

1975 WL 28880 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

June 4, 1975

***1 Re: Military Tribunals**

Brigadier General James W. Henderson
The Deputy Adjutant General of South Carolina
1225 Bluff Road
Columbia, South Carolina 29201

Dear General Henderson:

You inquired as to whether the Adjutant General could cause to be convened a Special Court-Martial to try and sentence certain enlisted members of the South Carolina National Guard for their failure to attend Annual Training with their units. You also asked as to what sentences a Court-Martial so convened could impose.

As to your first inquiry, I submit that any offense that falls within Article 8, The Code of Military Justice, of Chapter 1, The Military Code, to Title 44, South Carolina Code of Laws, 1962, as amended by Act No. 996 of 1964 is triable by any of three Courts-Martial—General, Special, or Summary, except in the case of officers who must be tried by a General Court-Martial.

The enlisted men who failed to report to their home armories or elsewhere as ordered to attend Annual Training did so in violation of Section 44-163, South Carolina Code, 1962, as amended, which provides:

‘Any officer or enlisted man who fails, except when prevented by sickness or other necessity, to repair at the fixed time to the appointed place of duty, or goes from it without leave, before he is dismissed or relieved, shall be punished as a court-martial may direct.’ (Emphasis added)

Their continuing failure to report for duty constitutes a wilful absence without leave, in violation of Section 44-162, South Carolina Code, 1962, as amended, which provides:

‘Any officer or enlisted man who absents himself from duty without leave shall be punished as a court-martial may direct.’ (Emphasis added)

These offenses, as are most others within the Article, are Court-Martial offenses, and as such may be punishable up to the maximum sentencing as allowed the tribunal before which the case is tried.

Section 44-182, South Carolina Code, 1962, as amended, specifies that ‘Courts-Martial shall have jurisdiction, subject to the limitation imposed by law, at all times, in all places and for all military offenses over officers and enlisted men of the National Guard of South Carolina . . .’ (Emphasis added). Section 44-183 specifies the classes of Courts-Martial, and also provides that these Courts-Martial ‘shall be respectively constituted and guided in general procedure as similar Courts-Martial provided for by laws and regulations of the Armed Forces of the United States.’ This language mandates that the type of Court-Martial convened be appropriate to the offense committed, as is done in Federally constituted Courts-Martial under the Uniform Code of Military Justice (UCMJ).

UCMJ, unlike the South Carolina Military Code, provides a Table of Maximum Punishments that are geared to the offense. Item 86(2)(b) provides a maximum sentence of six(6) months confinement at hard labor for an absence without leave of four to thirty days. Item 86(4) provides the same maximum for an absence to avoid maneuvers or field exercises. Item 87 provides up to 1 year for missing the movement of a unit through design, and six months if through neglect.

*2 Clearly these maximum punishments under UCMJ exceed even the highest punishments allowed General Courts-Martial constituted under state law. See Section 44-204, South Carolina Code, 1962, as amended, in which a General Court-Martial may sentence an officer or enlisted man up to ninety days confinement, or sixty days in the case of a Special Court-Martial.

Looking to Federally related laws on the matter, there are a series of statutes governing military justice within the National Guard. These statutes are interpreted by the State Judge Advocate's Office of the National Guard Bureau to constitute the outerlimits to which states may grant National Guard Courts-Martials their jurisdiction and powers, particularly to maximum punishments. These sections provide:

[32 U.S.C.A. Section 326](#)—‘In the National Guard not in Federal Service, there are general, special, and summary courts-martial constituted like similar courts of the Army and the Air Force. They have the jurisdiction and powers, except as to punishments, and shall follow the forms and procedures, provided for those courts.’

[32 U.S.C.A. Section 327](#)—‘(a) In the National Guard not in Federal service, general courts-martial may be convened by the President or by the governor of a State or Territory, . . .

‘(b) A General court-martial may sentence to —

- (1) a fine of not more than \$200;
- (2) forfeiture of pay and allowances;
- (3) a reprimand;
- (4) dismissal or dishonorable discharge;
- (5) reduction of a noncommissioned officer to the ranks; or
- (6) any combination of these punishments.’ (Emphasis added)

[32 U.S.C.A. Section 328](#)—‘(a) In the National Guard not in Federal service, the commanding officer of a garrison, . . . Special courts-martial may also be convened by superior authority.’

‘(b) A special court-martial may not try a commissioned officer.

‘(c) A special court-martial has the same powers of punishment as a general court-martial, except that a fine imposed by a special court-martial may not be more than \$100 for a single offense.’ (Emphasis added)

[32 U.S.C.A. Section 330](#)—‘In the National Guard not in Federal service, a court-martial may, instead of imposing a fine, sentence to confinement for not more than one day for each dollar of the authorized fine.’ (Emphasis added)

Significantly, [32 U.S.C.A. Section 330](#) grants state constituted courts-martial the authority to impose confinement, and South Carolina's Military Code does not exceed the maximum jurisdiction and powers authorized by these sections.

Therefore, it is the opinion of this Office that the Adjutant General of South Carolina may appoint a Special Court-Martial to try offenders of the State Code of Military Justice (See Section 44-185), and that that Court-Martial may impose any punishment within the limitations of Section 44-204, as would be consistent with the findings as to guilty and as to any mitigating or extenuating circumstances. If it should be the decision of the Adjutant General to so appoint a Special Court-Martial, this office will be available for legal assistance.

*3 With best wishes, I am
Very truly yours,

Harry B. Burchstead, Jr.
Assistant Attorney General

1975 WL 28880 (S.C.A.G.)

End of Document

© 2018 Thomson Reuters. No claim to original U.S. Government Works.