

SENATE BILL 175

54TH LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2020

INTRODUCED BY

William F. Burt

This document incorporates amendments that have been adopted during the current legislative session. The document is a tool to show the amendments in context and is not to be used for the purpose of amendments.

AN ACT

RELATING TO MILITARY AFFAIRS; AMENDING THE POWERS OF THE
ADJUTANT GENERAL; AUTHORIZING ACTIVATION OF THE NATIONAL GUARD
AND THE STATE DEFENSE FORCE IN THE CASE OF CERTAIN EVENTS;
AMENDING, REPEALING AND ENACTING SECTIONS OF THE NEW MEXICO
MILITARY CODE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. Section 20-1-4 NMSA 1978 (being Laws 1987,
Chapter 318, Section 4) is amended to read:

"20-1-4. GOVERNOR TO BE COMMANDER-IN-CHIEF--ENFORCEMENT

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OF NEW MEXICO MILITARY CODE.--

A. The governor shall be the commander-in-chief of the military forces, except so much thereof as may be in the actual service of the United States, and may employ the military forces for the defense or relief of the state, the enforcement of its law and the protection of life and property therein.

B. The adjutant general shall be the commanding general of New Mexico, and the deputy adjutant general shall be the deputy commanding general of New Mexico.

[B-] C. Whenever the governor or acting governor is unable to personally perform the duties of commander-in-chief or whenever the governor so directs, the adjutant general or, in [his] the adjutant general's absence, the senior line officer of the national guard present for duty with the troops shall command the military forces.

[G-] D. The governor may appoint a staff consisting of the adjutant general and aides-de-camp of field grade or higher who shall be detailed from the national guard or the state defense force. The governor may designate honorarily other persons as colonels aide-de-camp.

[D-] E. The governor may, by executive orders, proclamations or regulations not inconsistent with law, enforce all the provisions of the New Mexico Military Code."

SECTION 2. Section 20-1-5 NMSA 1978 (being Laws 1987,

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Chapter 318, Section 5, as amended) is amended to read:

"20-1-5. ADJUTANT GENERAL--APPOINTMENT, POWERS AND DUTIES.--In case of a vacancy, the governor shall appoint as the adjutant general of New Mexico for a term of five years an officer who for three years immediately preceding the appointment as the adjutant general of New Mexico has been federally recognized as an officer in the national guard of New Mexico and who during service in the national guard of New Mexico has received federal recognition in the rank of colonel or higher. The adjutant general shall not be removed from office during the term for which appointed, except for cause to be determined by a court-martial or efficiency board legally convened for that purpose in the manner prescribed by the national guard regulations of the United States department of defense. The adjutant general shall have the military grade of major general and shall receive the same pay and allowances as is prescribed by federal law and regulations for members of the active military in the grade of major general, unless a different rate of pay and allowances is specified in the annual appropriations bill. The adjutant general may promulgate rules for the conduct of courts-martial and punishments under the Code of Military Justice. Such procedural rules shall be consistent with and carry into effect the New Mexico Military Code and afford reasonable due process to criminal defendants.

SJC→~~The process for promulgation of such rules shall be exempt~~

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~~from the State Rules Act.~~ ←SJC The adjutant general shall:

A. prepare and publish, by order of the governor, such orders, rules and regulations, consistent with law, as are necessary to maintain the military forces in a state of efficiency in conformity with the needs of the state and the federal defense requirements;

B. supervise the receipt, preservation, repair, distribution, issue and collection of all arms and military equipment of the state;

C. supervise all personnel, organizations, facilities, equipment, supplies and funds of the military forces;

D. maintain records of all members of the military forces and keep on file in the adjutant general's offices copies of all orders, reports, regulations and communications received and issued by the adjutant general;

E. perform such other duties as may be required by the commander-in-chief; and

F. have a seal of office."

SECTION 3. Section 20-2-3 NMSA 1978 (being Laws 1987, Chapter 318, Section 10, as amended) is amended to read:

"20-2-3. GOVERNOR--POWER TO CALL OUT MILITIA.--

A. The governor may, in case of insurrection, invasion, riot or breach of the peace or of imminent danger thereof or in case of other emergency, order into active

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service of the state the militia or any components or parts thereof that have not been called into federal service. As used in this section, "emergency" includes any man-made or natural disaster causing or threatening widespread physical or economic harm that is beyond local control and requiring the resources of the state.

B. The governor may also order any member of the national guard to active state service for a period not to exceed a cumulative total of four months within a calendar year for any individual member for the following reasons:

(1) to protect critical infrastructure in the state from a cybersecurity threat or security vulnerability;

(2) to protect an information system owned or operated by the state from a cybersecurity threat or security vulnerability;

(3) to protect information that is stored on, processed by or transiting on an information system owned or operated by the state from a cybersecurity threat or security vulnerability; [or]

(4) to identify the source of a cybersecurity threat; or

(5) to assist in search and rescue missions

SJC→,←SJC SJC→or←SJC counter-drug operations SJC→.←SJC

SJC→or similar operations not otherwise authorized in

Subsection A of this section.←SJC

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C. A member of the national guard called to active service pursuant to the provisions of Subsection B of this section shall not have any police powers or arrest authority. "Subsection B of Section 20-2-3 NMSA 1978" shall be cited on all orders, vouchers and payroll documents submitted for reimbursement pursuant to Section 20-1-6 NMSA 1978 in support of all actions authorized by Subsection B of this section. In no case shall an activation ordered pursuant to Subsection B of this section be used to incur a debt under Article 9, Section 7 of the constitution of New Mexico.

D. In case of any breach of the peace, tumult, riot or resistance to process of this state or imminent danger thereof, the sheriff of a county may call for aid from the governor as commander-in-chief of the national guard. If it appears to the governor that the power of the county is insufficient to enable the sheriff to preserve the peace and protect the lives and property of the peaceful residents of the county or to overcome the resistance to process of this state, the governor shall, on application of the sheriff, order out such military force as is necessary.

E. When any portion of the militia is called out for the purpose of suppressing an unlawful or riotous assembly, the commander of the troops shall cooperate with the civil officers to the fullest extent consistent with the accomplishment of the object for which the troops were called.

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The civil officials may express to the commander of the troops the general or specific objective that the civil officials desire to accomplish, but the tactical direction of the troops, the kind and extent of force to be used and the particular means to be employed to accomplish the object specified by the civil officers shall be left solely to the commander of the troops present on duty.

F. When any portion of the militia is ordered into active service pursuant to this section in case of an emergency, the militia may provide those resources and services necessary to avoid or minimize economic or physical harm until a situation becomes stabilized and again under local self-support and control, including the provision, on a temporary, emergency basis, for lodging, sheltering, health care, food and any transportation or shipping necessary to protect lives or public property; or for any other action necessary to protect the public health, safety and welfare.

G. In the event of the exercise by the governor of the powers under this section, the governor shall first utilize the personnel and assets of the national guard and only in their absence or insufficiency utilize the personnel and assets of the state defense force."

SECTION 4. Section 20-2-6 NMSA 1978 (being Laws 1987, Chapter 318, Section 13) is amended to read:

"20-2-6. GOVERNOR--CALL FOR FEDERAL OR STATE SERVICE--

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POWERS.--

A. When the national guard or a part thereof is called or ordered into active federal service under the constitution and laws of the United States and the numbers or composition of the national guard forces are insufficient to meet such call or order, the governor may order out and cause through the adjutant general to be enrolled into the organized militia such persons as may be required and expected to reasonably meet the federal call or order.

B. The governor may order out the organized militia when:

(1) the national guard or any significant portion thereof is called or ordered into active federal service and the remaining national guard forces are insufficient for the needs of the state; or

(2) the ~~[total strength or composition of the national guard within the state is deemed by the governor to be insufficient]~~ governor deems it necessary to meet a major disaster, experienced or anticipated. The governor is authorized to call into active state service the state defense force or any portion thereof as may be necessary for the protection and well being of the state. If the numbers or composition of the state defense force ~~[be]~~ is inadequate to meet the need, the governor ~~[can]~~ may call out and cause through the adjutant general to be enrolled from the

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unorganized militia such persons as are required to bring the organized militia up to strength."

SECTION 5. Section 20-3-2 NMSA 1978 (being Laws 1987, Chapter 318, Section 17, as amended) is amended to read:

"20-3-2. DEPARTMENT STRUCTURE--AUTHORITY OF ADJUTANT GENERAL.--

A. The department of military affairs [~~is composed of~~] is a cabinet level department and consists of:

- (1) the office of the adjutant general;
- (2) three subordinate military divisions:
 - (a) the army national guard division;
 - (b) the air national guard division; and
 - (c) the state defense force division;

and

~~[(3) one subordinate civil division, the civil air patrol division; and~~

~~(4) four]~~ (3) five subordinate [~~support agencies~~] civil divisions:

- (a) the selective service office;
- (b) the state armory board;
- (c) the civil air patrol division;
- ~~[(e)]~~ (d) the state programs [~~office~~]

division; and

~~[(d)]~~ (e) the United States property and fiscal office and such other agencies, administrative staffs

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and clerical staffs necessary for departmental operation that the adjutant general may by regulation prescribe.

B. The adjutant general is the military chief of staff to the governor and is the head of the department of military affairs.

C. The adjutant general shall prescribe policies, rules and procedures for the orderly functioning of the department of military affairs, which may include subordinate organizational structures and lines of authority.

D. The adjutant general may employ such administrative, technical, clerical and other personnel as the adjutant general deems necessary and may fix the compensation of exempt personnel subject to the concurrence of the department of finance and administration.

E. The adjutant general may make expenditures from appropriations or from other funds available to the adjutant general for all purposes within Chapter 20 NMSA 1978.

F. The adjutant general is authorized to accept through the United States property and fiscal officer such equipment, supplies, arms, facilities and personnel support funding as may be authorized and appropriated by federal law.

G. The adjutant general shall be furnished suitable buildings, facilities, supplies and equipment for conducting the business of the department of military affairs to include the proper storage, repair and issuance of military property.

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H. The adjutant general may appoint as assistant adjutants general one officer from each of the three military divisions in the department of military affairs. The officers appointed shall hold the rank of brigadier general during such appointment. The qualifications of each person so appointed shall meet the specific standards required for such appointment within Chapter 20 NMSA 1978 and any applicable federal standards or requirements. Once appointed, the assistant adjutants general shall serve at the pleasure of the adjutant general; their performance will be reviewed annually, in January, by the adjutant general; and if relieved, an assistant adjutant general shall revert to the rank previously held or to such higher rank to which promoted and federally recognized while serving as assistant adjutant general. The adjutant general may designate one federally recognized assistant adjutant general as deputy adjutant general. The deputy adjutant general shall serve on full-time active status for the state. In the incapacity or absence from the state of the adjutant general, the deputy adjutant general shall act in the adjutant general's stead. In the incapacity or absence from the state of both the adjutant general and the deputy adjutant general, the governor may call any assistant adjutant general to active service for the state. The assistant adjutants general shall perform all duties that may be required of them by the adjutant general. The adjutant general may delegate in

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writing to any of the assistant adjutants general such authorities and responsibilities as the adjutant general deems appropriate, consistent with the constitutions, laws and regulations of the state and of the United States. Assistant adjutants general, when on active status for the state, shall receive the same pay and allowances as are prescribed by federal law and regulations for members of the active military in the grade of brigadier general, unless a different rate of pay and allowances are specified in a general appropriation act of the New Mexico legislature.

I. The adjutant general shall appoint individuals to serve as [~~director~~] directors of the [~~one civil division and as head of each of the four support agencies~~] five subordinate civil divisions, except as stated in Section 20-9-1 NMSA 1978. The qualifications of each person so appointed shall meet the specific standards required for such appointment within Chapter 20 NMSA 1978 and any applicable federal standards or requirements.

J. There shall be allowed to the adjutant general a contingent and entertainment fund of two thousand five hundred dollars (\$2,500) annually, plus such additional appropriations for carrying out the functions of the office as the legislature shall deem proper."

SECTION 6. Section 20-5-1 NMSA 1978 (being Laws 1987, Chapter 318, Section 32) is amended to read:

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"20-5-1. NEW MEXICO STATE DEFENSE FORCE ESTABLISHED--NOT
IN FEDERAL SERVICE--DEFINITIONS.--

A. The "New Mexico state defense force" is established as an element of the militia in the department of military affairs. The members and organizations of the former New Mexico state guard are transferred to the New Mexico state defense force on [~~the effective date of this act~~] April 10, 1987.

B. Nothing in Chapter 20 NMSA 1978 shall be construed as authorizing the New Mexico state defense force or any part thereof to be called, ordered or in any manner drafted by federal authorities into the military service of the United States, but no person by reason of [~~his~~] the person's enlistment or appointment in the state defense force shall be exempted from military service under any law of the United States.

C. The following definitions apply to the duty statuses under which members of the state defense force serve:

(1) "militia duty" means the performance of actual military service for the state in time of need when called by the governor or adjutant general following mobilization of the national guard. It may be performed by the standing cadre of the state defense force at any time so ordered [~~following~~] upon mobilization of the national guard. It may be performed by the unorganized militia following its

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call by the governor pursuant to Subsection B of Section 20-2-6 NMSA 1978 [~~of this chapter~~], in which case it shall include the post-call training of the New Mexico state defense force pursuant thereto; and

(2) "cadre duty" means the normal service and training performed by the standing cadre of the state defense force in anticipation and support of militia duty, including organization, administration and other pre-call matters."

SECTION 7. Section 20-5-3 NMSA 1978 (being Laws 1987, Chapter 318, Section 34) is amended to read:

"20-5-3. COMPOSITION--ENLISTMENT--APPOINTMENT.--

A. The state defense force shall consist of persons [~~between the ages of~~] eighteen [~~and sixty-four~~] years or older voluntarily appointed or voluntarily enlisted therein and such additional members of the unorganized militia as therein may be appointed, enlisted, enrolled or inducted as provided by law. [~~Volunteer members may be retained beyond age sixty-four with their consent by direction of the adjutant general.~~]

B. The officers of the state defense force shall be appointed by the governor and serve at [~~his~~] the governor's pleasure. They shall be chosen from the public and private leadership bases within local communities so as to best enable the community to efficiently muster and lead its people and protect its assets and [~~well-being~~] well-being."

SECTION 8. Section 20-5-6 NMSA 1978 (being Laws 1987,

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Chapter 318, Section 37) is amended to read:

"20-5-6. UNIFORM--RANK PRECEDENCE AND COMMAND.--

A. The state defense force shall be uniformed. The [governor] adjutant general shall by regulation prescribe the uniform and insignia of the [~~New Mexico~~] state defense force, which uniform and insignia shall include distinctive devices identifying it as the uniform of the state defense force and distinguishing it from the national guard. When in uniform, members of the state defense force will reasonably conform to the dress and appearance standards of the national guard. The wearing of permanent military decorations earlier awarded is authorized.

B. The grade structure of the state defense force shall to the extent practicable be the same as that prescribed for the army national guard.

C. The senior line officer without distinction as to component present in any organization or formation of the state defense force shall command, unless the adjutant general shall designate otherwise."

SECTION 9. Section 20-5-16 NMSA 1978 (being Laws 2003, Chapter 111, Section 1) is amended to read:

"20-5-16. STATE DEFENSE FORCE--CADRE DUTY WORKERS' COMPENSATION.--

A. When a member of the state defense force is on state-ordered militia duty, [~~he~~] the member is a worker under

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the Workers' Compensation Act and the department of military affairs is [his] the member's employer.

B. Members of the New Mexico state defense force, while performing cadre duty, may be utilized by the adjutant general to assist the national guard with training SJC~~→or other exercises that are not considered state-ordered militia~~duty.←SJC SJC→exercises or other cadre duties.←SJC

[B-] C. The average weekly wage of a member of the state defense force shall be computed at the pay earned in [his] the member's civilian capacity. Disability benefits to a member of the state defense force shall be limited to medical benefits and two-thirds of [his] the member's civilian pay if [he] the member is unable to work.

[C-] D. A member of the state defense force shall not be considered a worker under the Workers' Compensation Act when performing cadre duty.

[D-] E. As used in this section:

(1) "cadre duty" means the normal service and training of the standing cadre of the state defense force in anticipation and support of militia duty, including organization, administration and other pre-call matters; and

(2) "militia duty" means the performance of actual military service for the state in time of need when called by the governor or adjutant general following mobilization of the national guard. If performed by the

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unorganized militia following its call by the governor pursuant to Section 20-2-6 NMSA 1978, it shall include the post-call training of the New Mexico state defense force as required by that call. SJC→"←SJC

SJC→~~F. Nothing in this section shall be construed as a waiver of immunity under the Tort Claims Act.~~←SJC

SECTION 10. Section 20-12-4 NMSA 1978 (being Laws 1987, Chapter 318, Section 89, as amended) is amended to read:

"20-12-4. CONVENING AUTHORITIES--NONJUDICIAL PUNISHMENT AUTHORITIES.--

A. A general, special or summary court-martial may be convened by the governor or by the adjutant general.

B. A special or summary court-martial may be convened by the assistant adjutant general of the army national guard, as to all members of the army national guard; by the land component commander, as to members of the land component commander's command; by the commanding ~~[general]~~ officer of any brigade-level headquarters, as to members of the commanding ~~[general's]~~ officer's command; by the assistant adjutant general of the air national guard, as to all members of the air national guard; by the assistant adjutant general of the state defense force, as to all members of the state defense force; and to the commanders of such equivalent level commands as may be organized in the future.

C. A summary court-martial may be convened by a

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battalion commander, group commander or equivalent, as to all members of the commander's command.

D. Nonjudicial punishment authority is conferred upon all general, special or summary court-martial convening authorities and upon company, battery and squadron commanders or equivalent, as to members of their command."

SECTION 11. A new section of the Code of Military Justice is enacted to read:

"[NEW MATERIAL] PROHIBITED ACTIVITIES WITH MILITARY RECRUIT OR TRAINEE BY PERSON IN POSITION OF SPECIAL TRUST-- CONSENT NOT A DEFENSE.--

A. Any person subject to Chapter 20 NMSA 1978 shall be punished as a court-martial may direct if the person:

- (1) is an officer or noncommissioned officer;
- (2) is in a training leadership position with respect to a specially protected junior member of the armed forces; and

(3) knew, or reasonably should have known, that the person was engaged in prohibited sexual activity with a specially protected junior member of the armed forces.

B. Any person subject to Chapter 20 NMSA 1978 shall be punished as a court-martial may direct if the person is a military recruiter and knew, or reasonably should have known, that the person was engaged in prohibited sexual activity with:

- (1) an applicant for military service; or

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(2) a specially protected junior member of the armed forces who is enlisted under a delayed entry program.

C. Any person subject to Chapter 20 NMSA 1978 shall be punished as a court-martial may direct if the person:

(1) is a commissioned, warrant or noncommissioned officer;

(2) is in a training leadership position with respect to a specially protected member of the armed forces; and

(3) engaged in prohibited sexual activity with a person that the person knew, or reasonably should have known, was a specially protected junior member of the armed forces.

D. Any person subject to Chapter 20 NMSA 1978 shall be punished as a court-martial may direct if the person:

(1) is a commissioned, warrant or noncommissioned officer;

(2) is performing duties as a military recruiter; and

(3) engaged in prohibited sexual activity with a person that the person knew, or reasonably should have known, was an applicant for military service; or

(4) engaged in prohibited sexual activity with a person that the person knew, or reasonably should have known, was a specially protected junior member of the armed forces who is enlisted under a delayed entry program.

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E. Consent is not a defense to prosecution pursuant to this section.

F. The maximum punishment of prosecution pursuant to this section shall be a dishonorable discharge, forfeiture of all pay and allowances received on or after the effective date of the sentence and confinement for less than one year.

G. As used in this section:

(1) "applicant for military service" means a person who, under regulations prescribed by the secretary concerned, is an applicant for original enlistment or appointment in the armed forces;

(2) "military recruiter" means a person who, under regulations prescribed by the secretary concerned, has the primary duty to recruit persons for military service;

(3) "prohibited sexual activity" means, as specified in regulations prescribed by the secretary concerned, inappropriate physical intimacy under circumstances described in such regulations;

(4) "regulations prescribed by the secretary concerned" means rules, regulations, instructions and procedures proscribed by the secretary of the army or secretary of the air force with respect to soldiers or airmen of the national guard;

(5) "specially protected junior member of the armed forces" means a member of the armed forces who is:

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(a) assigned to, or is awaiting assignment to, basic training or other initial active duty for training, including a member who is enlisted under a delayed entry program;

(b) a cadet, an officer candidate or a student in any other officer qualification program; or

(c) in any program that, by regulation prescribed by the secretary concerned, is identified as a training program for initial career qualification; and

(6) "training leadership position" means, with respect to a specially protected junior member of the armed forces, any drill instructor position or other leadership position in a basic training program, an officer candidate school, a reserve officers' training corps unit, a training program for entry into the armed forces or any program that, by regulation prescribed by the secretary concerned, is identified as a training program for initial career qualification."

SECTION 12. A new section of the Code of Military Justice is enacted to read:

"[NEW MATERIAL] WEARING UNAUTHORIZED INSIGNIA, DECORATION, BADGE, RIBBON, DEVICE OR LAPEL BUTTON.--

A. Any person subject to Chapter 20 NMSA 1978 shall be punished as a court-martial may direct if the person:

(1) is not authorized to wear an insignia, decoration, badge, ribbon, device or lapel button; and

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(2) wrongfully wears such insignia, decoration, badge, ribbon, device or lapel button upon the person's uniform or civilian clothing.

B. The maximum punishment of prosecution pursuant to this section shall be:

(1) for the wrongful wearing of the medal of honor, distinguished service cross, navy cross, air force cross, silver star, purple heart or a valor device on any personal award, a dishonorable discharge, forfeiture of all pay and allowances received on or after the effective date of the sentence and confinement for less than one year; or

(2) for all other violations of this section, a bad conduct discharge, forfeiture of all pay and allowances and confinement for no more than six months.

C. As used in this section, "wrongful" means that the conduct is done without legal justification or excuse. Actual knowledge that the person was or is not authorized to wear the item in question is required. Knowledge may be proved by circumstantial evidence."

SECTION 13. REPEAL.--Sections 20-4-12, 20-12-57 and 20-12-68 NMSA 1978 (being Laws 1987, Chapter 318, Section 29 and Laws 1989, Chapter 337, Sections 56 and 67) are repealed.

SECTION 14. EFFECTIVE DATE.--The effective date of the provisions of this act is July 1, 2020.