national guard~~; Army National Guard, provided that such commander is a general officer.
- (2) The commander of a wing, group, separate squadron, comparable or higher command of the North Carolina ~~air national guard~~; Air National Guard, provided that such commander is a general officer.
- (3) The commander or officer in charge of any North Carolina ~~national guard~~ National Guard command when empowered by the Governor or the Adjutant General of North ~~Carolina~~-Carolina, provided that such commander or officer is a general officer.

Except as to commissioned officers, such courts-martial shall have the power and authority to try any person subject to military law for any crimes or offenses within the jurisdiction of a general military court. Such courts-martial shall have the ~~same powers of punishment as general courts-martial except that fines imposed by such courts-martial shall not exceed one hundred dollars (\$100.00), and such courts-martial shall not have the power of dismissal from~~



~~the national guard, power to impose punishments in like manner and to the extent prescribed by the Uniform Code of Military Justice and Manual for Courts-Martial, United States, as shall be in use by the armed forces of the United States at the time of the offense, except that (i) no court shall have the authority to impose confinement as part of the sentence unless the court consisted of a military judge and not less than three members except that a defendant who requests a military judge alone may be sentenced to confinement, and (ii) no court shall have the authority to impose confinement in excess of six months as part of a sentence."~~

**SECTION 4.** G.S. 127A-50 reads as rewritten:

**"§ 127A-50. Summary courts-martial.**

~~In the national guard, not in the service of the United States, summary courts-martial may be appointed by the commander of any company, battery, detachment, squadron, or any other federally recognized unit, either army or air. Such court shall consist of one officer, who shall have the power to administer oaths and try enlisted personnel of each respective command for breaches of discipline and violations of laws governing such organizations. Such courts shall also have the power to impose fines not exceeding twenty five dollars (\$25.00) for any single offense, may sentence to forfeiture of pay and allowances, or may sentence enlisted personnel to reduction in rank; but in the case of noncommissioned officers above the fourth enlisted grade, may not adjudge reduction except to the next inferior grade. There shall be no right to demand trial by special court-martial.~~

In the National Guard, not in the service of the United States, summary courts-martial may be appointed by any of the following:

- (1) Any person who may convene a general or special court-martial.
- (2) The commander of a battalion, comparable or higher command of the North Carolina Army National Guard, provided that such commander is an officer of the grade of major or above.
- (3) The commander of a detached squadron, comparable or higher command of the North Carolina Air National Guard, provided that such commander is an officer of the grade of major or above.

Such court shall consist of one officer who shall have the power to administer oaths and try enlisted personnel of each respective command for breaches of discipline and violations of laws governing such organizations. Such courts shall also have the power to impose punishments in like manner and to the extent prescribed by the Uniform Code of Military Justice and Manual for Courts-Martial, United States, as shall be in use by the armed forces of the United States at the time of the offense, except that no court shall have the authority to impose confinement as part of a sentence. There shall be no right to demand trial by court-martial."

**SECTION 5.** G.S. 127A-50.1 reads as rewritten:

**"§ 127A-50.1. Military judges.**

~~The Adjutant General shall appoint military judges to preside over courts-martial of the National Guard not in federal service. Minimum requirements for appointment as a military judge shall be:~~

- ~~(1) Licensed to practice law in this State or certified~~Certification as a military judge by the Judge Advocate General of the Army, Air Force, Navy, or Marines; Navy, Marines, or Coast Guard.
- ~~(2) Designation as a judge advocate by The Judge Advocate General of the Army, Navy, Air Force, or Marines; and~~Air Force, Marines, or Coast Guard.
- ~~(3) Membership in the North Carolina National Guard, the National Guard of another state, or the active or reserve components of any of the military services."~~

**SECTION 6.** G.S. 127A-51 reads as rewritten:

**"§ 127A-51. Nonjudicial punishment.**

~~Any commander of the national guard, National Guard, not in the service of the United States, may, in addition to or in lieu of admonition or reprimand, impose nonjudicial punishment in like manner and to the extent prescribed by Article 15 of the Uniform Code of Military Justice, Justice and Manual for Courts-Martial, United States, as shall be currently in use by the armed forces of the United States except that there shall be no right to demand trial by special court-martial."~~

**SECTION 7.** G.S. 127A-52 reads as rewritten:

**"§ 127A-52. Jurisdiction of courts-martial.**

The jurisdiction of courts-martial of the ~~national guard,~~ National Guard, not in the service of the United States, ~~except as to punishments,~~ shall be as prescribed by the Manual for Courts-Martial, United States, as shall be currently in use by the armed forces of the United States. Such courts-martial shall have jurisdiction to try accused persons for offenses committed while serving without the State and while going to and returning from such service without the State in like manner and to the same extent as while serving within the State."

**SECTION 8.** G.S. 127A-53 reads as rewritten:

**"§ 127A-53. Manual for Courts-Martial.**

Trials and proceedings by all courts and boards shall be in accordance with the ~~plans and procedures laid down in the~~ Manual for Courts-Martial, United States, as shall be currently in use by the armed forces of the United States, except as modified by this Chapter."

**SECTION 9.** G.S. 127A-54 reads as rewritten:

**"§ 127A-54. Pretrial confinement; Sentences; sentences; where executed.**

(a) A defendant may be arrested and placed under pretrial confinement in a local government confinement facility, but a determination shall be made under subsection (b) of this section whether he or she shall remain confined pending the court-martial. If the defendant is not released from confinement, he or she shall be transferred into the custody of the Sheriff of Wake County and confined in the Wake County confinement facility pending trial. All costs of transportation and confinement are to be paid from funds appropriated to the Department of Crime Control and Public Safety as reimbursements to the local government or agency providing the transportation and confinement.

(b) The provisions of Article 26 of Chapter 15A of the General Statutes shall apply to any defendant who has been placed into pretrial confinement, in the same manner as if the defendant had been placed into confinement for an alleged violation of the criminal laws of this State. Nothing in this section is intended to abridge the right of habeas corpus.

(c) Any defendant whose sentence by a military court includes confinement shall be placed into the custody of the Department of Correction. The Department of Correction is authorized to transfer physical custody of the defendant to a local confinement facility.

~~All sentences to confinement imposed by any military court of this State shall be executed in such prisons as the court may designate."~~

**SECTION 10.** G.S. 127A-55 reads as rewritten:

**"§ 127A-55. Forms for courts-martial procedure.**

In the ~~national guard,~~ National Guard, not in the service of the United States, forms for courts-martial procedure shall be substantially as those set forth in the Appendices, Manual for Courts-Martial, United States, as shall be currently in use by the armed forces of the United States. ~~States, with any modifications required by this Chapter."~~

**SECTION 11.** G.S. 127A-56 reads as rewritten:

**"§ 127A-56. Powers of courts-martial.**

In the ~~national guard,~~ National Guard, not in the service of the United States, presidents of courts-martial and summary court officers shall have power to issue warrants to arrest ~~an~~ an accused ~~persons~~ person and to bring ~~them~~ the person before ~~the~~ a court for trial whenever such ~~persons shall have~~ person has disobeyed an order in writing from the convening authority to appear before such court, a copy of the charge or charges having been delivered to the accused with such order, ~~and to issue commitments in carrying out sentences of confinement,~~ and to issue subpoenas and subpoenas duces tecum, and to enforce by attachment attendance of witnesses and the production of books, papers, records and other articles subject to a subpoena duces tecum, and to sentence for a refusal to be sworn or to answer as provided in actions before civil courts. ~~He~~ The presiding officer shall also have power to punish for contempt occurring in the presence of the court.

~~In addition to the power to issue warrants set forth in the first paragraph of this section, the arrest and confinement of persons subject to this Chapter may be accomplished by the means and under the procedures set forth in Articles 9 and 10 of the Uniform Code of Military Justice, Manual for Courts-Martial, United States, as shall be currently in use by the armed forces of the United States."~~

**SECTION 12.** G.S. 127A-57 reads as rewritten:

**"§ 127A-57. Execution of processes and sentences.**

All warrants and other processes authorized by this Chapter and sentences of any of the military courts of this State shall be executed by any sheriff, deputy sheriff, or ~~police officer~~ State or local law enforcement officer into whose hands the same may be placed for

service or execution, and such officer shall make return thereof to the officer issuing or imposing the same. Such service or execution of process or sentence shall be made by such officer without tender or advancement of fee therefor; but all costs in such cases shall be paid from funds appropriated for military purposes to the Department of Crime Control and Public Safety. ~~The actual necessary expenses of conveying a prisoner from one county in the State to another, when the same is authorized and directed by the Adjutant General of the State, shall be paid from the military funds of the State upon a warrant approved by the Adjutant General.~~"

**SECTION 13.** G.S. 127A-58 is repealed.

**SECTION 14.** G.S. 127A-59 reads as rewritten:

**"§ 127A-59. ~~Commitments.~~Sentences.**

When any sentence to fine or imprisonment shall be imposed by any military court of this State, it shall be the duty of the military judge, president of said court, or summary court officer, upon the approval of the findings and sentence of such court, to make out and sign a certificate entitling the case, giving the name of the accused, the date and place of trial, the date of approval of sentence, ~~the amount of fine or manner, place, and duration of confinement,~~ and the terms of the sentence. The trial counsel shall deliver such certificate to the ~~sheriff, or deputy sheriff, or police officer of the county wherein the sentence is to be executed;~~ Clerk of the Superior Court of Wake County, and it shall thereupon be the duty of ~~such officer~~ the clerk to take such actions as are necessary to carry said sentence into execution in the same manner as prescribed by law for the collection of fines—fines, or commitment to service of terms of ~~imprisonment—imprisonment,~~ in criminal cases determined in the courts of this State. The Administrative Office of the Courts shall ensure that the State's criminal history records include pertinent information relating to a court-martial under this Chapter in a like manner as a comparable offense under the State's criminal laws would be recorded."

**SECTION 15.** G.S. 127A-60 reads as rewritten:

**"§ 127A-60. ~~Sentence of dismissal.~~Approval of sentence.**

~~No sentence of dismissal from the service or dishonorable discharge, imposed by a special or general national guard court-martial of the National Guard, not in the service of the United States, shall be executed until approved by the Governor. Any officer convicted by a general court-martial and dismissed from the service shall be forever disqualified from holding a commission in the militia."~~

**SECTION 16.** Article 3 of Chapter 127A of the General Statutes is amended by adding a new section to read:

**"§ 127A-62. Appeals; discretionary review.**

(a) Jurisdiction. – Court-martial judgments which include a sentence to confinement shall have a right of appeal to the Wake County Superior Court. The provisions of G.S. 15A-1451 shall apply to appeals under this section.

(b) Filing and Service. – An appeal under this section must be made in writing and filed with the Clerk of Superior Court of Wake County within 10 days after the approval of the sentence by the Governor. A copy of the petition shall be filed with the military court and the military trial counsel of record. For the purposes of a filing fee, the appeal shall be treated as an administrative appeal to the Superior Court.

(c) Assertion of Errors. – All errors, including, but not limited to, the following, must be asserted or shall be deemed waived:

(1) Any error of law, including the following:

a. The court erroneously failed to dismiss the charge prior to the court-martial.

b. The court's ruling was contrary to law with regard to motions made before or during the trial or with regard to the admission or exclusion of evidence.

c. The evidence, at the close of all the evidence, was insufficient to justify submission of the case to the court-martial panel, whether or not a motion so asserting was made before verdict.

d. The court erroneously instructed the court-martial panel.

(2) The verdict is contrary to the weight of the evidence.

(3) For any other cause, the defendant did not receive a fair and impartial trial.

(d) Appointment of Superior Court Judge. – The appeal shall be heard by a judge assigned by the Chief Justice of the North Carolina Supreme Court, to be heard at such session of the Wake County Superior Court as the Chief Justice shall direct.

(e) Applicable Law. – The presiding judge, in determining whether there were errors, shall apply the law as provided for trial by courts-martial under this Article.

(f) Setting Aside of Findings or Sentence. – The findings or sentence, or both, may be modified or set aside, in whole or in part, by the court on the ground of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, or error prejudicial to the substantial rights of the accused.

(g) Hearings and Rehearings. – The court may remand the matter to the court-martial for such evidentiary hearings or other proceedings, to be conducted by a military judge alone, as it deems necessary prior to the court's final disposition of the case. If the court sets aside the findings or sentence, the court may, except when the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If the court sets aside the findings and sentence and does not order a rehearing, the court shall dismiss the charges. If the court orders a rehearing, but the convening authority finds a rehearing impractical, the convening authority shall dismiss the charges.

(h) Counsel. –

(1) The Staff Judge Advocate of the North Carolina National Guard shall:

a. Designate a judge advocate who is qualified and certified under Article 27(b) of the Uniform Code of Military Justice, and who is a member of the North Carolina Bar, to represent the defendant.

b. Designate a judge advocate who is qualified and certified under Article 27(b) of the Uniform Code of Military Justice, and who is a member of the North Carolina Bar, to represent the State.

(2) The counsel designated to represent the defendant under sub-subdivision a. of subdivision (1) of this subsection shall not be the counsel who represented the defendant at the court-martial.

(3) Where a defendant alleges ineffective assistance of prior counsel as a ground for relief, the defendant shall be deemed to waive the attorney-client privilege with respect to both oral and written communications between such counsel and the defendant to the extent the defendant's prior counsel reasonably believes such communications are necessary to defend against the allegations of ineffectiveness. This waiver of the attorney-client privilege shall be automatic upon the filing of the pleadings alleging ineffective assistance of prior counsel, and the Wake County Superior Court need not enter an order waiving the privilege.

(4) The Adjutant General, upon the recommendation of the Staff Judge Advocate, shall place the designated judge advocates described in this subsection onto State active duty for such periods of time as necessary for either counsel to provide adequate representation to the respective parties, if regularly scheduled unit training periods are insufficient. The Staff Judge Advocate shall verify to the Adjutant General whether any such additional periods of time are necessary.

(i) Discretionary Review. – Review of decisions by the Wake County Superior Court shall be pursuant to G.S. 7A-31.1.

(j) The rules for practice and procedure for review of courts-martial by the Wake County Superior Court shall be consistent with those prescribed for review of administrative appeals by the Superior Court, except as modified by this section."

**SECTION 17.** G.S. 7A-27(b) reads as rewritten:

"(b) From any final judgment of a superior court, other than the one described in subsection (a) of this section, or one based on a plea of guilty or nolo contendere, including any final judgment entered upon review of a decision of an administrative ~~agency~~, ~~agency~~, except for a final judgment entered upon review of a court-martial under G.S. 127A-62, appeal lies of right to the Court of Appeals."

**SECTION 18.** G.S. 7A-28 reads as rewritten:

"§ 7A-28. **Decisions of Court of Appeals on post-trial motions for appropriate relief final or relief, valuation of exempt property-property, or courts-martial are final.**

(a) Decisions of the Court of Appeals upon review of motions for appropriate relief listed in G.S. 15A-1415(b) are final and not subject to further review in the Supreme Court by appeal, motion, certification, writ, or otherwise.

(b) Decisions of the Court of Appeals upon review of valuation of exempt property under G.S. 1C are final and not subject to further review in the Supreme Court by appeal, motion, certification, writ, or otherwise.

(c) Decisions of the Court of Appeals upon review of courts-martial under G.S. 127A-62 are final and not subject to further review in the Supreme Court by appeal, motion, certification, writ, or otherwise."

**SECTION 19.** G.S. 7A-31 reads as rewritten:

**"§ 7A-31. Discretionary review by the Supreme Court.**

(a) In any cause in which appeal is taken to the Court of Appeals, except a cause appealed from the North Carolina Industrial Commission, the North Carolina State Bar pursuant to G.S. 84-28, the Property Tax Commission pursuant to G.S. 105-345, the Board of State Contract Appeals pursuant to G.S. 143-135.9, ~~or~~ the Commissioner of Insurance pursuant to G.S. 58-2-80, ~~or~~ a court-martial pursuant to G.S. 127A-62, a motion for appropriate ~~relief~~ relief, or valuation of exempt property pursuant to G.S. 7A-28, the Supreme Court may, in its discretion, on motion of any party to the cause or on its own motion, certify the cause for review by the Supreme Court, either before or after it has been determined by the Court of Appeals. A cause appealed to the Court of Appeals from any of the administrative bodies listed in the preceding sentence may be certified in similar fashion, but only after determination of the cause in the Court of Appeals. The effect of such certification is to transfer the cause from the Court of Appeals to the Supreme Court for review by the Supreme Court. If the cause is certified for transfer to the Supreme Court before its determination in the Court of Appeals, review is not had in the Court of Appeals but the cause is forthwith transferred for review in the first instance by the Supreme Court. If the cause is certified for transfer to the Supreme Court after its determination by the Court of Appeals, the Supreme Court reviews the decision of the Court of Appeals.

Except in courts-martial and motions within the purview of G.S. 7A-28, the State may move for certification for review of any criminal cause, but only after determination of the cause by the Court of Appeals."

**SECTION 20.** Article 5 of Chapter 7A of the General Statutes is amended by adding a new section to read:

**"§ 7A-31.1. Discretionary Review by the Court of Appeals.**

(a) In the case of a court-martial in which appeal is taken to the Wake County Superior Court under G.S. 127A-62, the Court of Appeals may, in its discretion, on motion of any party to the cause or on its own motion, certify the cause for review by the Court of Appeals after it has been reviewed by the Wake County Superior Court. The effect of such certification is to transfer the cause from the Wake County Superior Court to the Court of Appeals, and the Court of Appeals reviews the decision by the Wake County Superior Court.

(b) In causes subject to certification under subsection (a) of this section, certification may be made by the Court of Appeals after determination of the cause by the Wake County Superior Court when in the opinion of the Court of Appeals:

- (1) The subject matter of the appeal has significant public interest, or
- (2) The cause involves legal principles of major significance to the jurisprudence of the State, or
- (3) The decision of the Wake County Superior Court appears likely to be in conflict with a decision of the United States Court of Appeals for the Armed Forces.

Interlocutory determinations by the Wake County Superior Court, including orders remanding the cause for a new trial or for other proceedings, shall be certified for review by the Court of Appeals only upon a determination by the Court of Appeals that failure to certify would cause a delay in final adjudication which would probably result in substantial harm.

(c) Any rules for practice and procedure for review of courts-martial that may be required shall be prescribed pursuant to G.S. 7A-33."

**SECTION 21.** G.S. 127A-147 reads as rewritten:

**"§ 127A-147. Orders, rules, regulations and Uniform Code of Military Justice applicable to militia when not in service of United States.**

The ~~national guard,~~ National Guard, State defense militia and naval militia, when not in the service of the United States, shall ~~except as to punishments,~~ be governed by State law, the orders, rules and regulations of the Adjutant General, regulations promulgated by the secretary

of the appropriate service of the armed forces of the United States, and the Uniform Code of Military Justice, as amended from time to time."

**SECTION 22.** G.S. 127A-153 reads as rewritten:

**"§ 127A-153. Protection of uniform.**

(a) The wearing of any military uniform of the United States government by members of the militia shall be pursuant to applicable regulations promulgated by the respective armed services of the United States and regulations of the Adjutant General of North Carolina not inconsistent with federal uniform regulations.

(b) The wearing of any military uniform of the North Carolina State government by members of the militia shall be pursuant to applicable regulations promulgated by the Adjutant General of North Carolina.

(c) Members of the militia who violate the regulations referred to in (a) and (b) above shall, upon conviction by a court-martial, be punished ~~by a fine not exceeding fifty dollars (\$50.00) or by imprisonment not exceeding 30 days, or by both fine and imprisonment, for each offense in like manner and to the extent prescribed by Article 134 of the Uniform Code of Military Justice and Manual for Courts-Martial, United States, as shall be in use by the armed forces of the United States at the time of the offense.~~

(d) Persons not subject to courts-martial who violate the regulations referred to in (a) and (b) above may be charged and tried in the State courts and upon conviction shall be punished as provided in (c) above."

**SECTION 23.** Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions.

**SECTION 24.** This act becomes effective December 1, 2010, and applies to offenses committed on or after that date. The requirement contained in Section 14 of this act, that the Administrative Office of the Courts electronically record certain data, shall become effective after the next rewrite of the superior court clerks system by the Administrative Office of the Courts; until such time paper copies of the required criminal history records shall be kept on file in the Wake County Courthouse.

In the General Assembly read three times and ratified this the 8<sup>th</sup> day of July, 2010.

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Walter H. Dalton  
President of the Senate

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Joe Hackney  
Speaker of the House of Representatives

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Beverly E. Perdue  
Governor

Approved \_\_\_\_\_, m. this \_\_\_\_\_ day of \_\_\_\_\_, 2010