

LEGISLATIVE BILL 170

Approved by the Governor May 6, 1993

Introduced by Coordsen, 32

AN ACT relating to the military; to amend sections 55-126, 55-136, 55-140, 55-143, 55-152, 55-417, 55-426, and 55-443, Reissue Revised Statutes of Nebraska, 1943, and section 81-8,219, Revised Statutes Supplement, 1992; to change provisions relating to the deputy adjutant general, retirement from the National Guard, the administration of oaths, fitness of an officer to serve, and discharge from service of the United States; to provide for general, special, and summary courts-martial; to change provisions relating to claims based on activities of the National Guard; to harmonize provisions; and to repeal the original sections.

Be it enacted by the people of the State of Nebraska,

Section 1. That section 55-126, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

55-126. The deputy adjutant general shall aid the Adjutant General by the performance of such duties as may be assigned by ~~him~~ the Adjutant General. In case of absence or inability of the Adjutant General, ~~he~~ the deputy adjutant general shall perform all or such portion of the duties of the Adjutant General as the latter may expressly delegate to him ~~or her~~. ~~He~~ The deputy adjutant general shall be bonded under the blanket surety bond required by section 11-201. The deputy adjutant general shall receive such salary as the Adjutant General shall direct, payable monthly. Such salary shall not exceed the annual pay and allowances of regular military officers of equal rank. He shall receive for his services the sum of four thousand eight hundred dollars per annum, payable monthly, and such additional sums, as available for assigned duties or services, from federal or other income sources of the department, not to exceed the annual pay and allowances of his grade.

Sec. 2. That section 55-136, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

55-136. Staff officers, including officers of the pay, inspection, subsistence, medical, and Adjutant General's department, shall have had previous military experience; and shall hold their positions until they have reached the age of sixty-four years; unless retired prior to that time by reason of resignation, disability, or pursuant to applicable regulations ~~in force as of July 22, 1978,~~ issued by the Department of the Army or the Department of the Air Force. Vacancies among ~~said~~ such officers shall be filled by appointment by the Governor or the Adjutant General. All commissioned officers ~~are~~ shall be entitled to an honorable discharge in writing at the expiration of their term of office; on

properly accounting for all property for which they are responsible.

Sec. 3. That section 55-140, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

55-140. All commissioned officers of the Nebraska National Guard ~~are hereby~~ shall be authorized and empowered to administer oaths and affirmations ~~to written affidavits~~ necessary for the administration of military business.

Sec. 4. That section 55-143, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

55-143. At any time the moral character, capacity, and general fitness for the service of any National Guard officer may be determined by ~~an efficiency~~ a board as provided by the United States. Commissions of officers of the National Guard may be vacated; upon resignation, upon absence without leave for three months, ~~on the upon~~ recommendation of ~~an efficiency~~ a board; pursuant to sentence of a court-martial, or upon separation based upon the causes set forth in section 55-136. Officers of the guard rendered surplus by the disbandment of their organization shall be disposed of as provided by the United States. Officers may, upon their own application, be placed in the reserve as may be authorized by the United States.

Sec. 5. That section 55-152, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

55-152. Upon the termination of any emergency for which the National Guard has been drafted or called into the ~~military~~ service of the United States, all persons so drafted or called, upon being discharged from the Army or Air Force of the United States, shall continue to serve in the Nebraska National Guard until the dates upon which their enlistments; entered into prior to their draft or call into ~~military~~ service; would have expired if uninterrupted.

Sec. 6. That section 55-417, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

55-417. There shall be ~~a court-martial which shall consist of a military judge and not less than three members or only a military judge, if before the court is assembled the accused, knowing the identity of the military judge and after consultation with defense counsel, requests in writing a court composed only of a military judge and the military judge approves~~ general, special, and summary courts-martial constituted like similar courts of the Army and Air Force of the United States. The jurisdiction of the courts-martial shall be as follows:

(1) General court-martial: Except as otherwise provided by law, a general court-martial may try any person subject to the Nebraska Code of Military Justice;

(2) Special court-martial: Except as otherwise provided by law, a special court-martial may try any person subject to the code when the punishment for the offense does not include a dishonorable discharge; and

(3) Summary court-martial: Except as otherwise provided by law, a summary court-martial may try any person subject to the code

and it may adjudge any punishment not forbidden by the code except dishonorable discharge or bad-conduct discharge, confinement for more than one month, hard labor without confinement for more than forty-five days, or forfeiture of more than two-thirds of one month's pay.

Sec. 7. That section 55-426, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

55-426. The pretrial and trial procedures before a court-martial shall be in accordance with the procedures set forth in the Uniform Code of Military Justice of the United States, 10 U.S.C. chapter 47, for ~~a general court-martial~~ courts-martial as the same may be from time to time amended and according to regulations prescribed by the President of the United States as contemplated by such code except as to matters which are specifically covered in ~~sections 55-401 to 55-480~~ the Nebraska Code of Military Justice.

Sec. 8. That section 55-443, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

55-443. (1) The State Judge Advocate shall refer to the Court of Military Review the complete record of every case of trial by general or special court-martial within thirty days after receiving the record. The referral of the record in summary courts-martial shall be according to the manual for courts-martial adopted pursuant to section 55-426.

(2) In a case referred to it, the Court of Military Review may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

(3) If the Court of Military Review sets aside the findings and sentence, it may, except ~~where~~ when the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

(4) The State Judge Advocate shall, unless there is to be further action by the Governor, instruct the convening authority to take action in accordance with the decision of the Court of Military Review. If the Court of Military Review has ordered a rehearing but the convening authority finds a rehearing impracticable, he or she may dismiss the charges.

(5) The State Judge Advocate shall prescribe uniform rules of procedure for the Court of Military Review.

(6) No judge of a Court of Military Review shall be eligible to review the record of any trial if such judge (a) served as investigating officer in the case, (b) ~~or~~ served as a member of the court-martial before which such trial was conducted, or (c) served as military judge, trial or defense counsel, or reviewing officer of such trial.

Sec. 9. That section 81-8,219, Revised Statutes Supplement, 1992, be amended to read as follows:

81-8,219. The State Tort Claims Act shall not apply to:

(1) Any claim based upon an act or omission of an employee of the state, exercising due care, in the execution of a statute, rule, or regulation, whether or not such statute, rule, or regulation is valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion is abused;

(2) Any claim arising with respect to the assessment or collection of any tax or fee, or the detention of any goods or merchandise by any law enforcement officer;

(3) Any claim for damages caused by the imposition or establishment of a quarantine by the state whether such quarantine relates to persons or property;

(4) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights;

(5) Any claim by an employee of the state which is covered by the Nebraska Workers' Compensation Act;

(6) Any claim based on activities of the Nebraska National Guard when such claim is cognizable under the federal Tort Claims Act, 28 U.S.C. 2674, or the National Guard Tort Claims Act of the United States, 32 U.S.C.A. 715, or when such claim accrues as a result of active federal service or state service at the call of the Governor for quelling riots and civil disturbances;

(7) Any claim based upon the failure to make an inspection or making an inadequate or negligent inspection of any property other than property owned by or leased to the state to determine whether the property complies with or violates any statute, ordinance, rule, or regulation or contains a hazard to public health or safety unless the state had reasonable notice of such hazard or the failure to inspect or inadequate or negligent inspection constitutes a reckless disregard for public health or safety;

(8) Any claim based upon the issuance, denial, suspension, or revocation of or failure or refusal to issue, deny, suspend, or revoke any permit, license, certificate, or order. Such claim shall also not be filed against a state employee acting within the scope of his or her office;

(9) Any claim arising out of the malfunction, destruction, or unauthorized removal of any traffic or road sign, signal, or warning device unless it is not corrected by the governmental entity responsible within a reasonable time after actual or constructive notice of such malfunction, destruction, or removal. Nothing in this subdivision shall give rise to liability arising from an act or omission of any governmental entity in placing or removing any traffic or road signs, signals, or warning devices when such placement or removal is the result of a discretionary act of the governmental entity;

(10) Any claim arising out of snow or ice conditions or

other temporary conditions caused by nature on any highway as defined in section 39-602, bridge, public thoroughfare, or other state-owned public place due to weather conditions. Nothing in this subdivision shall be construed to limit the state's liability for any claim arising out of the operation of a motor vehicle by an employee of the state while acting within the course and scope of his or her employment by the state;

(11) Any claim arising out of the plan or design for the construction of or an improvement to any highway as defined in section 39-602 or bridge, either in original construction or any improvement thereto, if the plan or design is approved in advance of the construction or improvement by the governing body of the governmental entity or some other body or employee exercising discretionary authority to give such approval; or

(12) Any claim arising out of the alleged insufficiency or want of repair of any highway as defined in section 39-602, bridge, or other public thoroughfare. Insufficiency or want of repair shall be construed to refer to the general or overall condition and shall not refer to a spot or localized defect. The state shall be deemed to waive its immunity for a claim due to a spot or localized defect only if the state has had actual or constructive notice of the defect within a reasonable time to allow repair prior to the incident giving rise to the claim.

Sec. 10. That original sections 55-126, 55-136, 55-140, 55-143, 55-152, 55-417, 55-426, and 55-443, Reissue Revised Statutes of Nebraska, 1943, and section 81-8,219, Revised Statutes Supplement, 1992, are repealed.