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Final Analysis

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ACT SUMMARY

Uniform Code of Military Justice

- Expressly includes National Guard dual-status technicians during their normal duty hours as persons subject to the Uniform Code of Military Justice (UCMJ).
- Transfers certain rulemaking and other powers relating to the organized militia from the Governor to the Adjutant General.
- Modifies the nonjudicial and judicial punishments that may be imposed by commanding and warrant officers and by courts-martial.
- Expands the list of persons who may convene courts-martial.
- Elaborates upon pretrial, trial, and post-trial procedures in court-martial cases and specifies in more detail the qualifications required of military judges, prosecutors, and defense counsel.

- Permits a plea of not guilty by reason of insanity and requires the court-martial to notify the accused of the consequences of guilty pleas.

- Establishes procedures for determining whether an accused is competent to stand trial and for the disposition of persons who are found incompetent to stand trial or not guilty by reason of insanity.

- Establishes more detailed procedures for the review of a court-martial determination by the authority that convened the court-martial.

- Creates the Court of Military Appeals and procedures for taking, waiving, withdrawing, and determining appeals.

- Modifies provisions relating to the commutation or suspension of sentences.

- Replaces offenses under the UCMJ relating to the use of alcohol and drugs and to sexual assaults with more detailed provisions and modifies or repeals statutes creating other offenses.

- Clarifies and modernizes the language of the UCMJ and makes other changes related to the topics of the foregoing dot points.

Other provisions

- Requires a county recorder's office to make a veteran's record of discharge available to a county veterans service officer who is certified by the Department of Veterans Services.

- Specifies that a county veterans service officer must need access to a record of discharge for the purpose of supporting a veteran's claim for benefits before the record may be requested from, and provided by, the county recorder.

- Removes the requirement that the Director of Veterans Services publish and distribute a listing of veterans service directors and officers in Ohio and elsewhere and their contact information, and requires the Director of Veterans Services to publish electronically a listing of county veterans service offices and commissioners.

- Adds a member of the National Guard Association of the United States who is an Ohio resident to the Veterans Advisory Committee.

- Clarifies that nonresident spouses and dependents of veterans who died after military discharge still may qualify for in-state tuition.

- Removes an obsolete reference to the State Commissioner of Soldiers' Claims from a law that requires various state officers, commissions, boards, and other entities to make an annual report.

- Extends the veterans preference on civil service exams to members of the reserve components of the organized militia.

- Expands the reemployment rights of nonteaching school employees who go on extended active military duty.

- Grants an extension of time to military personnel to satisfy continuing education requirements for occupational licenses and authorizes licensing agencies to grant temporary licenses to persons whose spouses are on active military duty in Ohio.

- Authorizes the use of armories by federally chartered patriotic and national organizations.

- Includes cross-references in and makes technical changes to other sections of law relating to military personnel.

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CONTENT AND OPERATION

Introduction

Ohio's Uniform Code of Military Justice (UCMJ) dates from 1961. Most of the Code's 142 sections of law had not been amended since then. The act updates the Code by repealing or revising obsolete provisions, using gender-neutral language, conforming the Code to the current federal UCMJ, clarifying the language, and making other changes to modernize the law. The act also amends various sections of the Revised Code outside the UCMJ that relate to military personnel.

Uniform Code of Military Justice

General

The act modifies the definitions of several terms used in the UCMJ and adds several others. New definitions and changes to prior and continuing definitions are indicated below in italics.[1]

- "Accuser" means a person *who reports an offense subject to trial by court-martial* and who signs and swears to charges, any person who directs that charges nominally be signed and sworn to by another, and any other person who has an interest other than an official interest in the prosecution of the accused.

- "Arrest" means restraint of a person by an *oral or written order*, not imposed as punishment and directing the person to remain within specified physical limits.

- "Commanding officer" includes only commissioned *or warrant* officers in *command of a unit*.

[1] R.C. 5924.01 and 5924.09(A).

- "Confinement" is the physical restraint of a person *that is imposed by order of competent authority and deprives the person of freedom pending disposition of criminal charges*.

- *"Detention facility" means any place owned or operated by a municipal corporation, a county, or one or more municipal corporations, counties, or both and that is used for the confinement of persons charged with or convicted of any crime in Ohio, in another state, or under federal law.*

- *"Examiner,"* as *used in the act's provisions relating to incompetence to stand trial, means a psychiatrist or psychologist* who is *qualified to conduct examinations of defendants under existing law relating to incompetence to stand trial in a civil court.*

- "Military judge" means an official of a general or special court-martial who is a commissioned officer *who has been duly certified to be qualified for duty as a military judge by the State Judge Advocate, and who has been properly detailed*.

- *"Nonsecured status," "unsupervised, off-grounds movement," "trial visit," "conditional release," and "licensed clinical psychologist,"* as *used in the act's provisions relating to incompetence to stand trial, have the same meanings as in existing law relating to incompetence to stand trial in a civil court.*

- "*State active duty*" (instead of "active state duty") means full-time duty in the active military service of the state under a *proclamation* (instead of an order).

- *"Trial counsel" means the prosecuting attorney in a general or special court-martial.*

The act specifies that the persons subject to the UCMJ *include National Guard dual-status technicians during their normal duty hours*, persons who have been placed on the state retired list *under R.C. 5913.07 or 5919.13*, and other persons lawfully ordered to duty in the organized militia from the dates they are required by the terms of the order or other directive to obey the order or directive, *including any time when they are going to or returning from duty*.[2] The act further states that no person may be tried or punished for any offense under the UCMJ unless the person committed the offense *while in a military or National Guard technician duty status*.[3]

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[2] R.C. 5924.02.

[3] R.C. 5924.146.

The act provides that the Adjutant General, rather than the Governor on the Adjutant General's recommendation, appoints the State Judge Advocate and requires that the person appointed be a member of the Ohio National Guard, a member in good standing of the Ohio Bar, and be eligible to be recognized as a colonel under National Guard Bureau regulations. It further requires the Adjutant General to appoint judge advocates and legal officers on the recommendation of the State Judge Advocate. The appointees must be members in good standing of the Ohio Bar.[4]

The act eliminates the death penalty and all references to petty officers.[5]

Transfer of authority from the Governor to the Adjutant General

The act removes from the Governor certain powers that the Governor either had alone or shared with the Adjutant General under the prior and continuing UCMJ and transfers various powers from the Governor to the Adjutant General or to another officer. These powers are:

- To adopt regulations limiting the authority of commanding and warrant officers to impose certain punishments without trial for minor offenses if the accused does not demand a trial by court-martial (previously shared with Adjutant General).[6]
- To prescribe regulations regarding the form of records to be kept of nonjudicial proceedings (previously shared with Adjutant General).[7]
- To prescribe regulations governing the appointment of court reporters and interpreters (transferred to Adjutant General).[8]
- To prescribe regulations prescribing the procedure to be used in courts-martial (transferred to Adjutant General).[9]

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[4] R.C. 5924.06(A) and (B).

[5] R.C. 5924.18, 5924.19, 5924.20, 5924.45, 5924.52, 5924.71, 5924.85, 5924.94, and 5924.113; R.C. 5924.07, 5924.09, and 5924.91.

[6] R.C. 5924.15(A).

[7] R.C. 5924.15(H).

[8] R.C. 5924.28.

[9] R.C. 5924.36.

- To prescribe regulations pertaining to witnesses and other evidence (transferred to Adjutant General).[10]

- To prescribe regulations for the authentication of the record in special and summary courts-martial (transferred to Adjutant General).[11]

- To prescribe limits of punishment for any offense (transferred to Adjutant General).[12]

- To prescribe regulations under which a sentence of confinement may not be executed until approved by designated officers (repealed).[13]

- To defer execution of the sentence, and to rescind the deferment, in cases in which the accused is reassigned before a sentence of confinement is carried out (transferred to the officer exercising general court-martial jurisdiction over the command to which the accused currently is assigned).[14]

- To consider petitions for a new trial based on newly discovered evidence or fraud on the court (transferred to Adjutant General).[15]

- To substitute, for good cause, an administrative form of discharge for a discharge or dismissal executed in accordance with the sentence of a court-martial (transferred to Adjutant General).[16]

- To prescribe regulations under which all rights, privileges, and property affected by an executed part of a court-martial sentence that has been set aside or disapproved, except an executed dismissal or discharge, must be restored unless a new trial or rehearing is ordered and the executed part

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[10] R.C. 5924.46(A).

[11] R.C. 5924.54.

[12] R.C. 5924.56.

[13] R.C. 5924.57(B).

[14] R.C. 5924.57(D)(1).

[15] R.C. 5924.73.

[16] R.C. 5924.74(B).

of the sentence is included in a sentence imposed upon the new trial or rehearing (transferred to Adjutant General).[17]

- To substitute a form of discharge authorized for administrative issuance for a previously executed sentence of dishonorable or bad-conduct discharge that is not imposed on a new trial, unless the accused is to serve out the remainder of the accused's enlistment (transferred to Adjutant General).[18]

- To substitute a form of discharge authorized for administrative issuance for a previously executed sentence of dismissal that is not imposed on a new trial and to reappoint the commissioned officer to an appropriate grade and rank (transferred to Adjutant General).[19]

Apprehension, arrest, and confinement

Under the act, officers who may apprehend (take into custody) a person *may take reasonable action* to quell disorders and apprehend persons subject to the UCMJ. The act authorizes apprehension of a person in a person's home with the assistance of local law enforcement and only on probable cause to believe that the person who is legally subject to apprehension is or will be present to be apprehended.[20] Any peace officer (rather than "civil officer") may apprehend a deserter. The act eliminates a requirement that an offender apprehended outside of Ohio be returned pursuant to normal extradition procedures or a reciprocal agreement.[21]

The act authorizes a commanding (rather than a "commissioned") officer to order persons into arrest or confinement.[22] Under prior law, when a person is arrested or confined, "immediate steps" must have been taken to inform the person of the wrong of which the person was accused and to try the person or dismiss the charges. The act instead requires that the person be informed within 72 hours of the wrong and of the person's rights under the UCMJ.[23] The act also requires that confinement be in civil jails

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[17] R.C. 5924.75(A).

[18] R.C. 5924.75(B).

[19] R.C. 5924.75(C).

[20] R.C. 5924.07(C) and (D).

[21] R.C. 5924.08.

[22] R.C. 5924.09(B).

[23] R.C. 5924.10(A).

or like institutions *to the maximum extent practicable.* An order placing an accused person in pretrial confinement must be reviewed by a military judge within seven days and, if confirmed, may be reviewed subsequently only on motion.[24]

The act eliminates a provision allowing a person under arrest or confinement to be required to perform labor for the policing and sanitation of the person's living quarters, dining facilities, and adjacent areas.[25]

Under continuing law, a person on state active duty who commits an offense against a civil authority may be delivered to the civil authority for trial. The act specifies that a person on National Guard duty under Title 32 of the U.S. Code may likewise be delivered for trial.[26]

Nonjudicial punishment

The UCMJ allows commanding and warrant officers to impose certain punishments without trial for minor offenses if the accused does not demand a trial by court-martial, subject to such limitations as may be imposed by regulations prescribed by the Governor or Adjutant General. The act eliminates the Governor's power to adopt limiting regulations, authorizes the Governor and general officers and officers of flag rank to delegate their authority relating to nonjudicial punishment to a principal assistant, and grants the accused a reasonable time, normally not exceeding 48 hours, to reply to a notification of intent to impose punishment.[27]

The permissible punishments vary with the officer imposing the punishment and the rank of the accused. They include restrictions to specified limits, arrest in quarters, correctional custody, and extra duties for a period of time ranging from seven to 60 consecutive days. With one exception, the act eliminates the requirement that the days be served consecutively. In one instance, extra duties may be imposed for up to 14 consecutive days or 30 nonconsecutive days. The act eliminates a provision allowing persons attached to or embarked in a vessel to be confined on diminished rations. The UCMJ also authorizes monetary sanctions, including detention of pay, forfeiture of pay, fines, and reduction in pay grade. The act eliminates detention of pay and modifies some of the fines and reductions. The act prohibits the consecutive running of two or more nonfinancial punishments so that they exceed the maximum time that may be

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[24] R.C. 5924.10(B).

[25] R.C. 5924.11(A)(2) and 5924.13.

[26] R.C. 5924.14.

[27] R.C. 5924.15(A).

imposed for each of them. If such punishments are combined to run consecutively, they must be apportioned.[28]

The UCMJ authorizes an officer who imposed a nonjudicial punishment to suspend probationally a reduction in pay grade or forfeiture of pay, to mitigate reduction in grade to forfeiture, and to mitigate arrest in quarters or extra duties to restriction. The act extends the suspension power to cover fines and authorizes mitigation of reduction in grade to forfeiture or a fine.[29]

A person who thinks a nonjudicial punishment is unjust may appeal it to the next superior officer. In certain cases, that officer must refer the appeal to a judge advocate for advice. The act requires that the appeal be made within seven days and authorizes reference of the case to either a judge advocate or a legal officer.[30]

The prior UCMJ empowered the Governor or the Adjutant General to prescribe regulations regarding the form of records to be kept of nonjudicial proceedings. The act eliminates the Governor's authority to prescribe such regulations.[31]

Under the act, a commanding officer may delegate the authority to make a reduction in pay grade of a nonofficer in the commanding officer's command to the commanding officer's executive officer, deputy commander, vice commander, or principal assistant.[32]

Types of court-martial

The act retains the three types of court-martial established under current law: general, special, and summary. A general court-martial consists of either (1) one military judge and not fewer than five members or (2) one 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. A special court-martial consists of three or more members, a military judge and at least three members, or only a military judge if one has been detailed to the court. The act specifies that general and special courts-martial are courts of record with original jurisdiction. It modifies the judge-only special

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[28] R.C. 5924.15(B) and (C).

[29] R.C. 5924.15(E).

[30] R.C. 5924.15(F).

[31] R.C. 5924.15(H).

[32] R.C. 5924.15(I).

court-martial by permitting it only if it meets the same criteria as a judge-only general court-martial. A summary court-martial consists of one commissioned officer who, under the act, must be in the grade of captain or above.[33]

Under the UCMJ, each type of court-martial has jurisdiction over all offenses established by the UCMJ.[34] However, the punishments they may impose differ. Under the act, subject to any limitations that the Governor may prescribe, a general court-martial may adjudge any of the following punishments:[35]

(1) A fine of not more than $2,000 or confinement for not more than 365 days;

(2) Forfeiture of all pay and allowances;

(3) Reprimand;

(4) Dismissal and dishonorable discharge or a bad-conduct discharge;

(5) Reduction of a noncommissioned officer to the lowest or any intermediate enlisted rank;

(6) Any combination of the above.

A general court-martial may not adjudge dismissal or dishonorable discharge unless a complete record of the proceedings and testimony is made, defense counsel who is a member of the Ohio Bar in good standing and is certified by the State Judge Advocate as competent to act in general courts-martial is detailed to represent the accused, and a military judge is detailed to the trial.[36]

A special court-martial may impose the same punishments as a general court-martial, except that a special court-martial may not impose a fine of more than $1,000, confinement for more than 180 days per offense, or dismissal or dishonorable discharge. A special court-martial may adjudge a bad-conduct discharge only if a complete record of the proceedings and testimony is made, defense counsel who is a member of the Ohio Bar in good standing and is certified by the State Judge Advocate as competent to

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[33] R.C. 5924.16.

[34] R.C. 5924.18(A), 5924.19, and 5924.20(A).

[35] R.C. 5924.18(A).

[36] R.C. 5924.18(B).

act in general courts-martial is detailed to represent the accused, and a military judge is detailed to the trial.[37]

A summary court-martial has jurisdiction over all persons subject to the UCMJ, including *officers and warrant officers.* A summary court-martial may impose a fine of not more than $500, confinement of up to 30 days, forfeiture not exceeding two-thirds of one month's pay, and reduction to the lowest or any intermediate pay grade. For enlisted members in pay grade above E-4, a summary court-martial may not adjudge confinement or reduction except to the next inferior pay grade.[38]

The act expressly provides that the UCMJ's conferral of jurisdiction on courts-martial does not deprive military commissions, provost courts, other military tribunals, or state or federal courts of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by those bodies.[39]

Court-martial personnel

Courts-martial may be convened by different authorities. The act expands the list of persons who may convene the various types of courts-martial. Under the act, a general court-martial may be convened by the Governor, the Adjutant General, the Assistant Adjutant General for Army, or the Assistant Adjutant General for Air; a special court-martial by any commander authorized by regulation in the grade of colonel or higher; and a summary court-martial by any commander authorized by regulation in the grade of lieutenant colonel or higher.[40]

The UCMJ requires that a military judge (a member in good standing of the Ohio Bar certified as a military judge by the State Judge Advocate) be detailed to preside over each general court-martial. Under prior law, a military judge could be detailed to preside over each special court-martial. If a military judge were not detailed, the convening authority must have appointed a commissioned officer who was an Ohio attorney and of appropriate rank to preside, if one is available within the command. The act requires that a military judge be detailed to each special court-martial. Under the UCMJ, unless the court-martial was convened by the Governor *or the Adjutant General*, neither the convening authority nor the convening authority's staff, *other than*

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[37] R.C. 5924.19.

[38] R.C. 5924.20.

[39] R.C. 5924.21.

[40] R.C. 5924.22, 5924.23, and 5924.24.

the State Judge Advocate or Deputy State Judge Advocate, may prepare or review any report concerning the military judge's effectiveness, fitness, or efficiency of performance.[41]

The act provides that the State Judge Advocate rather than the convening authority details trial and defense counsel. Both trial and defense counsel must be members in good standing of the Ohio Bar and certified by the State Judge Advocate to perform their duties in a general court-martial. The act gives to the Adjutant General instead of the Governor the authority to prescribe regulations governing the appointment of court reporters and interpreters.[42]

The act permits a trial counsel, defense counsel, military judge, legal officer, summary court officer, or any other person from any component of the organized militia certified by the State Judge Advocate to perform legal functions under the UCMJ to perform those functions, as needed, for any other component.[43]

Charges against the accused and pleas

The act specifies that charges against an accused under the UCMJ must be signed by a commissioned officer of the organized militia. Not later than the eighth day after a person is ordered into arrest or confinement, the commanding officer must forward the charges to the general court-martial convening authority (instead of to the Governor, as under prior law). The convening authority must refer the charges to the convening authority's staff judge advocate or legal officer, rather than to the State Judge Advocate, for advice before directing a trial.[44]

The UCMJ requires that notice of the charges be served on the accused. Under prior law, an accused could not be required to participate, with or without counsel, in a court-martial that occurred within five days of receiving notice in a general court-martial case or within three days of receiving notice in a special court-martial case. The act reduces this time period to 24 hours in both cases.[45]

The act transfers from the Governor to the Adjutant General the power to prescribe regulations laying out the procedure to be used in courts-martial.[46]

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[41] R.C. 5924.26(A) and (C).

[42] R.C. 5924.27 and 5924.28.

[43] R.C. 5924.26(F).

[44] R.C. 5924.30, 5924.33, and 5924.34(A).

[45] R.C. 5924.35.

[46] R.C. 5924.36.

The UCMJ allows either side in a general or special court-martial to challenge the military judge and members of the court-martial and seek their removal. A peremptory challenge is a challenge for which the party need not state a reason. The act provides that if peremptory challenges reduce the number of members of a court-martial below the required minimum, any remaining peremptory challenges must be exercised or waived before additional members are detailed. Any additional members detailed may be challenged for cause. After any challenges for cause against additional members are decided, each side is entitled to one peremptory challenge against members not previously challenged peremptorily.[47]

The act sets forth the oaths that must be taken by members of a court-martial, military judges, trial and defense counsel and assistant counsel, court reporters, interpreters, and witnesses.[48]

The act revises the UCMJ's statute of limitations by prohibiting trial or punishment for any offense committed more than four years before receipt of the charges by an officer exercising court-martial jurisdiction. The act also modifies the UCMJ's double-jeopardy provision by eliminating a person's ability to consent to be tried a second time for the same offense and by specifying that a person may not be tried twice in a *court-martial* for the same offense.[49]

The act expands and makes more specific the types of pleas an accused may enter. Under the act, an accused may plead not guilty, not guilty by reason of insanity (which must be in writing and may be joined with a plea of not guilty), guilty, or no contest (with the consent of the court). Before accepting a guilty plea, the military judge must inform the accused personally of and be sure the accused understands the nature of the offense, the maximum possible penalty, the right to counsel (if the accused in a general or special court-martial is not represented), the right to plead not guilty, the right to a trial at which the accused may confront and cross-examine witnesses, the right against self-incrimination, the fact that a guilty plea waives a trial, and the facts that if the accused pleads guilty the military judge will question the accused about the offense and that answers given under oath, on the record, and in the presence of counsel may later be used against the accused in a prosecution for perjury or false statement. The military judge must also determine that the plea of guilty is voluntarily

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[47] R.C. 5924.41(C) and (D).

[48] R.C. 5924.42.

[49] R.C. 5924.43(A) and 5924.44(A).

made and that there is a factual basis for it. The underlying agreement for a negotiated plea of guilty or no contest must be stated on the record.[50]

If the court refuses to accept a plea of guilty or no contest, the plea may not be used in evidence or commented on by the court or trial counsel. An accused may move to withdraw a plea of guilty or no contest only before sentence is imposed. However, to correct manifest injustice, the court may set aside a conviction and allow the accused to withdraw the plea after sentence is imposed. An accused who is found guilty after pleading guilty waives any objection to the factual issue of guilt.[51]

An accused must plead a defense of not guilty by reason of insanity at the time of arraignment. For good cause shown, however, the court must permit a plea of not guilty by reason of insanity to be entered at any time before trial.[52]

Evidence

The act transfers from the Governor to the Adjutant General the authority to prescribe regulations pertaining to witnesses and other evidence and requires that the process to compel the appearance of witnesses and production of other evidence be substantially similar to the process issued by Ohio courts in criminal cases. The act authorizes military courts to punish recalcitrant witnesses and other persons for contempt in the same manner as other Ohio courts and provides for the taking of depositions under the Ohio Rules of Criminal Procedure. If a witness is unavailable for a court-martial, the UCMJ allows the use of testimony given before a board of officers under certain circumstances. The act eliminates a requirement that the accused have been physically present when the testimony was given.[53]

Competence to stand trial and insanity verdict

The act includes procedures for raising and determining the question of whether an accused is competent to stand trial, for the disposition of a defendant who is found incompetent, and for the disposition of a person found not guilty by reason of insanity. The procedures, although adopted for use by courts-martial, closely track those used in

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[50] R.C. 5924.45(A), (B), (C), (D), (E), and (F).

[51] R.C. 5924.45(G), (I), and (J).

[52] R.C. 5924.45(H).

[53] R.C. 5924.46, 5924.47, 5924.48, 5924.49, and 5924.50.

other Ohio courts under R.C. 2945.37 through 2945.40. The chief difference is that the act addresses mental illness but not mental retardation or developmental disability.[54]

The act authorizes the military judge, trial counsel, defense counsel, or civilian counsel to raise the issue of the accused's competence to stand trial. If the issue is raised before the trial has commenced, the court must hold a hearing on the issue. If the issue is raised after the trial has commenced, the court must hold a hearing on the issue only for good cause shown, or the court may hold a hearing on its own motion.[55]

Following the continuing procedures for determining competence in civil courts, the act establishes procedures for hearings, for professional evaluations of the accused's mental condition, and for the disposition of the accused. In general, the court may (1) find the accused competent and proceed with the case, (2) order continuing evaluation and treatment for four months to determine whether there is a substantial probability that a presently incompetent accused can become competent within a year with proper treatment, (3) order treatment if that substantial probability exists, or (4) discharge the accused or send the case to probate court for civil commitment procedures if the accused is incompetent and there is no substantial probability that the accused will become competent within a year, even with treatment.

If an accused is committed to an agency or institution for further evaluation or treatment, the person who supervises the evaluation or treatment must report to the court at specified times. Ultimately, the court must decide, based on these reports, whether the accused is competent to proceed or remains incompetent and is unlikely to become competent within the allotted time. If the accused remains incompetent, the court, depending on the seriousness of the offense and the amount of time that has elapsed since evaluation or treatment was ordered, may discharge the defendant or transfer the case to the probate court. If an accused is found competent to stand trial and is convicted and sentenced to confinement, the sentence must be reduced by the time the accused spent in confinement for evaluation or treatment.

The act generally tracks continuing law applicable in the civil courts by permitting a plea of not guilty by reason of insanity and authorizing the court to order evaluations of the accused's mental condition at the time of the offense charged. If an accused is found not guilty by reason of insanity, the court must hold a hearing to determine whether the accused is a mentally ill person subject to hospitalization by court order. If the court finds that the accused is such a person, it must commit the

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[54] R.C. 5924.501 through 5924.506.

[55] R.C. 5924.501(A).

accused to the Department of Mental Health for placement in an appropriate facility and for further proceedings in accordance with R.C. Chapter 5122. or 5123.

Record of proceedings

The UCMJ requires every court-martial to keep a record of proceedings in each case that comes before it and provides for the authentication of the record. The act requires the court reporter to authenticate every record of proceedings in a general court-martial that consists only of a military judge. It authorizes the Adjutant General instead of the Governor to prescribe regulations for the authentication of the record in special and summary courts-martial. The act requires that a complete record of the proceedings and testimony be prepared in each case tried before a general court-martial in which the sentence adjudged includes a dismissal, a discharge, or any punishment that exceeds the punishment that may otherwise be adjudged by a special court-martial. A complete record also must be prepared in each case tried before a special court-martial in which the sentence adjudged includes a bad-conduct discharge or confinement for more than six months. In all other cases, the record must contain any matters that are required by regulations of the Adjutant General.[56]

Conviction and execution of sentence

The act requires a two-thirds vote of the members of a court-martial who are present when the vote is taken in order to convict an accused. It transfers from the Governor to the Adjutant General the authority to prescribe limits of punishment for any offense.[57]

Under the act, any forfeiture of pay or allowances or reduction in grade that is included in a sentence takes effect on the earlier of the date that is 14 days after the sentence is adjudged and the date on which the sentence is approved by the convening authority. However, on application of an accused, the convening authority may defer a forfeiture of pay or allowances or reduction in grade until the date on which the sentence is approved by the convening authority. The convening authority may at any time rescind a deferment so granted. A forfeiture of pay or allowances applies to pay or allowances accruing on and after the date on which the sentence takes effect.[58]

The act addresses the situation of a person subject to the UCMJ who, while in the custody of a state or foreign country, is temporarily returned by that state or foreign

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[56] R.C. 5924.54.

[57] R.C. 5924.52(A) and 5924.56.

[58] R.C. 5924.57(A).

country to the armed forces for trial by court-martial and after the court-martial is returned to that state or foreign country under the authority of a mutual agreement or treaty. In such cases, the convening authority may defer execution of a sentence of confinement, without the consent of the person, until after the state or foreign country releases the person permanently to the armed forces.[59]

The act provides that if a sentence of confinement has been ordered executed in a case in which no appeal has been taken and a review by a judge advocate is pending, the Adjutant General may defer further service of the sentence until the review is completed.[60]

The UCMJ allowed a sentence of confinement to be carried out in any place of confinement controlled by the organized militia or in any jail or prison designated for that purpose. Under the act, the sentence may be served, subject to regulations prescribed by the Adjutant General, in any jail or correctional facility in Ohio. The act repeals a provision stating that the omission of "hard labor" from a sentence does not deprive the authority executing the sentence from requiring hard labor.[61]

The act provides that, except as otherwise provided in the Adjutant General's regulations, a sentence of an enlisted member in a pay grade above E-1 that includes a dishonorable or bad-conduct discharge, confinement, or hard labor reduces the member to pay grade E-1, effective on the date the convening authority approves the sentence. If the sentence is set aside or disapproved, or as finally approved does not include a dishonorable or bad-conduct discharge, confinement, or hard labor, the rights and privileges of which the member was deprived because of the reduction in pay are restored and the member must be given the pay and allowances lost during the period the reduction was in effect.[62]

If a sentence includes confinement for more than six months or confinement for six months or less and a dishonorable or bad-conduct discharge or dismissal, the offender forfeits pay, or pay and allowances, during any period of confinement or parole. The forfeiture amounts to all pay and allowances due during any period of confinement or parole if the sentence is imposed by a general court-martial and two-thirds of all pay and allowances due during confinement or parole if the sentence is imposed by a special court-martial. If the offender has dependents, the convening

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[59] R.C. 5924.57(D)(2) and (3).

[60] R.C. 5924.57(E).

[61] R.C. 5924.58.

[62] R.C. 5924.581.

authority may waive all or part of the forfeiture for up to six months. The amounts waived must be paid to the dependents. If the sentence is set aside or disapproved or, as finally approved, does not provide for a punishment that includes confinement for more than six months or confinement for six months or less plus a dishonorable or bad-conduct discharge or dismissal, the service member must be given the pay and allowances lost while the forfeiture was in effect.[63]

Review of findings and sentence

The act creates new, detailed procedures for review of the findings and sentence of a court-martial. After announcing the sentence, the court-martial must report its findings and sentence to the convening authority. The convening authority may approve, disapprove, or suspend the sentence. The accused may submit to the convening authority, in writing, matters relating to the findings and sentence. In a summary court-martial case, the submission must be made within seven days after the sentence is announced and the summary court officer must promptly give the accused a copy of the trial record for preparing the submission. In other cases, a submission must be made within ten days after the accused has been given an authenticated record of trial and, if applicable (see below), the recommendation of the staff judge advocate or legal officer. For good cause shown, the convening authority may extend by up to 20 days the period for submission. The accused may waive, irrevocably and in writing, the right to make a submission. A waiver terminates the period within which the accused may make a submission.[64]

Subject to the Adjutant General's regulations, the convening authority may act only after the accused makes a submission or the time for doing so expires. If the accused makes a submission, the convening authority must take it into account before acting. Before acting on a general court-martial case or on a special court-martial case that includes a bad-conduct discharge, the convening authority must consider the written recommendations of the convening authority's staff judge advocate or legal officer, to whom the convening authority must refer the record of trial. The recommendations must include any matters that the Adjutant General's regulations require and must be served on the accused. The accused may respond to anything in the recommendations in his or her submission to the convening authority. The accused waives the right to object to any part of the recommendations to which he or she does not object in the submission. The convening authority may but is not required to take action on the findings of the court-martial and may approve, disapprove, commute, or suspend the sentence in whole or in part. A convening authority that chooses to act

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[63] R.C. 5924.582.

[64] R.C. 5924.60(A) and (B).

may dismiss any charge or specification by setting aside a finding of guilt with regard to that charge or specification or may change a finding of guilty with regard to a charge or specification to a finding of guilty to a lesser offense that is included in the offense stated in the charge or specification.[65]

The convening authority may order a proceeding in revision if there is an apparent error or omission in the record of a court-martial or if the record shows improper or inconsistent action by a court-martial with respect to the findings or sentence that can be rectified without material prejudice to the substantial rights of the accused. In a proceeding in revision, the convening authority may not reconsider a finding of not guilty of any specification or a ruling that amounts to a finding of not guilty; may not reconsider a finding of not guilty of any charge, unless there has been a finding of guilty under a specification laid under that charge that sufficiently alleges a violation of any provision of the UCMJ; and may not increase the severity of the sentence unless the sentence prescribed for the offense is mandatory. The convening authority may order a rehearing on disapproving the findings or sentence and stating the reasons for disapproval. If the convening authority disapproves the findings or sentence and does not order a rehearing, the charges must be dismissed. A convening authority may not order a rehearing as to the findings if the record does not contain sufficient evidence to support the findings. A convening authority may order a rehearing as to the sentence if the convening authority disapproves the sentence.[66]

The UCMJ requires that a rehearing ordered by a convening authority be conducted by a court-martial composed of different members from those who sat on the original court-martial. The act extends this requirement to rehearings ordered by the Court of Military Appeals. The act further provides that if the sentence approved after the first court-martial was in accordance with a pretrial agreement and the accused at the rehearing changes the accused's plea with respect to the charges or specifications upon which the pretrial agreement was based or otherwise does not comply with the pretrial agreement, the approved sentence as to those charges or specifications may include any punishment not in excess of the punishment lawfully adjudged at the first court-martial.[67]

The act establishes a Court of Military Appeals and a procedure for taking appeals (see below). The act also requires a review of any case in which an accused is found guilty but does not appeal. A judge advocate who was not involved in the case

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[65] R.C. 5924.60(C)(2) and (3) and (D).

[66] R.C. 5924.60(E).

[67] R.C. 5924.63.

(the State Judge Advocate if the case was conducted by a general court-martial) must review each such case pursuant to regulations prescribed by the Adjutant General. The judge advocate must issue written findings and recommendations that contain all of the following: [68]

(1) Conclusions as to whether the court had jurisdiction over the accused and the offense;

(2) Conclusions as to whether the charge and specification stated an offense;

(3) Conclusions as to whether the sentence was within the limits prescribed by law;

(4) A response to each allegation of error made in writing by the accused;

(5) If the case is sent for action as described in the next paragraph, a recommendation as to the appropriate action to be taken and an opinion as to whether corrective action is required as a matter of law.

The record of trial and related documents in each case reviewed by a judge advocate must be sent for further action to the person exercising general court-martial jurisdiction over the accused at the time the court-martial was convened, or to that person's successor in command, if the judge advocate recommends corrective action, if the sentence as approved includes dismissal, a bad-conduct or dishonorable discharge, or confinement for more than six months, or if regulations prescribed by the Adjutant General require further review. The person to whom the record of trial and related documents are sent may approve or disapprove the findings or sentence in whole or in part; remit, commute, or suspend the sentence in whole or in part; except where the evidence was insufficient at the trial to support the findings, order a rehearing on the findings, the sentence, or both; or dismiss the charges. If a rehearing is ordered but the convening authority finds that a rehearing is impracticable, the convening authority must dismiss the charges. If the judge advocate who reviews the case finds that corrective action is required as a matter of law and the person to whom the record of trial and related documents are sent does not take action that is at least as favorable to the accused as that recommended by the judge advocate, the convening authority must transmit the record of trial and action on that record to the State Judge Advocate for review.[69]

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[68] R.C. 5924.64(A) and (F).

[69] R.C. 5924.64(B), (C), (D), and (E).

The convening authority's power to act under the act's review provisions is a matter of command prerogative involving the convening authority's sole discretion. Pursuant to regulations prescribed by the Adjutant General, a commissioned officer commanding for the time being, a successor in command, or any person exercising general court-martial jurisdiction may act in the matters in place of the convening authority.[70]

Appeals

The act creates the Court of Military Appeals as a court of record with exclusive jurisdiction over appeals from courts-martial and establishes procedures for taking an appeal. The court sits in Franklin County. All its hearings are public. The judges are military appellate judges appointed by the Adjutant General. Each judge must be a retired judge advocate officer who has previously served in the rank of colonel or above in either the Ohio Army National Guard or the Ohio Air National Guard. The judges sit in panels of not less than three members. The act authorizes the Adjutant General to make rules governing practice and procedure in the court. The Rules of Appellate Procedure apply to the extent that they are not inconsistent with the UCMJ or with the Adjutant General's rules.[71]

A judge of the Court of Military Appeals is paid *per diem* at the same rate as a judge of a court of appeals. A judge who resides more than 50 miles from the location of the court also receives reimbursement for the judge's actual and necessary expenses of traveling to attend the business of the court.[72]

The act grants the accused the right to appeal to the Court of Military Appeals a finding of guilty or a sentence imposed by a court-martial. The court must hear the appeal if the convening authority approved a sentence of dismissal of a commissioned officer, dishonorable or bad-conduct discharge, or confinement for one year or more and if the appeal was timely filed. The court has discretion to hear other appeals. To take an appeal, the accused must file a notice of appeal with the convening authority within 30 calendar days after the convening authority serves a copy of the approved findings and sentence on the trial attorney of record for the accused or, if the accused waived the right to counsel, on the accused in accordance with regulations prescribed by the Adjutant General. The notice of appeal must state the name of the party taking the appeal, the findings, sentence, or parts of the findings or sentence appealed from,

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[70] R.C. 5924.60(C)(1).

[71] R.C. 5924.66.

[72] R.C. 5924.67.

and the grounds for the appeal. Failure to file a notice of appeal in a timely manner constitutes a waiver of the right to appeal.[73]

Upon receiving a notice of appeal, the convening authority must serve a copy of the notice on the trial counsel and on the trial attorney of record for any codefendant or, if a codefendant waived the right to counsel, on the codefendant in accordance with the Adjutant General's regulations. The convening authority must note on each copy served the date on which the notice of appeal was filed. The convening authority's failure to serve a copy of the notice of appeal does not affect the validity of the appeal. Service in accordance with the act is sufficient notwithstanding the death of a party or a party's counsel. The convening authority must note on its docket the names of the parties served, the dates on which they were served, and the method of service.[74]

An accused may waive appellate review by filing with the convening authority, within ten days after the action under the review procedures (above) is served on the accused or on defense counsel, a written waiver signed by the accused and by defense counsel. The convening authority, for good cause, may extend the period for filing by not more than 30 days. An accused may voluntarily withdraw an appeal at any time by filing a notice of withdrawal with the convening authority. A waiver or withdrawal bars any further appellate review.[75]

If an accused files a notice of appeal, the convening authority must transmit the record of trial and post-trial proceedings in the case to the State Judge Advocate for appropriate action. If the accused does not file a notice of appeal or files a notice of appeal and withdraws the appeal, then following completion of all post-trial review, the record of trial and related documents must be transmitted and disposed of in accordance with regulations prescribed by the Adjutant General.[76]

The act prohibits the state from appealing a finding of not guilty with respect to a charge or specification, but it authorizes the state to appeal from the following actions of a court-martial in which a military judge presides and in which a punitive discharge may be adjudged:[77]

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[73] R.C. 5924.61(A) and (B).

[74] R.C. 5924.61(C).

[75] R.C. 5924.61(D), (E), and (F).

[76] R.C. 5924.65.

[77] R.C. 5924.62(A).

(1) An order or ruling that terminates the proceedings with respect to a charge or specification;

(2) An order or ruling that excludes evidence that is of substantial consequence to the determination of the material issues in the proceeding;

(3) An order or ruling that directs the disclosure of classified information;

(4) An order or ruling that imposes sanctions for nondisclosure of classified information;

(5) A refusal by the military judge to issue a protective order sought by the state to prevent the disclosure of classified information;

(6) A refusal by the military judge to enforce a protective order that has previously been issued by appropriate authority to prevent the disclosure of classified information.

To take an appeal, trial counsel for the state must file a written notice of appeal with the military judge within 72 hours after the order or ruling is made. The notice must include a certification by trial counsel that the appeal is not taken for the purpose of delay and, if the order or ruling appealed is one that excludes evidence, that the evidence excluded is substantial proof of a fact material in the proceeding. The state's appellate counsel must diligently prosecute the appeal. Any period of delay resulting from the appeal is excluded in deciding any issue regarding denial of a speedy trial unless an appropriate authority determines that the appeal was filed solely for the purpose of delay with the knowledge that it was totally frivolous and without merit.[78]

The State Judge Advocate must detail one or more commissioned officers as appellate government counsel and one or more judge advocates assigned to the United States Army Trial Defense Service or the United States Air Force Area Defense Counsel as appellate defense counsel. Appellate counsel must be members in good standing of the Ohio Bar and certified by the State Judge Advocate to be competent to act as appellate counsel. Appellate government counsel must represent the state in the Court of Military Appeals. If a case arising under the UCMJ is heard in the Supreme Court, appellate government counsel must represent the state in that court unless the Attorney General elects to represent the state. Appellate defense counsel must represent the accused in the Court of Military Appeals and the Supreme Court unless the accused elects to be represented by civilian counsel at the accused's own expense. Appellate government and defense counsel must perform any additional functions in connection

[78] R.C. 5924.62(B), (C), and (D).

with post-trial proceedings in court-martial cases that the State Judge Advocate directs.[79]

The Court of Military Appeals may subpoena witnesses, require the production of evidence, and punish for contempt in the same manner and to the same extent as a court of common pleas. Appeals from orders and judgments of the Court of Military Appeals may be taken to the Supreme Court in the same manner and to the same extent as criminal appeals from orders and judgments of a court of appeals.[80]

The act provides that the appellate review of trial records under the UCMJ and all dismissals and discharges carried out following affirmation are final and conclusive. Under prior law, orders publishing the proceedings of courts-martial and all action taken pursuant to those proceedings were binding upon all departments, courts, agencies, and officers of the state, subject only to action upon a petition for a new trial. The act makes such orders also subject to action by the Adjutant General suspending a sentence or substituting an administrative form of discharge under R.C. 5924.74 (see below).[81]

Post-trial matters

Under the act, if the sentence of a court-martial of a commissioned officer or cadet includes dismissal, that part of the sentence may not be executed until it is approved by the Adjutant General. The Adjutant General may commute, remit, or suspend the sentence or any part of the sentence. In a time of war or national emergency, the Adjutant General may commute a sentence of dismissal to reduction to any enlisted grade. A person so reduced may be required to serve for the duration of the war or emergency and for six months thereafter.[82]

If the sentence includes dismissal or dishonorable or bad-conduct discharge and the accused appeals to the Court of Military Appeals, the dismissal or discharge part of the sentence may not be executed until the appellate process has been completed and, in case of dismissal, the Adjutant General has approved the sentence. The appellate process is completed when the accused withdraws the appeal, the Court of Military Appeals renders a decision and the accused fails to file an appeal to the Supreme Court in time, or the Supreme Court dismisses or denies the appeal or enters judgment on the appeal. If the sentence includes dismissal or dishonorable or bad-conduct discharge

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[79] R.C. 5924.70.

[80] R.C. 5924.68 and 5924.69.

[81] R.C. 5924.76.

[82] R.C. 5924.71(A).

and the accused does not appeal, waives appellate review, or withdraws an appeal, the dismissal or discharge part of the sentence may not be executed until a judge advocate has reviewed the case and the convening authority has completed action in the review (see above). The convening authority may order that any other part of the sentence be executed.[83]

The UCMJ authorizes the convening authority to suspend the execution of any sentence or part of a sentence imposed by a court-martial and includes provisions relating to the vacation of a suspension.[84] The act adds language that expressly authorizes an officer having special court-martial jurisdiction over a person whose sentence has been suspended to recommend vacation of the suspension of an approved sentence or part of a sentence that was imposed by a general court-martial, or a sentence or part of a sentence that was imposed by a special court-martial and that includes a bad-conduct discharge. If a suspension is vacated, the unexecuted part of the sentence, other than dismissal, is executed subject to any applicable restrictions set forth in the two preceding paragraphs. A vacation of suspension of a dismissal is not effective until the Adjutant General approves it.[85]

The UCMJ allows a convicted offender to petition for a new trial on the ground of newly discovered evidence or fraud on the court within two years after the sentence is approved. The act requires the Adjutant General to act on the petition unless the case is pending before the Court of Military Appeals or the Supreme Court, in which circumstance the Adjutant General must refer the petition to the court.[86]

The UCMJ provides that if on a new trial, an unsuspended sentence of dismissal is not imposed, the dismissed officer may be reappointed to the rank and grade the officer would have attained but for the dismissal if a vacancy is available. The act requires the reappointment without regard to the existence of a vacancy, stipulates that the reappointment affects the promotion status of other officers only to the extent directed by the Adjutant General, and requires that the period between the dismissal and reappointment be considered as service for all purposes including the right to pay and allowances.[87]

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[83] R.C. 5924.71(B).

[84] R.C. 5924.71(C) (R.C. 5924.66 in existing law) and 5924.72.

[85] R.C. 5924.72(A) and (C).

[86] R.C. 5924.73.

[87] R.C. 5924.75(C).

Under the act, pursuant to regulations prescribed by the Adjutant General, an accused may be required to take leave pending completion of action if the sentence as approved includes an unsuspended dismissal or an unsuspended dishonorable or bad-conduct discharge. The accused may be required to begin leave on the date on which the sentence is approved or at any time after that date. Leave may be continued until the date on which action is completed.[88]

Crimes

The act amends the UCMJ's substantive law of crimes in various ways. The act repeals outright 17 sections of the UCMJ that created offenses and repeals and reenacts another section (see "**Sexual assault**," below). The act repeals outright the section that makes sodomy an offense, whether or not it is consensual. Under the act, sodomy is an offense only as part of the sexual assault provisions, when it is not consensual.[89] Some other offenses repealed in the act, for example, rape, are covered by other sections as amended by the act. Other offenses, such as murder, robbery, and arson, are simply removed from the UCMJ, which means that they must be prosecuted in civil courts. The greatest changes to offenses that remain in the UCMJ involve alcohol and drugs and sexual assaults.

Alcohol and drugs

The act amends the prohibition against drunken operation of a vehicle to conform it in major part to the general OVI law (R.C. 4511.19). The act prohibits a person from operating or physically controlling any vehicle, aircraft or vessel in any of the following ways:[90]

- In a reckless or wanton manner;
- While under the influence of alcohol, a drug of abuse, or a combination of them;
- While having in the person's whole blood, blood serum or plasma, breath, or urine the minimum concentrations of alcohol set forth in R.C. 4511.19(A)(1)(b) to (A)(1)(i);

[88] R.C. 5924.75(D) and 5924.761.

[89] R.C. 5924.125, not in the act, and 5924.120.

[90] R.C. 5924.111(A).

- While having in the person's whole blood, blood serum or plasma, or urine the concentrations of controlled substances or metabolites of a controlled substance set forth in R.C. 4511.19(A)(1)(j).

If a military installation is located partially in Ohio and partially in one or more other states, the Adjutant General may select the alcohol and controlled substance levels set forth in the impaired operating laws of one of the other states to apply on the installation in place of the levels set forth in R.C. 4511.19.[91]

The act also prohibits the wrongful use, possession, manufacture, and distribution of a prohibited substance, and prohibits the importation into the customs territory of the United States, exportation from the United States, or introduction into an installation, vessel, vehicle, or aircraft used by or under the control of the armed forces of the United States or of the organized militia of a prohibited substance. Prohibited substances include (1) opium, heroin, cocaine, amphetamines, lysergic acid diethylamide (LSD), methamphetamine, phencyclidine, barbituric acid, or marihuana or any compound or derivative of any of those substances and (2) any other substance that the Adjutant General lists on a schedule of controlled substances or that is listed on a schedule established under the Federal Controlled Substances Act (21 U.S.C. 812).[92]

Sexual assault

The act repeals the UCMJ's 50-year-old rape and sodomy laws and replaces them with a new sexual assault statute. Each of the offenses named in the statute is punishable as a court-martial may direct. Some of the offenses prohibit sexual acts, sexual contact, or sexual conduct under specified circumstances. The act defines these terms as follows:[93]

"Sexual act" means (1) contact between the penis and the vulva, including any penetration, however slight, (2) anal intercourse, fellatio, and cunnilingus between persons, regardless of sex, or (3) the penetration, however slight, of the genital opening of another by a hand or finger or any object with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

"Sexual contact" means the intentional touching, either directly or through clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of another person

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[91] R.C. 5924.111(B).

[92] R.C. 5924.1121.

[93] R.C. 5924.120.

with an intent to abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of any person.

"Sexual conduct" means any act that is prohibited by the sexual assault statute.

Other terms defined by the act relate to force, the threat or use of force, or harm. These terms include the following:

"Bodily harm" means any offensive touching of another, however slight, that does not result in grievous bodily harm.

"Grievous bodily harm" means serious bodily injury, including but not limited to fractured or dislocated bones, deep cuts, torn members of the body, and serious damage to internal organs.

"Lesser degree of harm" means (1) physical injury to the person or property of a person other than the victim of the offense, (2) a threat to accuse any person of a crime, to expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt, or ridicule, or (3) through the use or abuse of military position, rank, or authority, to affect or threaten to affect, either positively or negatively, the military career of some person.

"Force" means action to compel submission of another or to overcome or prevent another's resistance by (1) the use, display, or suggestion of possession of a dangerous weapon or object, or (2) physical violence, strength, power, or restraint applied to another person sufficient to prevent the other person from avoiding or escaping sexual contact.

"Dangerous weapon or object" means (1) any firearm, whether loaded or not and whether operable or not, (2) any other weapon, device, instrument, material, or substance, whether animate or inanimate, that as used or intended to be used is known to be capable of producing death or grievous bodily harm, or (3) any object fashioned or used in such a manner as to lead a person on whom the object is used or threatened to be used to reasonably believe under the circumstances that the object is capable of producing death or grievous bodily harm.

As used in the provisions prohibiting rape and aggravated sexual contact, "threatening or placing that other person in fear" means making a communication or performing an action of sufficient consequence to cause that other person reasonably to fear that noncompliance will result in that person or another being subjected to death, grievous bodily harm, or kidnapping.

As used in the provisions prohibiting aggravated sexual assault and abusive sexual contact, "threatening or placing that other person in fear" means making a communication or performing an action of sufficient consequence to cause a victim of the offense reasonably to fear that noncompliance will result in the victim or another being subjected to a lesser degree of harm than death, grievous bodily harm, or kidnapping.

The act defines consent as words or overt acts by a competent person, indicating a freely given agreement to the sexual conduct at issue. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from an accused's use of force, threat of force, or placing another person in fear is not consent. A current or previous dating relationship by itself or the manner of dress of a person involved with the accused does not show consent. A person cannot consent to sexual conduct if the person is substantially incapable of (1) appraising the nature of the sexual conduct due to mental impairment or unconsciousness resulting from consumption of alcohol, drugs, or a similar substance or any other cause or to mental disease or defect that renders the person unable to understand the nature of the sexual conduct, (2) physically declining to participate in the sexual conduct, or (3) physically communicating unwillingness to engage in the sexual conduct.

The act prohibits as rape the causing of another person of any age to engage in a sexual act by doing any of the following:

(1) Using force against that other person;

(2) Causing grievous bodily harm to any person;

(3) Threatening or placing that other person in fear;

(4) Rendering another person unconscious;

(5) Administering to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance that substantially impairs the ability of that other person to appraise or control the person's conduct.

The act prohibits as aggravated sexual assault the causing of another person of any age to engage in a sexual act by (1) threatening or placing that other person in fear or causing bodily harm or (2) engaging in a sexual act with another person of any age if that other person is substantially incapable of appraising the nature of the sexual act, declining to participate in the sexual act, or communicating unwillingness to engage in the sexual act.

The act prohibits as aggravated sexual contact the engaging in sexual contact or causing sexual contact with or by another person by doing any of the following:

(1) Using force against that other person;

(2) Causing grievous bodily harm to any person;

(3) Threatening or placing that other person in fear;

(4) Rendering another person unconscious;

(5) Administering to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance that substantially impairs the ability of that other person to appraise or control the person's conduct.

The act prohibits as abusive sexual contact the engaging in or causing sexual contact with or by another person by (1) threatening or placing that other person in fear or causing bodily harm or (2) engaging in a sexual contact with another person of any age if that other person is substantially incapable of appraising the nature of the sexual contact, declining to participate in the sexual contact, or communicating unwillingness to engage in the sexual contact.

The act prohibits as an indecent act the engaging in indecent conduct, defined as "that form of immorality relating to sexual impurity that is grossly vulgar, obscene, and repugnant to common propriety and tends to excite sexual desire or deprave morals with respect to sexual relations." Indecent conduct includes observing or making an image, without the person's consent and contrary to the person's reasonable expectation of privacy, of another person's genitalia, anus, or buttocks, or, if that other person is female, that person's areola or nipple or of another person while that other person is engaged in a sexual act, sexual contact, or sodomy.

The act prohibits as wrongful sexual contact the engaging in sexual contact with another person without that other person's permission and without legal justification or lawful authorization. The act expressly states that lack of permission is an element of the offense.

The act prohibits as indecent exposure the intentional exposure in an indecent manner, in any place where the conduct involved may reasonably be expected to be viewed by people other than members of the person's family or household, the person's genitalia, anus, buttock, or female areola or nipple.

The sexual assault statute has several provisions dealing with proof of an offense or with affirmative defenses. The act provides that in a prosecution under the statute, the prosecutor, in proving that the accused made a threat, need not prove that the accused actually intended to carry out the threat.

The act defines "affirmative defense" as any special defense that, although not denying that the accused committed the objective acts constituting the offense charged, denies, in whole or in part, criminal responsibility for those acts. It provides that in prosecutions for certain forms of aggravated sexual assault, wrongful sexual contact, or indecent exposure, it is an affirmative defense that the accused and the other person, when they engaged in the sexual conduct, were married to each other, unless the accused's intent at the time of the sexual conduct was to abuse, humiliate, or degrade any person. Consent and mistake of fact as to consent are affirmative defenses only in prosecutions for rape, aggravated sexual assault, aggravated sexual contact, or abusive sexual contact.

"Mistake of fact as to consent" means a belief that is incorrect, as a result of ignorance or mistake, that a person engaging in sexual conduct consented to engage in that conduct, if (1) the ignorance or mistake existed in the mind of the accused at the time the sexual conduct in issue occurred and was based on information or lack of information that would have indicated to a reasonable person that the other person consented and (2) the ignorance or mistake was not based on the accused's failure to discover facts that a reasonably careful person would have discovered under the same or similar circumstances. An accused's state of intoxication, if any, at the time of an offense under this section occurs is not relevant to the existence of a mistake of fact as to consent.

The act states that the enumeration of some affirmative defenses may not be construed to exclude other affirmative defenses. It places upon the accused the burden of proving an affirmative defense by a preponderance of the evidence. Once that burden has been met, the prosecution has the burden of proving beyond a reasonable doubt that the affirmative defense does not exist.

Other offenses

The act modifies other offenses as follows:

- Desertion, in addition to continuing law, includes entering any foreign armed services without the authorization of the United States and without being regularly separated from one of the forces of the organized militia.[94]

[94] R.C. 5924.85(A)(4).

- Use of contemptuous words against officials applies only with regard to words used against the Governor or legislature of Ohio, not against the President or officials of any other jurisdiction in which the service member is serving.[95]

- Fleeing from, as well as resistance to, apprehension is an offense, and escape from "custody or confinement" replaces escape from "physical restraint lawfully imposed."[96]

- Apprehension, arrest, or confinement of a person except as provided by law or regulation is modified by eliminating "or regulation."[97]

- The duty to secure "all public property taken from the enemy for the service of the United States" becomes the duty to secure "all property taken from the enemy for the service of the United States and this state."[98]

- Willfully or recklessly damaging or destroying nonmilitary property of the United States or Ohio applies to anyone subject to the UCMJ, not just to persons in duty status.[99]

- Perjury, in addition to continuing law, includes subscribing, in any declaration, certification, verification, or statement made under penalty of perjury, any false statement material to the issue or matter of inquiry.[100]

- "Conduct unbecoming an officer and a gentleman" becomes "conduct unbecoming an officer and a lady or gentleman."[101]

Technical changes

The act amends various sections of the UCMJ to clarify the language or to make the sections gender-neutral.

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[95] R.C. 5924.88.

[96] R.C. 5924.95.

[97] R.C. 5924.97.

[98] R.C. 5924.103(A).

[99] R.C. 5924.109.

[100] R.C. 5924.131(B).

[101] R.C. 5924.133.

Matters outside the UCMJ

Availability of record of discharge to county veterans service officer

The act requires a county recorder's office to make a veteran's record of discharge available to a county veterans service officer who is certified by the Department of Veterans Services. Prior law specified that a county recorder's office must make the record of discharge available to only certain authorized parties as are defined in law, including county veterans service officers. The act expressly requires that a county veterans service officer, in order to be entitled to receive a veteran's record of discharge, must be certified by the Department of Veterans Services. The act also specifies that a county veterans service officer must need access to a veteran's record of discharge for the purpose of supporting the veteran's claim for benefits before the record may be requested from, and provided by, the county recorder.[102]

Publication of veterans service and organizational information

The act removes a requirement that the Director of Veterans Services annually publish, update, and distribute a listing of county veterans service officers, state directors of veterans affairs, and national and state service officers of accredited veterans organizations and their state headquarters. Instead, the act requires the Director to publish electronically a listing of county veterans service offices and, under continuing law, county veterans service commissioners. The electronic listing must include, under continuing law, the expiration dates of commission members' terms of office and the organizations they represent; the names, addresses, and telephone numbers of county veterans service offices; and the addresses and telephone numbers of the Ohio offices and headquarters of state and national veterans service organizations.[103]

Composition of the Veterans Advisory Committee

The act adds to the Veterans Advisory Committee a member of the National Guard Association of the United States who is an Ohio resident. The Veterans Advisory Committee also is composed of the following members: a member of the Military Officers Association of America who is a resident of Ohio; a state representative of one of the following congressionally chartered veterans organizations: the American Legion, the Veterans of Foreign Wars, the Disabled American Veterans, AMVETS, the Military Order of the Purple Heart of the U.S.A., the Vietnam Veterans of America, or the Korean War Veterans Association; a representative of any other congressionally

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[102] R.C. 317.24.

[103] R.C. 5902.02(I).

chartered state veterans organization that has at least one veterans service commissioner in Ohio; three representatives of the Ohio State Association of County Veterans Service Commissioners, who together have one vote; three representatives of the State Association of County Veterans Service Officers, who together have one vote; one representative of the County Commissioners Association of Ohio who is not from the same county as any of the other county representatives; a member of the Advisory Committee on Women Veterans; a representative of a labor organization; and a representative of the Office of the Attorney General.[104]

In-state tuition for military survivors

The act clarifies that a spouse or dependent of a veteran may remain eligible for in-state tuition at state institutions of higher education if the veteran dies after being discharged from the military and had not established Ohio residence. Under prior law, a veteran, or a veteran's spouse or dependent, who had not lived in Ohio for the customary 12 months nonetheless could qualify for in-state tuition if the veteran (1) served at least one year on active military duty and (2) was honorably discharged or received a medical discharge that was related to military service. The act makes a simple wording change acknowledging cases in which the veteran has died following discharge. Under continuing law, the spouse or dependent still must establish residence in Ohio by the first day of the academic term.[105]

Official reports

The act removes an obsolete reference to the State Commissioner of Soldiers' Claims from the law that requires various state officers, commissions, boards, and other entities that receive state money for their use and purpose to make an annual report. This specific position no longer exists.[106]

Civil service

The act makes it clear that the Ohio National Guard is a reserve component of the United States armed forces and provides that a member in good standing of a reserve component who successfully completes initial entry-level training receives a credit of 15% of the person's total grade given in the civil service examination in which the person receives a passing grade. The act specifies that a person who receives the 15% credit may not also receive the continuing-law 20% credit for persons who have been honorably discharged or transferred to the reserve with satisfactory service after

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[104] R.C. 5902.02(J).

[105] R.C. 3333.31.

[106] R.C. 149.01.

having served more than 180 days on active duty. The act also modifies the preference for veterans on the eligible list of candidates for civil service jobs by extending it to members of the reserve components. Under the act, a tie among veterans or among reserve component members is decided by priority in the filing of applications, while a tie between a veteran and a reserve component member is decided in favor of the veteran.[107]

Reemployment of school employees

Under prior law, a nonteaching school employee who left employment to go on extended active military duty and who returned with an honorable discharge must have been reemployed under the same type of contract if he or she applied for employment within 90 days after being discharged. Reemployment must have been for the beginning of the next semester if application was made not less than 30 days before the beginning of the semester. For purposes of seniority and placement on the salary schedule, the years of absence on extended active duty may not have exceeded four and were counted as though school service had been performed.

The act applies the reemployment requirement to any nonteaching school employee who performs service in the uniformed services or service when ordered to state active duty by the Governor and who returns with a discharge under honorable conditions or is released from state active duty. The board of education must reemploy the former employee in the same position the former employee previously held. The act eliminates references to dates of application and dates when reemployment must begin and instead requires that reemployment take place in accordance with the federal Uniformed Services Employment and Reemployment Rights Act.[108]

Occupational licenses

The act includes in the Revised Code chapter that contains general provisions relating to occupational licensing bodies a cross-reference to the continuing statute under which an occupational license that expired due to the licensee's military service must be renewed. The license must be renewed without penalty or re-examination upon proof of honorable discharge or separation under honorable conditions within six months of the discharge or separation if the licensee is not otherwise disqualified because of mental or physical disability. The act amends the renewal statute to cover

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[107] R.C. 124.23(C)(2) and 124.26.

[108] R.C. 3319.085.

service in either the armed forces or a reserve component of the armed forces and service by the licensee's spouse that resulted in the licensee's absence from Ohio.[109]

In the provisions of law that require the Fire Marshal to adopt rules establishing standards and procedures for the continuing education for certification renewal of underground storage tank system installers and that require the Board of Building Standards to adopt rules for the continuing education of building code officials, the act adds references to the continuing statutory requirement that installers and building code officials who are called to active duty be granted an extension for completing their continuing education. The act also includes a new Revised Code section that makes the extension statute applicable to continuing education requirements for all occupational licensees under Title 47 of the Revised Code.[110]

The act authorizes any agency of the state or of a political subdivision that issues a license or certificate to practice a trade or profession, pursuant to rules adopted by the agency, to issue a temporary license or certificate to practice to a person whose spouse is on active military duty in Ohio.[111]

Rental agreements

The act requires landlords to comply with the rights of tenants under the federal Servicemembers Civil Relief Act, which under certain circumstances, prevents landlords without a court order from evicting serving members of the military and their families, and allows a court to adjust the terms of a lease in order to protect the tenant.[112]

Use of armories

The act authorizes rather than requires the maintenance of rooms in state armories for the free use of various organizations. It replaces the prior list of named organizations with patriotic and national organizations chartered under federal law.[113]

Technical changes

In Revised Code sections relating to employment and training opportunities for veterans and to members of the National Guard who are ordered by the Governor to

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[109] R.C. 4743.04(A) and 5903.10.

[110] R.C. 3737.881(D)(3) and 3781.10(E)(3), both referring to R.C. 5903.12, and 4743.04(B).

[111] R.C. 4743.04(C).

[112] R.C. 5321.04(A)(10) and 50 U.S.C. Sec. 531.

[113] R.C. 5911.07.

perform training or duty, the act replaces references to the federal Job Training Partnership Act and Soldiers and Sailors Civil Relief Act with references to the federal Workforce Investment Act and Servicemembers Civil Relief Act.[114]

HISTORY

ACTION	DATE
Introduced	03-22-12
Reported, H. Veterans Affairs	04-24-12
Passed House (95-0)	04-24-12
Reported, S. State and Local Government and Veterans' Affairs	05-23-12
Re-reported, S. Rules & Reference	06-12-12
Passed Senate (32-0)	06-12-12
House concurred in Senate amendments (88-0)	06-13-12

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[114] R.C. 5903.11(A) and 5923.12.