Chapter 398

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Military Justice

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GENERAL PROVISIONS

398.002 Definitions for this chapter and ORS 396.120, 399.205 and 399.515. As used in this chapter and ORS 396.120, 399.205 and 399.515, unless the context requires otherwise:

(1) "Accuser" means a person who signs and swears to charges, any person who directs that charges nominally be signed and sworn to by another, or any other person who has an interest other than an official interest in the prosecution of the accused.

(2) "Active state duty" means full-time duty in the active military service of the state under an order of the Governor issued under authority vested in the Governor by law, and includes travel to and from such duty. The term "active state duty" also includes all Oregon National Guard personnel serving on active duty under Title 32 U.S.C. 502 (f).

(3) "Commanding officer" includes only commissioned officers.

(4) "Commissioned officer" includes a commissioned warrant officer.

(5) "Component" includes the Army National Guard, the Air National Guard and the Oregon State Defense Force.

(6) "Convening authority" includes, in addition to the person who convened the court, a commissioned officer commanding for the time being, or a successor in command.

(7) "Duty status other than active state duty" means and includes any periods of drill and such other training or service, other than active state duty, as may be required under state or federal laws, regulations or orders, and includes travel to and from such duty.

(8) "Enlisted member" means a person in an enlisted grade.

(9) "Grade" means a step or degree, in a graduated scale of office or military rank, that is established and designated as a grade by law or regulation.

(10) "Judge advocate" means the State Judge Advocate or an Assistant State Judge Advocate.

(11) "May" is used in a permissive sense. However, the words "no person may..." mean that no person is required, authorized or permitted to do the act prescribed.

(12) "Military" refers to any or all of the armed forces.

(13) "Military court" means a court-martial, a court of inquiry or a provost court.

(14) "Military judge" means an official of a general or special court-martial detailed in accordance with ORS 398.135.

(15) "Officer" means commissioned or warrant officer.

(16) "Organized militia" means the National Guard of the state, as defined in section 101(3) of title 32, United States Code, and the Oregon State Defense Force.

(17) "Rank" means the order of precedence among members of the armed forces.

(18) "Record," when used in connection with the proceedings of a court-martial, means:

(a) An official written transcript, written summary or other writing relating to the proceedings; or

(b) An official audiotape, videotape or similar material from which sound or sound and visual images depicting the proceedings may be reproduced.

(19) "Shall" is used in an imperative sense.

(20) "State Judge Advocate" means the commissioned officer responsible for supervising the administration of the military justice in the organized militia.

(21) "Superior commissioned officer" means a commissioned officer superior in rank or command. [1961 c.454 §78; 1975 c.719 §1; 1985 c.682 §14; 1989 c.361 §5]

398.004 Persons subject to this chapter. The following persons who are not in federal service are subject to this chapter:

(1) Members of the organized militia.

(2) All other persons lawfully ordered to duty in or with the organized militia, from the dates they are required by the terms of the order or other directive to obey the same. [1961 c.454 §79]

398.006 Jurisdiction to try certain personnel. (1) Each person discharged from the organized militia who is later charged with having fraudulently obtained the discharge of the person is, subject to ORS 398.216, subject to trial by court-martial on that charge and is after apprehension subject to this chapter while in the custody of the military for that trial. Upon conviction of that charge the person is subject to trial by court-martial for all offenses under this chapter committed before the fraudulent discharge.

(2) No person who has deserted from the organized militia may be relieved from amenability to the jurisdiction of this chapter by virtue of a separation from any later period of service. [1961 c.454 §80]

398.008 Dismissal of commissioned officer. (1) If any commissioned officer dismissed by order of the Governor makes a written application for trial by court-martial, setting forth under oath that the officer has been wrongfully dismissed, the Governor, as soon as practicable shall convene a general court-martial to try that officer on the charges on which the officer was dismissed. A court-martial so convened has jurisdiction to try the dismissed officer on those charges, and the officer shall be considered to have waived the right to plead any statute of limitations applicable to any offense with which the officer is charged. The court-martial may, as part of its sentence, adjudge the affirmance of the dismissal; but if the court-martial acquits the accused or if the sentence adjudged, as finally approved or affirmed, does not include dismissal, the Adjutant General shall substitute for the dismissal ordered by the Governor a form of discharge authorized for administrative issue.

(2) If the Governor fails to convene a general court-martial within six months from the presentation of an application for trial under this chapter, the Adjutant General shall substitute for the dismissal ordered by the Governor a form of discharge authorized for administrative issue.

(3) If a discharge is substituted for a dismissal under this chapter, the Governor alone may reappoint the officer to such commissioned grade and with such rank as, in the opinion of the Governor, that former officer would have attained had the officer not been dismissed. The reappointment of such a former officer may be made only if a vacancy is available under applicable tables of organization. All time between the dismissal and the reappointment shall be considered as actual service for all purposes.

(4) If an officer is discharged from the organized militia by administrative action or by board proceedings under law, or is dropped from the rolls by order of the Governor, the officer has no right to trial under this section. [1961 c.454 §81; 1975 c.719 §2]

398.010 Territorial applicability of this chapter. (1) This chapter applies throughout the state. It also applies to all persons otherwise subject to this chapter while they are serving outside the state, and while they are going to and returning from such service outside the state, in the same manner and to the same extent as if they were serving inside the state.

(2) Courts-martial and courts of inquiry may be convened and held in units of the organized militia while those units are serving outside the state with the same jurisdiction and powers as to persons subject to this chapter as if the proceedings were held inside the state; and offenses committed outside the state may be tried and punished either inside or outside the state. [1961 c.454 §82]

398.012 Judge advocates and legal officers. (1) The Governor, on the recommendation of the Adjutant General, shall appoint an officer of the organized militia as State Judge Advocate. To be eligible for appointment, an officer must be a member of the bar of the highest court of the state and must have been a member of the bar of the state for at least five years.

(2) The Adjutant General may appoint as many Assistant State Judge Advocates as the Adjutant General deems necessary, which Assistant State Judge Advocates shall be officers of the organized militia and members of the bar of the state. However, the Adjutant General may appoint temporary Assistant State Judge Advocates for a period not to exceed 12 months. An individual appointed as a temporary Assistant State Judge Advocate shall be an officer of the Oregon State Defense Force and shall be legally trained but is not required to be admitted to the practice of law by the Supreme Court of this state. The legal services performed by temporary Assistant State Judge Advocates shall be limited to those legal services that may be performed by legal assistants consistent with ORS 9.160.

(3) The State Judge Advocate or assistants shall make frequent inspections in the field for supervision of the administration of military justice.

(4) Convening authorities shall at all times communicate directly with their staff judge advocate or legal officers in matters relating to the administration of military justice; and the staff judge advocate or legal officer of any command is entitled to communicate directly with the staff judge advocate or legal officer of a superior or subordinate command, or with the State Judge Advocate.

(5) No person who has acted as member, military judge, trial counsel, assistant trial counsel, defense counsel, assistant defense counsel or investigating officer, or who has been a witness for either the prosecution or defense in any case, may later act as staff judge advocate or legal officer to any reviewing authority upon the same case.

(6) A judicial officer, as defined by ORS 1.210, is not prohibited, by reason of holding that office, from performing all acts necessary or incumbent to the authorized exercise of duties as a State Judge Advocate or legal officer. [1961 c.454 §83; 1975 c.719 §3; 1993 c.483 §1]

APPREHENSION AND RESTRAINT

398.052 "Apprehension" defined; quelling of disorders. (1) Apprehension is the taking of a person into custody.

(2) Any person authorized by this chapter and ORS chapters 396 and 399, or by military department regulations issued pursuant thereto, to apprehend persons subject to this chapter, any marshal of a court-martial appointed pursuant to the provisions of this chapter and any peace officer authorized to do so by law may do so upon reasonable belief that an offense has been committed and that the person apprehended committed it.

(3) Commissioned officers, warrant officers and noncommissioned officers have authority to quell quarrels, frays and disorders among persons subject to this chapter and to apprehend persons subject to this chapter who take part therein. [1961 c.454 §84]

398.054 Apprehension of deserters. Any civil officer having authority to apprehend offenders under the laws of the United States or of a state, territory, commonwealth or possession, or the District of Columbia, may summarily apprehend a deserter from the organized militia and deliver the deserter into the custody of the organized militia. If an offender is apprehended outside the state, the return of the offender to the area must be in accordance with normal extradition procedures or reciprocal agreement. [1961 c.454 §85]

398.056 Imposition of restraint; "arrest" and "confinement" defined. (1) Arrest is the restraint of a person by an order, not imposed as a punishment for an offense, directing the person to remain within certain specified limits. Confinement is the physical restraint of a person.

(2) An enlisted member may be ordered into arrest or confinement by any commissioned officer by an oral or written order, delivered in person or through other persons subject to this chapter or through any person authorized by this chapter to apprehend persons. A commanding officer may authorize warrant officers or noncommissioned officers to order enlisted members of the command of the officer or subject to the authority of the officer into arrest or confinement.

(3) A commissioned officer or warrant officer may be ordered apprehended or into arrest or confinement only by a commanding officer to whose authority the officer is subject, by an order, oral or written, delivered in person or by another commissioned officer. The authority to order such persons apprehended or into arrest or confinement may not be delegated.

(4) No person may be ordered apprehended or into arrest or confinement except for probable cause.

(5) Nothing in this section shall be construed to limit the authority of persons authorized to apprehend offenders to secure the custody of an alleged offender until proper authority may be notified. [1961 c.454 §86]

398.058 Restraint of persons charged with offenses; notice of charges; speedy disposition. (1) Any person subject to this chapter charged with an offense under this chapter may be ordered into arrest or confinement, as circumstances may require; but when charged only with an offense normally tried by a summary court-martial, such person shall not ordinarily be placed in confinement.

(2) When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform the person of the specific wrong of which the person is accused and to try the person or to dismiss the charges and release the person. [1961 c.454 §87; 1975 c.719 §4]

398.060 Place of confinement. Confinement other than in a guard house, whether before, during or after trial by a military court, shall be executed in civil jails, penitentiaries or prisons designated by the Governor or by such persons as the Governor may authorize to act. [1961 c.454 §88]

398.062 Reports and receiving of prisoners. (1) No provost marshal, commander of a guard, master at arms, warden, keeper or officer of a city or county jail or any other jail, penitentiary or prison designated under ORS 398.060, may refuse to receive or keep any prisoner committed to the charge of the person, when the committing person furnishes a statement, signed by the committing person, of the offense charged against the prisoner.

(2) Every commander of a guard, master-at-arms, warden, keeper or officer of a city or county jail or of any other jail, penitentiary or prison designated under ORS 398.060, to whose charge a prisoner is committed shall, within 24 hours after that commitment or as soon as the person is relieved from guard, report to the commanding officer of the prisoner the name of the prisoner, the offense charged against the prisoner, and the name of the person who ordered or authorized the commitment. [1961 c.454 §89]

398.064 [1961 c.454 §90; repealed by 1985 c.682 §53]

398.065 Punishment prohibited before trial. A person, while being held for trial, may not be subjected to punishment or penalty other than arrest or confinement upon the charges pending against the person, nor

shall the arrest or confinement imposed be any more rigorous than the circumstances required to insure the person's presence, but the person may be subjected to minor punishment during that period for infractions of discipline. [1985 c.682 §2]

398.066 Delivery of offenders to civil authorities; redelivery to military authority. (1) Under such military department regulations as may be prescribed under this chapter and ORS chapters 396 and 399, a person on active state duty subject to this chapter who is accused of an offense against civil authority may be delivered, upon request, to the civil authority for trial.

(2) When delivery under this section is made to any civil authority of a person undergoing sentence of a court-martial, the delivery, if followed by conviction in a civil tribunal, interrupts the execution of the sentence of the court-martial, and the offender after having answered to the civil authorities for the offense shall, upon the request of competent military authority, be returned to military custody for the completion of the sentence of the offender. [1961 c.454 §91]

398.068 Confinement pending trial for failure to appear. When an accused person shall have been arrested for failure to appear before a court-martial for trial, the military judge, the president of a court-martial or a summary court officer to whom the charges have been referred for trial may issue a commitment for confinement of such person pending trial, subject to the prior approval of the State Judge Advocate. No person shall be kept in confinement pending trial longer than seven days. [1985 c.682 §11]

398.082 [1961 c.454 §92; repealed by 1975 c.719 §5 (398.083 enacted in lieu of 398.082)]

NONJUDICIAL PUNISHMENT

398.083 Imposition and enforcement of disciplinary punishment without court-martial. (1) Under such rules as may be prescribed by the Governor, limitations may be placed on the powers granted by this section with respect to the kind and amount of punishment authorized, the categories of commanding officers and warrant officers exercising command authorized to exercise those powers, the applicability of this section to an accused who demands trial by court-martial, and the kinds of courts-martial to which the case may be referred upon such a demand. However, punishment may not be imposed upon any member of the organized militia under this section if the member has, before the imposition of such punishment demanded trial by court-martial in lieu of such punishment. Rules may be prescribed by the Governor with respect to the suspension of punishments authorized under this section. If authorized by regulations prescribed by the Governor, the Governor, the Adjutant General, or an officer of a general rank in command may delegate powers under this section to a principal assistant who is a member of the organized militia.

(2) Subject to subsection (1) of this section, any commanding officer may, in addition to or in lieu of admonition or reprimand, impose one or more of the following disciplinary punishments for minor offenses without the intervention of a court-martial:

(a) Upon officers of the command:

(A) Restriction to certain specified limits, with or without suspension from duty, for not more than 15 consecutive duty or drill days, the punishment to be completed within 90 days of the date punishment was imposed.

(B) If imposed by the Governor, the Adjutant General, or an officer of a general rank in command:

(i) Arrest in quarters for not more than 15 consecutive duty or drill days, the punishment to be completed within 90 days of the date punishment was imposed.

(ii) Forfeiture of pay of not more than two-thirds of one month's pay for three months.

(b) Upon other military personnel of the command:

(A) Forfeiture of pay of not more than two-thirds of one month's pay for one month;

(B) Reduction to the next inferior pay grade, if the grade from which demoted is within the promotion authority of the officer imposing the reduction or any officer subordinate to the one who imposes the reduction;

(C) Extra duties, including fatigue or other duties, not to exceed two hours per day, including holidays, for not more than 15 consecutive duty or drill days, the punishment to be completed within 90 days of the date punishment was imposed;

(D) Restriction to certain specified limits, with or without suspension from duty, for not more than 15 consecutive duty or drill days, the punishment to be completed within 90 days of the date punishment was imposed; or

(E) If imposed by an officer of the grade of major or above:

(i) Forfeiture of pay of not more than two-thirds of one month's pay for two months;

(ii) Reduction to the lowest or any intermediate pay grade, if the grade from which demoted is within the promotion authority of the officer imposing the reduction or any officer subordinate to the one who imposes

the reduction, but an enlisted member in a pay grade above E-4 may not be reduced more than two pay grades;

(iii) The punishment authorized under subparagraph (C) of this paragraph; or

(iv) The punishment authorized under subparagraph (D) of this paragraph.

(3) No two or more of the punishments of arrest in quarters, extra duties, and restriction may be combined to run consecutively in the maximum amount that may be imposed for each. When any of those punishments are combined to run consecutively, there must be an apportionment.

(4) An officer in charge may impose upon enlisted members assigned to the unit of which the officer is in charge such of the punishments authorized under subsection (2)(b)(A), (B), (C) and (D) of this section as the Governor may specifically prescribe by regulation.

(5) The officer who imposes the punishments authorized under subsection (2) of this section, or a successor in command, may, at any time, suspend probationally a reduction in grade or a forfeiture imposed under subsection (2) of this section, whether or not executed. In addition, such officer may, at any time, remit or mitigate any part or amount of the unexecuted punishment and may set aside in whole or in part the punishment, whether executed or unexecuted, and restore all rights, privileges and property affected. The officer may also mitigate reduction in grade to forfeiture of pay. When mitigating an arrest in quarters to restriction or extra duties to restriction, the mitigated punishment shall not be for a greater period than the punishment mitigated. When mitigating reduction in grade to forfeiture of pay, the amount of the forfeiture shall not be greater than the amount that could have been imposed initially under this section by the officer who imposed the punishment mitigated.

(6) A person punished under this section who considers the punishment unjust or disproportionate to the offense may, through the proper channel, appeal to the next superior authority. The appeal shall be promptly forwarded and decided, but the person punished may in the meantime be required to undergo the punishment adjudged. The superior authority may exercise the same powers with respect to the punishment imposed as may be exercised under subsection (5) of this section by the officer who imposed the punishment. Before acting on an appeal from a punishment of:

(a) Arrest in quarters for more than seven days;

(b) Forfeiture of pay of more than two-thirds of one month's pay for one month; or

(c) Reduction of one or more pay grades from the fourth or a higher pay grade,

the authority who is to act on the appeal shall refer the case to a staff judge advocate or legal officer for consideration and advice, and may so refer the case upon appeal from any punishment imposed under subsection (2) of this section.

(7) The imposition and enforcement of disciplinary punishment under this section for any act or omission is not a bar to trial by court-martial or other legal proceeding for a serious crime or offense growing out of the same act or omission, and not properly punishable under this section; but the fact that a disciplinary punishment has been enforced may be shown by the accused upon trial, and when so shown shall be considered in determining the measure of punishment to be adjudged in the event of a finding of guilty.

(8) Whenever a punishment of forfeiture of pay is imposed under this section, the forfeiture may apply to pay accruing on or after the date that punishment is imposed and to any pay accrued before that date.

(9) The Governor may, by rule, prescribe the form of records to be kept of proceedings under this section and may also prescribe that certain categories of those proceedings shall be in writing. [1975 c.719 §6 (enacted in lieu of 398.082); 1985 c.682 §15]

COURTS-MARTIAL JURISDICTION

398.102 Courts-martial of organized militia not in federal service; composition. (1) In the organized militia not in federal service, there are general, special and summary courts-martial constituted like similar courts of the army and air force. They have the jurisdiction and powers, except as to punishments, and shall follow the forms and procedures provided for those courts as far as applicable, except as otherwise provided in this chapter.

(2) The three kinds of courts-martial shall be constituted as follows:

(a) General courts-martial, consisting of:

(A) A military judge and not less than five members; or

(B) Only a military judge, if before the court is assembled, the accused, knowing the identity of the military judge, and after consultation with defense counsel, requests orally on the record or in writing a court composed only of a military judge and the military judge approves.

(b) Special courts-martial, consisting of:

(A) Not less than three members; or

(B) A military judge and not less than three members; or

(C) Only a military judge, if one has been detailed to the court, and the accused under the same conditions prescribed in paragraph (a)(B) of this subsection so requests.

(c) Summary courts-martial, consisting of one commissioned officer. [1961 c.454 §93; 1975 c.719 §7; 1985 c.682 §16]

398.104 Jurisdiction of courts-martial of each component. Each component of the organized militia has court-martial jurisdiction over all persons subject to this chapter. The exercise of jurisdiction by one component over personnel of another component shall be in accordance with military department regulations prescribed by the Governor. [1961 c.454 §94; 1975 c.719 §8]

398.106 Jurisdiction of general courts-martial. Subject to ORS 398.104, general courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter and may, under such limitations as the Governor may prescribe, adjudge any of the following punishments:

(1) A fine of not more than $200;

(2) Forfeiture of pay and allowances;

(3) Dishonorable discharge or dismissal;

(4) Reprimand;

(5) Reduction of a noncommissioned officer to the ranks; or

(6) Any combination of these punishments. [1961 c.454 §95; 1975 c.719 §9; 1985 c.682 §17]

398.108 Jurisdiction of special courts-martial. (1) Subject to ORS 398.104, special courts-martial shall have jurisdiction to try persons except officers for any offense for which they may be punished under this chapter.

(2) A special court-martial has the same powers of punishment as a general court-martial, except that a fine imposed by a special court-martial may not be more than $100 for a single offense. [1961 c.454 §96; 1975 c.719 §10; 1985 c.682 §18]

398.110 Jurisdiction of summary courts-martial. (1) Subject to ORS 398.104, summary courts-martial have jurisdiction to try persons subject to this chapter, except officers, for any offense made punishable by this chapter.

(2) No person with respect to whom summary courts-martial have jurisdiction may be brought to trial before a summary court-martial if the person objects thereto, unless the person has been permitted to refuse punishment under ORS 398.083 and has elected to refuse such punishment. If objection to trial by summary court-martial is made by an accused who has not been permitted to refuse punishment under ORS 398.083, trial shall be ordered by special or general court-martial, as may be appropriate.

(3) A summary court-martial may sentence to a fine of not more than $25 for a single offense, to forfeiture of pay and allowances and to reduction of a noncommissioned officer to the ranks. [1961 c.454 §97; 1975 c.719 §11; 1985 c.682 §19]

398.112 Sentences of dismissal or dishonorable discharge to be approved by Governor. In the organized militia not in federal service, no sentence of dismissal or dishonorable discharge may be executed until it is approved by the Governor. [1961 c.454 §98]

398.114 When complete record of proceedings and testimony required. A dishonorable discharge or dismissal shall not be adjudged by any court-martial unless a complete record of the proceedings and testimony before the court has been made. [1961 c.454 §99; 1985 c.682 §20]

398.116 Authorized sentence of general or special court-martial after declaration of war prior to jurisdiction of United States Code of Military Justice. A general or special court-martial convened for the trial of a person charged with committing an offense after the declaration of a war or national emergency and before the time when the person is brought under the jurisdiction of the United States Uniform Code of Military Justice, (chapter 47, title 10, United States Code), may, upon conviction, adjudge such punishment as may be appropriate, except that it may not exceed that authorized for a similar offense by the United States Uniform Code of Military Justice. [1961 c.454 §100]

APPOINTMENT AND COMPOSITION OF COURTS-MARTIAL

398.126 Convening general courts-martial. In the organized militia not in federal service, general courts-martial may be convened by the President or by the Governor. [1961 c.454 §101]

398.128 Convening special courts-martial. In the organized militia not in federal service, the commanding officer of a garrison, fort, post, camp, air base, auxiliary air base or other place where troops are on duty, or of a brigade, regiment, wing, group, detached battalion, separate squadron or other detached command, may convene special courts-martial. Special courts-martial may also be convened by superior authority. When any such officer is an accuser, the court shall be convened by superior competent authority. [1961 c.454 §102]

398.130 Convening summary courts-martial. (1) In the organized militia not in federal service, the commanding officer of a garrison, fort, post, camp, air base, auxiliary air base or other place where troops are on duty, or of a brigade, regiment, wing, group, detached battalion, separate squadron or other detached command, may convene a summary court-martial.

(2) When only one commissioned officer is present with a command or detachment that officer shall be the summary court-martial of that command or detachment and shall hear and determine all summary court-martial cases. Summary courts-martial may, however, be convened in any case by superior competent authority when considered desirable by such authority. [1961 c.454 §103; 1985 c.682 §21]

398.132 Who may serve on courts-martial. (1) Any commissioned officer of the organized militia is eligible to serve on all courts-martial for the trial of any person who may lawfully be brought before such courts for trial.

(2) Any warrant officer of the organized militia is eligible to serve on general and special courts-martial for the trial of any person, other than a commissioned officer, who may lawfully be brought before such courts for trial.

(3)(a) Any enlisted member of the organized militia who is not a member of the same unit as the accused is eligible to serve on general and special courts-martial for the trial of any enlisted member who may lawfully be brought before such courts for trial, but shall serve as a member of a court only if, before the conclusion of a session called by the military judge under ORS 398.209, prior to trial or, in the absence of such a session, before the court is assembled for the trial of the accused, the accused personally has requested in writing that enlisted members serve on it. After such a request, the accused may not be tried by a general or special court-martial the membership of which does not include enlisted members in a number comprising at least one-third of the total membership of the court, unless eligible enlisted members cannot be obtained on account of physical conditions or military exigencies. If such members cannot be obtained, the court may be convened and the trial held without them, but the convening authority shall make a detailed written statement, to be appended to the record, stating why they could not be obtained.

(b) As used in this section, the word "unit" means any regularly organized body of the organized militia not larger than a company, a squadron or a corresponding body.

(4)(a) When it can be avoided, no person subject to this chapter shall be tried by a court-martial any member of which is junior to the person in rank or grade.

(b) When convening a court-martial, the convening authority shall detail as members thereof such members of the organized militia as, in the opinion of the convening authority, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. No member of the organized militia is eligible to serve as a member of a general or special court-martial when the member is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case.

(5) Before a court-martial is assembled for the trial of a case, the convening authority may excuse a member of the court from participating in the case. The convening authority may delegate any authority under this subsection to the State Judge Advocate or designee. [1961 c.454 §104; 1975 c.719 §12; 1985 c.682 §22]

398.134 [1961 c.454 §105; repealed by 1975 c.719 §13 (398.135 enacted in lieu of 398.134)]

398.135 Detail of military judge. (1) The authority convening a general court-martial shall, and, subject to rules of the Governor, the authority convening a special court-martial may, detail a military judge thereto. A military judge shall preside over each open session of the court-martial to which the judge has been detailed.

(2) A military judge shall be a commissioned officer of the organized militia who is a member of the bar of the highest court of a state, or a member of the bar of a federal court, and who is certified to be qualified for such duty by the State Judge Advocate.

(3) The military judge of a general or special court-martial shall be designated by the State Judge Advocate, or designee, for detail by the convening authority, and, unless the court-martial was convened by the Governor, neither the convening authority nor any member of the staff of the convening authority shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to performance of duty as a military judge.

(4) No person is eligible to act as a military judge in a case if the person is the accuser or a witness for the prosecution or has acted as investigating officer or as a counsel in the same case.

(5) The military judge of a court-martial may not consult with the members of the court except in the presence of the accused, trial counsel, and defense counsel, nor may

the military judge vote with members of the court. [1975 c.719 §14 (enacted in lieu of 398.134); 1985 c.682 §23]

398.136 Detail of trial counsel and defense counsel. (1) For each general and special court-martial the authority convening the court shall detail trial counsel and defense counsel, and such assistants as the convening authority considers appropriate. No person who has acted as investigating officer, military judge or court member in any case may act later as trial counsel, assistant trial counsel or, unless expressly requested by the accused, as defense counsel or assistant defense counsel in the same case. No person who has acted for the prosecution may act later in the same case for the defense, nor may any person who has acted for the defense act later in the same case for the prosecution.

(2) Trial counsel or defense counsel detailed for a general court-martial must be:

(a) A person who is a member of the bar of the highest court of this state, or a member of the bar of a federal court; and

(b) Certified as competent to perform such duties by the State Judge Advocate.

(3) In the case of a special court-martial:

(a) If the trial counsel is qualified to act as counsel before a general court-martial, the defense counsel detailed by the convening authority must be a person similarly qualified; and

(b) If the trial counsel is a member of the bar of the highest court of this state, the defense counsel detailed by the convening authority must have the same qualifications. [1961 c.454 §106; 1975 c.719 §15; 1985 c.682 §24]

398.138 Detail or employment of reporters and interpreters. Under such regulations as the Governor may prescribe, the convening authority of a general or special court-martial or court of inquiry shall detail or employ qualified court reporters, who shall record the proceedings of and testimony taken before that court. Under like regulations the convening authority of a military court may detail or employ interpreters who shall interpret for the court. [1961 c.454 §107; 1985 c.682 §25]

398.140 Absent and additional members; effect of absences on trial. (1) No member of a general or special court-martial shall be absent or excused after the court has been assembled for the trial of the accused except for physical disability or as a result of a challenge or by order of the convening authority for good cause.

(2) Whenever a general court-martial, other than a general court-martial composed of a military judge only, is reduced below five members, the trial may not proceed unless the convening authority details new members sufficient in number to provide not less than five members. When the new members have been sworn, the trial may proceed after the recorded testimony of each witness previously examined has been read to the court in the presence of the military judge, the accused, and counsel for both sides.

(3) Whenever a special court-martial, other than a special court-martial composed of a military judge only, is reduced below three members, the trial may not proceed unless the convening authority details new members sufficient in number to provide not less than three members. When the new members have been sworn, the trial shall proceed as if no evidence has previously been introduced, unless a verbatim record of the testimony of previously examined witnesses or a stipulation thereof is read to the court in the presence of the military judge, if any, the accused and counsel for both sides.

(4) If the military judge of a court-martial composed of a military judge only is unable to proceed with the trial because of physical disability, as a result of a challenge or for other good cause, the trial shall proceed, subject to any applicable conditions of ORS 398.102 after the detail of a new military judge as if no evidence had previously been introduced unless a verbatim record of the evidence previously introduced or a stipulation thereof is read in court in the presence of the new military judge, the accused and counsel for both sides. [1961 c.454 §108; 1975 c.719 §16]

PRETRIAL PROCEDURE

398.162 Charges and specifications. (1) Charges and specifications shall be signed by a person subject to this chapter under oath before a person authorized by ORS 396.120 to administer oaths and shall state:

(a) That the signer has personal knowledge of, or has investigated, the matters set forth therein; and

(b) That they are true in fact to the best of the signer's knowledge and belief.

(2) Upon the preferring of charges, the proper authority shall take immediate steps to determine what disposition should be made thereof in the interest of justice and discipline, and the person accused shall be informed of the charges as soon as practicable. [1961 c.454 §109; 1985 c.682 §26]

398.164 Compulsory self-incrimination and immaterial and degrading evidence prohibited. (1) No person subject to this chapter may compel any person to incriminate self or to answer any question the an-

swer to which may tend to incriminate the person.

(2) No person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing the person of the nature of the accusation and advising the person that the person does not have to make any statement regarding the offense of which the person is accused or suspected and that any statement made by the person may be used as evidence against the person in a trial by court-martial.

(3) No person subject to this chapter may compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade the person.

(4) No statement obtained from any person in violation of this section, or through the use of coercion, unlawful influence or unlawful inducement may be received in evidence against the person in a trial by court-martial. [1961 c.454 §110]

398.166 Investigation. (1) No charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made. This investigation shall include inquiry as to the truth of the matter set forth in the charges, consideration of the form of charges, and a recommendation as to the disposition which should be made of the case in the interest of justice and discipline.

(2) The accused shall be advised of the charges and of the right to be represented at that investigation by counsel. Upon request the accused shall be represented by civilian counsel if provided by the accused, or military counsel selected by the accused if such counsel is reasonably available, or by counsel detailed by the officer exercising general court-martial jurisdiction over the command. At that investigation full opportunity shall be given to the accused to cross-examine witnesses if they are available and to present anything in the accused's own behalf, either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after the investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides and a copy thereof shall be given to the accused.

(3) If an investigation of the subject matter of an offense has been conducted before the accused is charged with offense, and if the accused was present at the investigation and afforded the opportunities for representation, cross-examination, and presentation prescribed in subsection (2) of this section, no further investigation of that charge is necessary under this section unless it is demanded by the accused after being informed of the charge. A demand for further investigation entitles the accused to recall witnesses for further cross-examination and to offer any new evidence in behalf of the accused.

(4) The requirements of this section are binding on all persons administering this chapter but failure to follow them does not divest a military court of jurisdiction. [1961 c.454 §111; 1985 c.682 §27]

398.168 Forwarding of charges. When a person is held for trial by general court-martial the commanding officer shall, within eight days after the accused is ordered into arrest or confinement, if practicable, forward the charges, together with the investigation and allied papers, to the person exercising general court-martial jurisdiction. If that is not practicable, the officer shall report in writing to the that person the reasons for delay. [1961 c.454 §112; 1975 c.719 §17]

398.170 Advice of State Judge Advocate; reference for trial; formal corrections. (1) Before directing the trial of any charge by general court-martial, the convening authority shall refer it to the State Judge Advocate for consideration and advice. The convening authority may not refer a specification under a charge to a general court-martial for trial unless the convening authority has been advised in writing by the State Judge Advocate that:

(a) The specification alleges an offense under this chapter;

(b) The specification is warranted by the evidence indicated in the report of investigation, if any, under ORS 398.166; and

(c) A court-martial has jurisdiction over the accused and the offense.

(2) The advice of the State Judge Advocate under subsection (1) of this section with respect to a specification under a charge shall include a written and signed statement by the State Judge Advocate:

(a) Expressing conclusions with respect to each matter set forth in subsection (1) of this section; and

(b) Recommending action that the convening authority take regarding the specification.

(3) If the specification is referred for trial, the recommendation of the State Judge Advocate shall accompany the specification.

(4) If the charges or specifications are not formally correct or do not conform to the substance of the evidence contained in the

report of the investigating officer, formal corrections, and such changes in the charges and specifications as are needed to make them conform to the evidence, may be made. [1961 c.454 §113; 1985 c.682 §28]

398.172 Service of charges. The trial counsel to whom court-martial charges are referred for trial shall cause to be served upon the accused a copy of the charges upon which trial is to be had. No person may, against the objection of the person, be brought to trial or be required to participate by self or counsel in a session called by the military judge under ORS 398.209 in a general court-martial within a period of five days after the service of the charges upon the person, or before a special court-martial within a period of three days after the service of the charges upon the person. [1961 c.454 §114; 1975 c.719 §18]

TRIAL PROCEDURE

398.202 Procedural regulations. The procedure, including modes of proof, in cases before military courts and other military tribunals may be prescribed by the Governor by military department regulations, which shall, so far as the Governor considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the courts of the state, but which may not be contrary to or inconsistent with this chapter. [1961 c.454 §115]

398.204 Unlawfully influencing action of court. (1) No authority convening a general, special or summary court-martial nor any other commanding officer, or officer serving on the staff thereof, may censure, reprimand or admonish the court or any member, military judge or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or the member's functions in the conduct of the proceeding. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of the court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving or reviewing authority with respect to judicial acts of the authority.

(2) The provisions of subsection (1) of this section do not apply to:

(a) General instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of courts-martial; and

(b) To statements and instructions given in open court by the military judge, president of a special court-martial, or counsel.

(3) In the preparation of an effectiveness, fitness or efficiency report or any other report or document used in whole or in part for the purpose of determining whether a member of the organized militia is qualified to be advanced in grade, or in determining the assignment or transfer of a member of the organized militia or in determining whether a member should be retained on active duty, no person subject to this chapter may, in preparing any such report:

(a) Consider or evaluate the performance of duty of any such member as a member of a court-martial; or

(b) Give a less favorable rating or evaluation of any member of the organized militia because of the zeal with which such member, as counsel, represented any accused before a court-martial. [1961 c.454 §116; 1975 c.719 §19]

398.206 Duties of trial counsel and defense counsel. (1) The trial counsel of a general or special court-martial shall prosecute in the name of the state and shall, under the direction of the court, prepare the record of the proceedings.

(2) The accused has the right to be represented in the accused's defense before a general or special court-martial by civilian counsel if provided by the accused, or by military counsel of the accused's own selection if reasonably available, or by the defense counsel detailed under ORS 398.136. Should the accused have counsel of the accused's own selection, the defense counsel and assistant defense counsel, if any, who were detailed, shall, if the accused so desires, act as associate counsel; otherwise they shall be excused by the military judge or by the president of a court-martial without a military judge.

(3) In every court-martial proceeding the defense counsel may, in the event of conviction, forward for attachment to the record of proceedings a brief of such matters as defense counsel feels should be considered in behalf of the accused on review, including any objection to the contents of the record which defense counsel considers appropriate.

(4) An assistant trial counsel of a general court-martial may, under the direction of the trial counsel or when qualified to be a trial counsel as required by ORS 398.136, perform any duty imposed by law, regulation or the custom of the service upon the trial counsel of the court. An assistant trial counsel of a special court-martial may perform any duty of the trial counsel.

(5) An assistant defense counsel of a general or special court-martial may, under

the direction of the defense counsel or when qualified to be the defense counsel as required by ORS 398.136, perform any duty imposed by law, regulation or the custom of the service upon counsel for the accused. [1961 c.454 §117; 1975 c.719 §20; 1985 c.682 §29]

398.208 [1961 c.454 §118; repealed by 1975 c.719 §21 (398.209 enacted in lieu of 398.208)]

398.209 Sessions. (1) At any time after the service of charges which have been referred for trial to a court-martial composed of a military judge and members, the military judge may, subject to ORS 398.172, call the court into session without the presence of the members for the purpose of:

(a) Hearing and determining motions, raising defenses or objections which are capable of determination without trial of the issues raised by a plea of not guilty;

(b) Hearing and ruling upon any matter which may be ruled upon by the military judge under this chapter, whether or not the matter is appropriate for later consideration or decision by the members of the court;

(c) If permitted by rules of the Governor, holding the arraignment and receiving the pleas of the accused; and

(d) Performing any other procedural function which may be performed by the military judge under this chapter or under rules prescribed pursuant to ORS 398.202 and which does not require the presence of the members of the court.

(2) These proceedings shall be conducted in the presence of the accused, the defense counsel, and the trial counsel and shall be made a part of the record.

(3) When the members of a court-martial deliberate or vote, only the members may be present. All other proceedings, including any other consultation of the members of the court with counsel or the military judge, shall be made a part of the record and shall be in the presence of the accused, the defense counsel, the trial counsel, and in cases in which a military judge has been detailed to the court, the military judge. [1975 c.719 §22 (enacted in lieu of 398.208)]

398.210 Continuances. The military judge or a court-martial without a military judge may, for reasonable cause, grant a continuance to any party for such time, and as often, as may appear to be just. [1961 c.454 §119; 1975 c.719 §23]

398.212 Challenges. (1) The military judge and members of a general or special court-martial may be challenged by the accused or the trial counsel for cause stated to the court. The military judge or, if none, the court shall determine the relevancy and validity of challenges for cause, and may not receive a challenge to more than one person at a time. Challenges by the trial counsel shall ordinarily be presented and decided before those by the accused are offered.

(2) Each accused and the trial counsel is entitled to one peremptory challenge, but the military judge may not be challenged except for cause. [1961 c.454 §120; 1975 c.719 §24]

398.214 Oaths. (1) The military judge, interpreters, and in general and special courts-martial, members, trial counsel, assistant trial counsel, defense counsel, assistant defense counsel and reporters shall take an oath or affirmation in the presence of the accused to perform their duties faithfully.

(2) Each witness before a military court shall be examined on oath or affirmation. [1961 c.454 §121; 1975 c.719 §25]

398.216 Statute of limitation. (1) A person charged with desertion or absence without leave in time of war, or with aiding the enemy, may be tried and punished at any time without limitation.

(2) Except as otherwise provided in this section, a person charged with desertion in time of peace or the offense punishable under ORS 398.386 is not liable to be tried by court-martial if the offense was committed more than three years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command.

(3) Except as otherwise provided in this section, a person charged with any offense is not liable to be tried by court-martial or punished under ORS 398.083 if the offense was committed more than two years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command or before the imposition of punishment under ORS 398.083.

(4) Periods in which the accused was absent from territory in which the state has the authority to apprehend the accused, or in the custody of civil authorities, or in the hands of the enemy, shall be excluded in computing the period of limitation prescribed in this section. [1961 c.454 §122; 1985 c.682 §30]

398.218 Former jeopardy. (1) No person may, without the person's consent, be tried a second time for the same offense.

(2) No proceeding in which an accused has been found guilty by a court-martial upon any charge or specification is a trial in the sense of this section until the finding of guilty has become final after review of the case has been fully completed.

(3) A proceeding which, after the introduction of evidence but before a finding, is dismissed or terminated by the convening authority or on motion of the prosecution for

failure of available evidence or witnesses without any fault of the accused is a trial in the sense of this section. [1961 c.454 §123; 1985 c.682 §31]

398.220 Pleas of accused. (1) If an accused arraigned before a court-martial makes an irregular pleading, or after a plea of guilty sets up matter inconsistent with the plea, or if it appears that the accused has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect, or if the accused fails or refuses to plead, a plea of not guilty shall be entered in the record, and the court shall proceed as though the accused had pleaded not guilty.

(2) With respect to any charge or specification to which a plea of guilty has been made by the accused and accepted by the military judge or by a court-martial without a military judge, a finding of guilty of the charge or specification may be entered immediately without vote. This finding shall constitute the finding of the court unless the plea of guilty is withdrawn prior to announcement of the sentence, in which event the proceedings shall continue as though the accused had pleaded not guilty. [1961 c.454 §124; 1985 c.682 §32]

398.222 Opportunity to obtain witnesses and evidence. (1) The trial counsel, the defense counsel and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such military department regulations as the Governor may prescribe.

(2) The military judge, the president of a court-martial or a summary court officer may:

(a) Issue a warrant for the arrest of any accused person who, having been served with a warrant and a copy of the charges, disobeys a written order by the convening authority to appear before the court;

(b) Issue subpoenas duces tecum and other subpoenas;

(c) Enforce by attachment the attendance of witnesses and the production of books and papers; and

(d) Sentence for refusal to be sworn or to answer, as provided in actions before civil courts of the state.

(3) Process issued in court-martial cases to compel witnesses to appear and testify and to compel the production of other evidence shall run to any part of the state. [1961 c.454 §125; 1975 c.719 §26]

398.224 Refusal to appear or testify. (1) Any person not subject to this chapter is guilty of an offense against the state when the person:

(a) Has been duly subpoenaed to appear as a witness before a court-martial, court of inquiry or any other military court or board, or before any military or civil officer designated to take a deposition to be read in evidence before such a court, commission or board;

(b) Has been duly paid or tendered the fees and mileage of a witness at the rates allowed to witnesses attending the circuit court of the state in ORS 44.415 (2); and

(c) Willfully neglects or refuses to appear, or refuses to qualify as a witness or to testify or to produce any evidence which that person may have been legally subpoenaed to produce.

(2) Any person who commits an offense described in subsection (1) of this section shall be tried before the circuit court or judge thereof of the county where the offense occurred, and exclusive jurisdiction is conferred upon those courts for such purpose. Upon conviction, such a person shall be punished by a fine of not more than $500, or imprisonment for not more than six months, or both.

(3) The district attorney of the county in which the offense occurred, upon certification of the facts by the military court, court of inquiry or board, shall prosecute any person who commits the offense described in subsection (1) of this section. The fine shall be deposited in the General Fund of the State Treasury, to be available for general governmental expenses. [1961 c.454 §126; 1985 c.682 §33; 1989 c.980 §13]

398.226 Contempts. A military court may punish for contempt any person who uses any menacing word, sign or gesture in its presence, or who disturbs its proceedings by any riot or disorder. The punishment may not exceed confinement for 30 days or a fine of $100, or both. [1961 c.454 §127]

398.228 Depositions. (1) At any time after charges have been signed, as provided in ORS 398.162, any party may take oral or written depositions unless the military judge or court-martial without a military judge hearing the case or, if the case is not being heard, an authority competent to convene a court-martial for the trial of those charges forbids it for good cause. If a deposition is to be taken before charges are referred for trial, such authority may designate commissioned officers to represent the prosecution and the defense and may authorize those officers to take the deposition of any witness.

(2) The party at whose instance a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition.

(3) Depositions may be taken before and authenticated by any military or civil officer authorized by the laws of the state or by the laws of the place where the deposition is taken to administer oaths.

(4) A duly authenticated deposition taken upon reasonable notice to the other parties, so far as otherwise admissible under the rules of evidence, may be read in evidence or, in the case of audiotape, videotape or similar material, may be played as evidence before any military court or commission, in any proceeding before any court-martial or in any proceeding before a court of inquiry, if it appears:

(a) That the witness resides or is beyond the state in which the court-martial or court of inquiry is ordered to sit, or beyond the distance of 100 miles from the place of hearing;

(b) That the witness by reason of death, age, sickness, bodily infirmity, imprisonment, military necessity, nonamenability to process, or other reasonable cause, is unable or refuses to appear and testify in person at the place of trial or hearing; or

(c) That the present whereabouts of the witness is unknown. [1961 c.454 §128; 1985 c.682 §34]

398.230 Admissibility of records of courts of inquiry. (1) In any case not extending to the dismissal of a commissioned officer, the sworn testimony, contained in the duly authenticated record of proceedings of a court of inquiry, of a person whose oral testimony cannot be obtained, may, if otherwise admissible under the rules of evidence, be read in evidence by any party before a court-martial if the accused was a party before the court of inquiry and if the same issue was involved or if the accused consents to the introduction of such evidence.

(2) Such testimony may be read in evidence only by the defense in cases extending to the dismissal of a commissioned officer.

(3) Such testimony may also be read in evidence before a court of inquiry or a military board. [1961 c.454 §129]

398.232 Voting and rulings. (1) Voting by members of a general or special court-martial on the findings and on the sentence, and by members of a court-martial without a military judge upon questions of challenge, on the findings and on the sentence shall be by secret written ballot. The junior member of the court shall in each case count the votes. The count shall be checked by the president, who shall forthwith announce the result of the ballot to the members of the court.

(2) The military judge and, except for questions of challenge, the president of a court-martial without a military judge, shall rule upon all questions of law and all interlocutory questions, arising during the proceedings. Any such ruling made by the military judge upon any question of law or any interlocutory question other than the factual issue of mental responsibility of the accused, or by the president of a court-martial without a military judge upon any question of law other than a motion for a finding of not guilty is final and constitutes the ruling of the court. However, the military judge or the president of a court-martial without a military judge may change a ruling at any time during the trial. Unless the ruling is final, if any member objects thereto, the court shall be cleared and closed and the question decided by a voice vote as provided in ORS 398.234 beginning with the junior in rank.

(3) Before a vote is taken on the findings, the military judge or the president of a court-martial without a military judge shall, in the presence of the accused and counsel, instruct the members of the court as to the elements of the offense and charge them:

(a) That the accused must be presumed to be innocent until guilt is established by legal and competent evidence beyond reasonable doubt;

(b) That in the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt must be resolved in favor of the accused and the accused must be acquitted;

(c) That if there is a reasonable doubt as to the degree of guilt, the findings must be in a lower degree as to which there is no reasonable doubt; and

(d) That the burden of proof to establish the guilt of the accused beyond reasonable doubt is upon the state.

(4) Subsections (1), (2) and (3) of this section do not apply to a court-martial composed of a military judge only. The military judge of such a court-martial shall determine all questions of law and fact arising during the proceedings, and, if the accused is convicted, adjudge an appropriate sentence. The military judge of such a court-martial shall make a general finding and shall in addition on request find the facts specially. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein. [1961 c.454 §130; 1975 c.719 §27; 1985 c.682 §35]

398.234 Number of votes required. (1) No person may be convicted of an offense, except by the concurrence of two-thirds of

the members present at the time the vote is taken.

(2) All sentences shall be determined by the concurrence of two-thirds of the members present at the time that the vote is taken.

(3) All other questions to be decided by the members of a general or special court-martial shall be determined by a majority vote. However, a determination to reconsider a finding of guilty or to reconsider a sentence, with a view toward decreasing it, may be made by any lesser vote which indicates that the reconsideration is not opposed by the number of votes required for that finding or sentence. A tie vote on a challenge disqualifies the member challenged. A tie vote on a motion for a finding of not guilty or on a motion relating to the question of the accused's sanity is a determination against the accused. A tie vote on any other question is a determination in favor of the accused. [1961 c.454 §131; 1985 c.682 §36]

398.236 Court to announce action. A court-martial shall announce its findings and sentence to the parties as soon as determined. [1961 c.454 §132]

398.238 Record of trial. (1) Each general court-martial shall keep a separate record of the proceedings of the trial of each case brought before it and the record shall be authenticated by the signature of the military judge. If the record cannot be authenticated by the military judge, by reason of death, disability or absence, it shall be authenticated by the signature of the trial counsel or by that of a member if the trial counsel is unable to authenticate it by reason of death, disability or absence.

(2) Each special and summary court-martial shall keep a separate record of the proceedings in each case, and the record shall be authenticated in the manner required by such regulations as the Governor may prescribe.

(3) A complete record of the proceedings and testimony shall be prepared:

(a) In each general court-martial case in which the sentence adjudged includes a dismissal or a dishonorable discharge; and

(b) In each special court-martial case in which the sentence adjudged includes a dishonorable discharge.

(4) In all other court-martial cases the record shall contain such matters as may be prescribed by regulations of the Governor.

(5) A copy of the record of the proceedings of each general and special court-martial shall be given to the accused as soon as it is authenticated. [1961 c.454 §133; 1975 c.719 §28; 1985 c.682 §37]

SENTENCES

398.252 Cruel and unusual punishments prohibited. Punishment by flogging, or by branding, marking or tattooing on the body, or any other cruel or unusual punishment, may not be adjudged by any court-martial or inflicted upon any person subject to this chapter. The use of irons, single or double, except for the purpose of safe custody, is prohibited. [1961 c.454 §134]

398.254 Punishments limited. (1) The punishments which a court-martial may direct for an offense may not exceed limits prescribed by this chapter.

(2) Unless otherwise provided in regulation to be prescribed by the Governor or Adjutant General, a court-martial sentence of an enlisted member in a pay grade above E-1 reduces that member to pay grade E-1, effective on the date on which the sentence is approved by the convening authority, when the sentence includes a dishonorable discharge or dismissal.

(3) If the sentence of a member who is reduced in pay grade under subsection (2) of this section is set aside, disapproved or as finally approved does not include any punishment described in subsection (2) of this section, the rights and privileges of which the member was deprived because of that reduction shall be restored and the member is entitled to the pay and allowances to which the member would have been entitled for the period the reduction was in effect. [1961 c.454 §135; 1985 c.682 §38]

398.256 Effective date of sentence. (1) Whenever a sentence of a court-martial as lawfully adjudged and approved includes a forfeiture of pay or allowances, the forfeiture may apply to pay or allowances becoming due on or after the date the sentence is approved by the convening authority. No forfeiture may extend to any pay or allowances accrued before that date.

(2) Any period of confinement included in a sentence of a court-martial begins to run from the date the sentence is ordered to be executed by the convening authority but periods during which the sentence to confinement is suspended or deferred shall be excluded in computing the service of the term of confinement. Regulations prescribed by the Governor may provide that sentences of confinement may not be executed until approved by designated officers.

(3) All other sentences of courts-martial are effective on the date ordered executed. [1961 c.454 §136; 1985 c.682 §39]

398.258 Execution of confinement. (1) A sentence of confinement adjudged by a

military court, whether or not the sentence includes discharge or dismissal, and whether or not the discharge or dismissal has been executed, may be carried into execution by confinement in any place of confinement under the control of any of the forces of the organized militia or in any jail, penitentiary or prison designated for that purpose. Persons so confined in a jail, penitentiary or prison are subject to the same discipline and treatment as persons confined or committed to the jail, penitentiary or prison by the courts of the state or of any political subdivision thereof.

(2) The keepers, officers and wardens of city or county jails and of other jails, penitentiaries or prisons designated by the Governor, or by such person as the Governor may authorize to act under ORS 398.060, shall receive persons ordered into confinement before trial and persons committed to confinement by a military court and shall confine them according to law. No such keeper, officer or warden may require payment of any fee or charge for so receiving or confining a person. [1961 c.454 §137; 1975 c.719 §29; 1985 c.682 §40]

398.260 Confinement as alternative to fine. In the organized militia not in federal service, a court-martial may, instead of imposing a fine, sentence to confinement for not more than one day for each dollar of the authorized fine. [1985 c.682 §13]

REVIEW OF COURTS-MARTIAL

398.272 Approval and execution or suspension of sentence. Except as provided in ORS 398.112 and 398.282, a court-martial sentence, unless suspended, may be ordered executed by the convening authority when approved. The convening authority shall approve the sentence or such part, amount or commuted form of the sentence as the convening authority sees fit, and may suspend the execution of the sentence as approved. [1961 c.454 §138; 1985 c.682 §41]

398.274 Initial review and action on trial record. (1) After a trial by court-martial the record shall be forwarded to the convening authority, as reviewing authority, and action thereon may be taken by the person who convened the court, a commissioned officer commanding for the time being, a successor in command or by the Governor.

(2) The convening authority shall refer the record of each general court-martial to the State Judge Advocate, who shall submit a written opinion thereon to the convening authority. If the final action of the court has resulted in an acquittal of all charges and specifications, the opinion shall be limited to questions of jurisdiction. [1961 c.454 §§139,140]

398.276 Reconsideration and revision of court's ruling. (1) If a specification before a court-martial has been dismissed on motion and the ruling does not amount to a finding of not guilty, the convening authority may return the record to the court for reconsideration of the ruling and any further appropriate action.

(2) Where there is an apparent error or omission in the record or where the record shows improper or inconsistent action by a court-martial with respect to a finding or sentence which can be rectified without material prejudice to the substantial rights of the accused, the convening authority may return the record to the court for appropriate action. In no case, however, may the record be returned:

(a) For reconsideration of a finding of not guilty of any specification, or a ruling which amounts to a finding of not guilty;

(b) For reconsideration of a finding of not guilty of any charge, unless the record shows a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation of some section of this chapter; or

(c) For increasing the severity of the sentence unless the sentence prescribed for the offense is mandatory. [1961 c.454 §141]

398.278 Rehearings. (1) If the convening authority disapproves the findings and sentence of a court-martial the convening authority may, except where there is lack of sufficient evidence in the record to support the findings, order a rehearing. In such a case the convening authority shall state the reasons for disapproval. If the convening authority disapproves the findings and sentence and does not order a rehearing, the convening authority shall dismiss the charges.

(2) Each rehearing shall take place before a court-martial composed of members not members of the court-martial which first heard the case. Upon a rehearing the accused may not be tried for any offense of which the accused was found not guilty by the first court-martial, and no sentence in excess of or more severe than the original sentence may be imposed, unless the sentence is based upon a finding of guilty of an offense not considered upon the merits in the original proceedings, or unless the sentence prescribed for the offense is mandatory. [1961 c.454 §142]

398.280 Approval by convening authority. In acting on the findings and sentence of a court-martial, the convening authority may approve only such findings of guilty, and the sentence or such part or amount of the sentence, as the convening authority finds correct in law and fact and

as the convening authority in the discretion of the convening authority determines should be approved. Unless the convening authority indicated otherwise, approval of the sentence is approval of the findings and sentence. [1961 c.454 §143]

398.282 Review of records; disposition. (1) If the convening authority is the Governor, action by the Governor on the review of any record of trial is final.

(2) In all other cases not covered by subsection (1) of this section, if the sentence of a special court-martial as approved by the convening authority includes a dishonorable discharge, whether or not suspended, the entire record shall be sent to the appropriate judge advocate of the state force concerned to be reviewed in the same manner as a record of trial by general court-martial. The record and the opinion of the judge advocate shall then be sent to the State Judge Advocate for review.

(3) All other special and summary court-martial records shall be sent to the judge advocate of the appropriate force of the organized militia and shall be acted upon, transmitted, and disposed of as may be prescribed by the Governor.

(4) The State Judge Advocate shall review the record of trial in each case sent to the State Judge Advocate for review as provided under subsection (2) of this section. If the final action of the court-martial has resulted in an acquittal of all charges and specifications, the opinion of the State Judge Advocate shall be limited to questions of jurisdiction.

(5) The State Judge Advocate shall take final action in any case reviewable by the State Judge Advocate.

(6) In a case reviewable by the State Judge Advocate under this section, the State Judge Advocate may act only with respect to the findings and sentence as approved by the convening authority. The State Judge Advocate may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as the State Judge Advocate finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record the State Judge Advocate may weigh the evidence, judge the credibility of witnesses and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses. If the State Judge Advocate sets aside the findings and sentence, the State Judge Advocate may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If the State Judge Advocate sets aside the findings and sentence and does not order a rehearing, the State Judge Advocate shall order that the charges be dismissed.

(7) In a case reviewable by the State Judge Advocate under this section, the State Judge Advocate shall instruct the convening authority to act in accordance with the State Judge Advocate's decision on the review. If the State Judge Advocate has ordered a rehearing but the convening authority finds a rehearing impracticable, the State Judge Advocate may dismiss the charges.

(8) The State Judge Advocate may order one or more boards of review each composed of not less than three commissioned officers of the organized militia, each of whom must be a member of the bar of the highest court of the state. Each board of review shall review the record of any trial by special court-martial referred to it by the State Judge Advocate. Boards of review have the same authority on review as the State Judge Advocate has under this section. [1961 c.454 §144; 1985 c.682 §42]

398.284 Error of law; lesser included offense. (1) A finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused.

(2) Any reviewing authority with the power to approve or affirm a finding of guilty may approve or affirm so much of the finding as includes a lesser included offense. [1961 c.454 §145]

398.286 Review counsel. (1) Upon the final review of a sentence of a general court-martial, the accused has the right to be represented by counsel before the reviewing authority, before the staff judge advocate or legal officer, as the case may be, and before the State Judge Advocate.

(2) Upon the request of an accused entitled to be so represented, the State Judge Advocate shall appoint a lawyer who is a member of the organized militia and who has the qualifications prescribed in ORS 398.136, if available, to represent the accused before the reviewing authority, before the staff judge advocate or legal officer, as the case may be, and before the State Judge Advocate, in the review of cases specified in subsection (1) of this section.

(3) If provided by the accused, an accused entitled to be so represented may be represented by civilian counsel before the reviewing authority, before the staff judge advocate or legal officer, as the case may be, and before the State Judge Advocate. [1961 c.454 §146; 1985 c.682 §43]

398.288 Vacation of suspension. (1) Before the vacation of the suspension of a spe-

cial court-martial sentence which as approved includes a dishonorable discharge, or of any general court-martial sentence, the officer having court-martial jurisdiction over the probationer shall hold a hearing on the alleged violation of probation. The probationer shall be represented at the hearing by counsel if the probationer so desires.

(2) The record of the hearing and the recommendation of the officer having special court-martial jurisdiction shall be sent for action to the Governor in cases involving a general court-martial sentence and to the commanding officer of the force of the organized militia of which the probationer is a member in all other cases covered by subsection (1) of this section. If the Governor or commanding officer vacates the suspension, any unexecuted part of the sentence except a dismissal shall be executed.

(3) The suspension of any other sentence may be vacated by any authority competent to convene, for the command in which the accused is serving or assigned, a court of the kind that imposed the sentence. [1961 c.454 §147; 1985 c.682 §44]

398.290 Petition for new trial. At any time within two years after approval by the convening authority of a court-martial sentence which extends to dismissal or dishonorable discharge, the accused may petition the Governor for a new trial on ground of newly discovered evidence or fraud on the court-martial. [1961 c.454 §148; 1985 c.682 §45]

398.292 Remission and suspension. (1) A convening authority may remit or suspend any part or amount of the unexecuted part of any sentence, including all uncollected forfeitures.

(2) The Governor may, for good cause, substitute an administrative form of discharge for a discharge or dismissal executed in accordance with the sentence of a court-martial. [1961 c.454 §149]

398.294 Restoration. (1) Under such military department regulations as the Governor may prescribe, all rights, privileges and property affected by an executed part of a court-martial sentence which has been set aside or disapproved, except an executed dismissal or discharge, shall be restored unless a new trial or rehearing is ordered and such executed part is included in a sentence imposed upon the new trial or rehearing.

(2) If a previously executed sentence of dishonorable discharge is not imposed on a new trial, the Governor shall substitute therefor a form of discharge authorized for administrative issuance unless the accused is to serve out the remainder of the enlistment.

(3) If a previously executed sentence of dismissal is not imposed on a new trial, the Governor shall substitute therefor a form of discharge authorized for administrative issue, and the commissioned officer dismissed by that sentence may be reappointed by the Governor alone to such commissioned grade and with such rank as in the opinion of the Governor that former officer would have attained had the officer not been dismissed. The reappointment of such former officer may be made if a position vacancy is available under applicable tables of organization. All time between the dismissal and the reappointment shall be considered as service for all purposes. [1961 c.454 §150; 1985 c.682 §46]

398.296 Finality of proceedings, findings and sentences. The proceedings, findings and sentences of court-martial as reviewed and approved, as required by this chapter, and all dismissals and discharges carried into execution under sentences by court-martial following review and approval, as required by this chapter, are final and conclusive. Orders publishing the proceedings of court-martial and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies and officers of the state, subject only to action upon a petition for a new trial as provided in ORS 398.290. [1961 c.454 §151]

PUNITIVE PROVISIONS

398.302 When persons may be tried or punished. No person may be tried or punished for any offense provided for in ORS 398.304 to 398.388, unless it was committed while the person was in a duty status, or during a period of time in which the person was under lawful orders to be in a duty status. [1961 c.454 §152; 1975 c.719 §30]

398.304 Principals. Any person subject to this chapter who:

(1) Commits an offense punishable by this chapter, or aids, abets, counsels, commands or procures its commission; or

(2) Causes an act to be done which if directly performed by the person would be punishable by this chapter;

is a principal. [1961 c.454 §153]

398.306 Accessory after fact. Any person subject to this chapter who, knowing that an offense punishable by this chapter has been committed, receives, comforts or assists the offender in order to hinder or prevent the apprehension, trial or punishment of the offender shall be punished as a court-martial may direct. [1961 c.454 §154]

398.308 Conviction of lesser included offense. An accused may be found guilty of an offense necessarily included in the offense

charged or of an attempt to commit either the offense charged or an offense necessarily included therein. [1961 c.454 §155]

398.310 Attempts. (1) An act done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending even though failing to effect its commission, is an attempt to commit that offense.

(2) Any person subject to this chapter who attempts to commit any offense punishable by this chapter shall be punished as a court-martial may direct, unless otherwise specifically prescribed.

(3) Any person subject to this chapter may be convicted of an attempt to commit an offense although it appears on the trial that the offense was consummated. [1961 c.454 §156]

398.312 Conspiracy. Any person subject to this chapter who conspires with any other person to commit an offense under this chapter shall, if one or more of the conspirators does an act to effect the object of the conspiracy, be punished as a court-martial may direct. [1961 c.454 §157]

398.314 Solicitation. (1) Any person subject to this chapter who solicits or advises another or others to desert in violation of ORS 398.320 or mutiny in violation of ORS 398.338 shall be punished as a court-martial may direct.

(2) Any person subject to this chapter who solicits or advises another or others to commit an act of misbehavior before the enemy in violation of ORS 398.348 or sedition in violation of ORS 398.338 shall be punished as a court-martial may direct. [1961 c.454 §158]

398.316 Fraudulent enlistment, appointment or separation. Any person who:

(1) Procures the person's own enlistment or appointment in the organized militia by knowingly false representation or deliberate concealment as to qualifications for that enlistment or appointment and receives pay or allowances thereunder; or

(2) Procures the person's own separation from the organized militia by knowingly false representation or deliberate concealment as to eligibility for that separation;

shall be punished as a court-martial may direct. [1961 c.454 §159]

398.318 Unlawful enlistment, appointment or separation. Any person subject to this chapter who effects an enlistment or appointment in or a separation from the organized militia of any person who is known to the person to be ineligible for that enlistment, appointment or separation because it is prohibited by law, regulation or order shall be punished as a court-martial may direct. [1961 c.454 §160]

398.320 Desertion. (1) Any member of the organized militia who:

(a) Without authority goes or remains absent from the unit, organization or place of duty of the member with intent to remain away therefrom permanently;

(b) Quits the unit, organization or place of duty of the member with intent to avoid hazardous duty or to shirk important service; or

(c) Without being regularly separated from one of the forces of the organized militia enlists or accepts an appointment in the same or another one of the forces of the organized militia without fully disclosing the fact that the member has not been regularly separated;

is guilty of desertion.

(2) Any commissioned officer of the organized militia who, after tender of resignation and before notice of its acceptance, quits the post or proper duties of the officer without leave and with intent to remain away therefrom permanently is guilty of desertion.

(3) Any person found guilty of desertion or attempt to desert shall be punished as a court-martial may direct. [1961 c.454 §161]

398.322 Absence without leave. Any person subject to this chapter who, without authority:

(1) Fails to go to the appointed place of duty of the person at the time prescribed;

(2) Goes from that place; or

(3) Is absent from the unit, organization or place of duty at which the person is required to be at the time prescribed;

shall be punished as a court-martial may direct. [1961 c.454 §162]

398.324 Failure to make required move. Any person subject to this chapter who through neglect or design misses the movement of a ship, aircraft or unit with which the person is required in the course of duty to move shall be punished as a court-martial may direct. [1961 c.454 §163]

398.326 Contempt toward officials. Any commissioned officer subject to this chapter who uses contemptuous words against the President, the Governor or the legislature of this state, or the Governor or legislature of any state, territory, commonwealth or possession wherein that officer may be serving, shall be punished as a court-martial may direct. [1961 c.454 §164; 1985 c.682 §47]

398.328 Disrespect toward superior commissioned officer. Any person subject to this chapter who behaves with disrespect

toward a superior commissioned officer shall be punished as a court-martial may direct. [1961 c.454 §165]

398.330 Assaulting or willfully disobeying superior commissioned officer. Any person subject to this chapter who:

(1) Strikes a superior commissioned officer or draws or lifts up any weapon or offers any violence against the officer while the officer is in the execution of office; or

(2) Willfully disobeys a lawful command of a superior commissioned officer;

shall be punished as a court-martial may direct. [1961 c.454 §166]

398.332 Insubordinate conduct toward warrant officer or noncommissioned officer. Any warrant officer or enlisted member who:

(1) Strikes or assaults a warrant officer or noncommissioned officer while that officer is in the execution of office;

(2) Willfully disobeys the lawful order of a warrant officer or noncommissioned officer; or

(3) Treats with contempt or is disrespectful in language or deportment toward a warrant officer or noncommissioned officer while that officer is in the execution of office;

shall be punished as a court-martial may direct. [1961 c.454 §167]

398.334 Failure to obey order or regulation. Any person subject to this chapter who:

(1) Violates or fails to obey any lawful general order or regulation;

(2) Having knowledge of any other lawful order issued by a member of the organized militia, which it is the duty of the person to obey, fails to obey the order; or

(3) Is derelict in the performance of duties;

shall be punished as a court-martial may direct. [1961 c.454 §168]

398.336 Cruelty and maltreatment. Any person subject to this chapter who is guilty of cruelty toward, or oppression or maltreatment of, any person subject to the orders of the person shall be punished as a court-martial may direct. [1961 c.454 §169]

398.338 Mutiny or sedition. (1) Any person subject to this chapter who:

(a) With intent to usurp or override lawful military authority refuses, in concert with another, to obey orders or otherwise do the person's duty or creates any violence or disturbance is guilty of mutiny;

(b) With intent to cause the overthrow or destruction of lawful civil authority, creates, in concert with any other person, revolt, violence or other disturbance against that authority is guilty of sedition;

(c) Fails to do the utmost to prevent and suppress a mutiny or sedition being committed in the presence of the person, or fails to take all reasonable means to inform a superior commissioned officer or commanding officer of a mutiny or sedition which the person knows or has reason to believe is taking place, is guilty of a failure to suppress or report a mutiny or sedition.

(2) A person who is found guilty of attempted mutiny, mutiny, sedition or failure to suppress or report a mutiny or sedition, shall be punished as a court-martial may direct. [1961 c.454 §170]

398.340 Resistance, breach of arrest and escape. Any person subject to this chapter who resists apprehension or breaks arrest or who escapes from custody or confinement shall be punished as a court-martial may direct. [1961 c.454 §171; 1985 c.682 §48]

398.342 Releasing prisoner without proper authority. Any person subject to this chapter who, without proper authority, releases any prisoner committed to the charge of the person, or who through neglect or design suffers any such prisoner to escape, shall be punished as a court-martial may direct, whether or not the prisoner was committed in strict compliance with law. [1961 c.454 §172]

398.344 Unlawful detention. Any person subject to this chapter who, except as provided by law or regulation, apprehends, arrests or confines any person shall be punished as a court-martial may direct. [1961 c.454 §173]

398.346 Noncompliance with procedural rules. Any person subject to this chapter who:

(1) Is responsible for unnecessary delay in the disposition of any case of a person accused of an offense under this chapter; or

(2) Knowingly and intentionally fails to enforce or comply with any provision of this chapter regulating the proceedings before, during or after trial of an accused;

shall be punished as a court-martial may direct. [1961 c.454 §174]

398.348 Misbehavior before enemy. Any person subject to this chapter who before or in the presence of the enemy:

(1) Runs away;

(2) Shamefully abandons, surrenders or delivers up any command, unit, place or mil-

itary property which it is the duty of the person to defend;

(3) Through disobedience, neglect or intentional misconduct endangers the safety of any such command, unit, place or military property;

(4) Casts away arms or ammunition;

(5) Is guilty of cowardly conduct;

(6) Quits a place of duty to plunder or pillage;

(7) Causes false alarms in any command, unit or place under control of the Armed Forces of the United States or the organized militia;.

(8) Willfully fails to do the utmost to encounter, engage, capture or destroy any enemy troops, combatants, vessels, aircraft or any other thing, which it is the duty of the person so to encounter, engage, capture or destroy; or

(9) Does not afford all practicable relief and assistance to any troops, combatants, vessels or aircraft of the Armed Forces belonging to the United States or their allies, to this state or to any other state, when engaged in battle;

shall be punished as a court-martial may direct. [1961 c.454 §175]

398.350 Subordinate compelling surrender. Any person subject to this chapter who compels or attempts to compel the commander of any force of the organized militia of this state or of any other state to give it up to an enemy or to abandon it, or who strikes the colors or flag to any enemy without proper authority, shall be punished as a court-martial may direct. [1961 c.454 §176]

398.352 Improper use of countersign. Any person subject to this chapter who in time of war discloses the parole or countersign to any person not entitled to receive it, or who gives to another who is entitled to receive and use the parole or countersign a different parole or countersign from that which, to the knowledge of the person, the person was authorized and required to give, shall be punished as a court-martial may direct. [1961 c.454 §177]

398.354 Forcing safeguard. Any person subject to this chapter who forces a safeguard shall be punished as a court-martial may direct. [1961 c.454 §178]

398.356 Captured or abandoned property. (1) All persons subject to this chapter shall secure all public property taken from the enemy for the service of the United States, and shall give notice and turn over to the proper authority without delay all captured or abandoned property in their possession, custody or control.

(2) Any person subject to this chapter who:

(a) Fails to carry out the duties prescribed in subsection (1) of this section;

(b) Buys, sells, trades or in any way deals in or disposes of, captured or abandoned property, whereby the person receives or expects any profit, benefit or advantage to self or another directly or indirectly connected with self; or

(c) Engages in looting or pillaging;

shall be punished as a court-martial may direct. [1961 c.454 §179]

398.358 Aiding enemy. Any person subject to this chapter who:

(1) Aids, or attempts to aid, the enemy with arms, ammunition, supplies, money or other things; or

(2) Without proper authority, knowingly harbors or protects or gives intelligence to, or communicates or corresponds with or holds any intercourse with the enemy, either directly or indirectly;

shall be punished as a court-martial may direct. [1961 c.454 §180]

398.360 Misconduct as prisoner. Any person subject to this chapter who, while in the hands of the enemy in time of war:

(1) For the purpose of securing favorable treatment by the captors of the person acts without proper authority in a manner contrary to law, custom or regulation, to the detriment of others of whatever nationality held by the enemy as civilian or military prisoners; or

(2) While in a position of authority over such persons maltreats them without justifiable cause;

shall be punished as a court-martial may direct. [1961 c.454 §181]

398.362 False official statements. Any person subject to this chapter, who, with intent to deceive, signs any false record, return, regulation, order or other official document, knowing it to be false, or makes any other false official statement knowing it to be false, shall be punished as a court-martial may direct. [1961 c.454 §182]

398.366 Loss, damage, destruction or wrongful disposition of military property. Any person subject to this chapter who, without proper authority:

(1) Sells or otherwise disposes of;

(2) Willfully or through neglect damages, destroys or loses; or

(3) Willfully or through neglect suffers to be lost, damaged, destroyed, sold or wrongfully disposed of;

any military property of the United States or of the state, shall be punished as a court-martial may direct. [1961 c.454 §183]

398.368 Waste, spoilage or destruction of property other than military. Any person subject to this chapter who, while in a duty status, willfully or recklessly wastes, spoils or otherwise willfully and wrongfully destroys or damages any property other than military property of the United States or of the state shall be punished as a court-martial may direct. [1961 c.454 §184]

398.370 Improper hazarding of vessel. (1) Any person subject to this chapter who willfully and wrongfully hazards or suffers to be hazarded any vessel of the Armed Forces of the United States or of the organized militia shall be punished as a court-martial may direct.

(2) Any person subject to this chapter who negligently hazards or suffers to be hazarded any vessel of the Armed Forces of the United States or of the organized militia shall be punished as a court-martial may direct. [1961 c.454 §185]

398.372 Driving while drunk. Any person subject to this chapter who operates any vehicle while drunk, or in a reckless or wanton manner, shall be punished as a court-martial may direct. [1961 c.454 §186; 1975 c.719 §31; 1979 c.744 §18; 1985 c.682 §49]

398.374 Drunk on duty. Any person subject to this chapter other than a sentinel or lookout who is found drunk on duty shall be punished as a court-martial may direct. [1961 c.454 §187; 1985 c.682 §50]

398.375 Sentinel or lookout drunk or sleeping on post; leaving before relief. Any sentinel or lookout who is found drunk or sleeping upon post, or who leaves it before being regularly relieved, shall be punished as a court-martial may direct. [1985 c.682 §4]

398.376 [1961 c.454 §188; repealed by 1975 c.719 §34]

398.378 Malingering. Any person subject to this chapter who for the purpose of avoiding work duty or service in the organized militia:

(1) Feigns illness, physical disablement, mental lapse or derangement; or

(2) Intentionally inflicts self-injury;

shall be punished as a court-martial may direct. [1961 c.454 §189]

398.380 Riot or breach of peace. Any person subject to this chapter who causes or participates in any riot or breach of the peace shall be punished as a court-martial may direct. [1961 c.454 §190]

398.382 [1961 c.454 §191; repealed by 1975 c.719 §34]

398.384 Stealing goods. (1) Any person subject to this chapter who wrongfully takes, obtains, or withholds, by any means, from the possession of the owner or of any other person any money, personal property, or article of value of any kind:

(a) With intent permanently to deprive or defraud another person of the use and benefit of property or to appropriate it for personal use or to the use of any person other than the owner, steals that property and is guilty of larceny; or

(b) With intent temporarily to deprive or defraud another person of the use and benefit of property or to appropriate it for personal use or to the use of any person other than the owner, is guilty of wrongful appropriation.

(2) Any person found guilty of larceny or wrongful appropriation shall be punished as a court-martial may direct. [1961 c.454 §194; 1975 c.719 §32; 1985 c.682 §51]

398.386 Perjury. Any person subject to this chapter who in a judicial proceeding or in a course of justice conducted under this chapter willfully and corruptly gives, upon a lawful oath or in any form allowed by law to be substituted for an oath, any false testimony material to the issue or matter of inquiry is guilty of perjury and shall be punished as a court-martial may direct. [1961 c.454 §192]

398.388 Frauds against government. Any person subject to this chapter:

(1) Who, knowing it to be false or fraudulent:

(a) Makes any claim against the United States, the state or any officer thereof; or

(b) Presents to any person in the civil or military service thereof, for approval or payment, any claim against the United States, the state, or any officer thereof;

(2) Who, for the purpose of obtaining the approval, allowance, or payment of any claim against the United States, the state or any officer thereof:

(a) Makes or uses any writing or other paper knowing it to contain any false or fraudulent statements;

(b) Makes any oath to any fact or to any writing or other paper knowing the oath to be false; or

(c) Forges or counterfeits any signature upon any writing or other paper, or uses any such signature knowing it to be forged or counterfeited;

(3) Who, having charge, possession, custody or control of any money or other property of the United States or the state, furnished or intended for the Armed Forces of the United States or the organized militia or any force thereof, knowingly delivers to

any person having authority to receive it, any amount thereof less than that for which the person receives a certificate or receipt; or

(4) Who, being authorized to make or deliver any paper certifying the receipt of any property of the United States or the state, furnished or intended for the Armed Forces of the United States or the organized militia or any force thereof, makes or delivers to any person such writing without having full knowledge of the truth of the statements therein contained and with intent to defraud the United States or the state;

shall upon conviction, be punished as a court-martial may direct. [1961 c.454 §193]

398.390 [1961 c.454 §195; repealed by 1975 c.719 §34]

398.391 Controlled substances. (1) Any person subject to this chapter who wrongfully uses, possesses, manufactures, distributes or introduces into an installation, vessel, vehicle or aircraft used by or under the control of the organized militia a substance described in subsection (2) of this section shall be punished as a court-martial may direct.

(2) The substances referred to in subsection (1) of this section are the following:

(a) Opium, heroin, cocaine, amphetamine, lysergic acid diethylamide, methamphetamine, phencyclidine, barbituric acid and marijuana and any compound or derivative of any such substance.

(b) Any other substance not specified in paragraph (a) of this subsection that is listed in schedules I to V of section 202 of the Controlled Substances Act (21 U.S.C. 812), as modified under ORS 475.035. [1985 c.682 §3]

398.392 [1961 c.454 §196; 1971 c.743 §363; repealed by 1975 c.719 §34]

398.393 Dueling; failure to report dueling. Any person subject to this chapter who fights or promotes or is concerned in or connives at fighting a duel or who, having knowledge of a challenge sent or about to be sent, fails to report the fact promptly to the proper authority, shall be punished as a court-martial may direct. [1985 c.682 §5]

398.394 Provoking or reproachful words or gestures. Any person subject to this chapter who uses provoking or reproachful words or gestures toward any other person subject to this chapter shall be punished as a court-martial may direct. [1985 c.682 §6]

398.395 Insufficient funds or credit. (1) Any person subject to this chapter who makes, draws, utters or delivers any check, draft or order for the payment of money upon any bank or other depository, knowing at the time that the maker or drawer has not or will not have sufficient funds in, or credit with, the bank or other depository for the payment of that check, draft or order in full upon its presentment shall be punished as a court-martial may direct when the person makes, draws or utters the check, draft or order:

(a) For the procurement of any article or thing of value, with intent to defraud; or

(b) For the payment of any past due obligation or for any other purpose, with intent to deceive.

(2) The making, drawing, uttering or delivering by a maker or drawer of a check, draft or order for which payment is refused by the drawee because of insufficient funds of the maker or drawer in the drawee's possession or control is prima facie evidence of an intent to defraud or deceive and of a knowledge of insufficient funds in, or credit with, that bank or other depository unless the maker or drawer pays the holder the amount due within five days after receiving notice, orally or in writing, that the check, draft or order was not paid on presentment.

(3) As used in this section, "credit" means an arrangement or understanding, express or implied, with the bank or other depository for the payment of that check, draft or order. [1985 c.682 §7]

398.397 Unlawful force or violence. Any person subject to this chapter who attempts or offers with unlawful force or violence to do bodily harm to another person, whether or not the attempt or offer is consummated is guilty of assault and shall be punished as a court-martial may direct. [1985 c.682 §8]

398.399 Conduct unbecoming officer. Any commissioned officer who is convicted of conduct unbecoming an officer shall be punished as a court-martial may direct. [1985 c.682 §9]

398.400 Conduct to prejudice of good order and discipline; limits to jurisdiction of court-martial. Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the organized militia, of which persons subject to this code may be guilty, shall be taken cognizance of by a general, special or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court. However, cognizance shall not be taken of, and jurisdiction may not extend to, the crimes of murder, manslaughter, rape, robbery, maiming, sodomy, arson, extortion, aggravated assault, burglary or housebreaking, jurisdiction of which is reserved to civilian criminal courts. [1985 c.682 §10]

MISCELLANEOUS PROVISIONS

398.402 Courts of inquiry. (1) Courts of inquiry to investigate any matter may be convened by the Governor or by any other person designated by the Governor for that purpose, whether or not the persons involved have requested such an inquiry.

(2) A court of inquiry consists of three or more commissioned officers. For each court of inquiry the convening authority shall also appoint counsel for the court.

(3) Any person subject to this chapter whose conduct is subject to inquiry shall be designated as a party. Any person subject to this chapter or employed in the Oregon Military Department, who has a direct interest in the subject of inquiry has the right to be designated as a party upon request of the court. Any person designated as a party shall be given due notice and has the right to be present, to be represented by counsel, to cross-examine witnesses and to introduce evidence.

(4) Members of a court of inquiry may be challenged by a party, but only for cause stated to the court.

(5) The members, counsel, the reporter and interpreters of courts of inquiry shall take an oath of affirmation to faithfully perform their duties.

(6) Witnesses may be summoned to appear and testify and be examined before courts of inquiry, as provided for courts-martial.

(7) Courts of inquiry shall make findings of fact but may not express opinions or make recommendations unless required to do so by the convening authority.

(8) Each court of inquiry shall keep a record of its proceedings, which shall be authenticated by the signatures of the president and counsel for the court and forwarded to the convening authority. If the record cannot be authenticated by the president, it shall be signed by a member in lieu of the president. If the record cannot be authenticated by the counsel for the court, it shall be signed by a member in lieu of the counsel. [1961 c.454 §197; 1989 c.360 §10]

398.404 Redress of injuries to property. (1) Whenever complaint is made to any commanding officer that willful damage has been done to the property of any person or that the property of any person has been wrongfully taken by members of the organized militia, the officer may, subject to such military department regulations as the Governor may prescribe, convene a board to investigate the complaint. The board shall consist of from one to three officers and, for the purpose of that investigation, it has power to summon witnesses and examine them upon oath or affirmation, to receive depositions or other documentary evidence, and to assess the damages sustained against the responsible parties. The assessment of damages made by the board is subject to the approval of the commanding officer, and in the amount approved by the officer shall be charged against the pay of the offenders. The order of the commanding officer directing charges herein authorized is conclusive, except as provided in subsection (3) of this section, on any disbursing officer for the payment by the disbursing officer to the injured parties of the damages so assessed and approved.

(2) If the offenders cannot be ascertained, but the organization or detachment to which they belong is known, charges totaling the amount of damages assessed and approved may be paid to the injured parties from the military fund of the unit or units of the organized militia to which such offenders belonged.

(3) Any person subject to this chapter who is accused of causing willful damage to property has the right to be represented by counsel, to summon witnesses in behalf of the person and to cross-examine those appearing against the person. The person has the right to appeal to the next higher commander. [1961 c.454 §201]

398.406 Execution of process and sentence. In the organized militia not in federal service, the processes and sentences of its courts-martial shall be executed by the civil officers prescribed by the laws of the state. Where no provision is made for executing those processes and sentences, the process or sentence shall be executed by a United States Marshal or deputy marshal, who shall make a return to the military officer issuing the process or the court imposing the sentence, pursuant to section 333 of title 32, United States Code. [1961 c.454 §202]

398.408 Process of military courts. (1) Military courts may issue all process necessary to carry into effect the powers vested in those courts. Such courts may issue subpoenas and subpoenas duces tecum and enforce by attachment attendance of witnesses and production of books and records, when the courts are sitting within the state and the witnesses, books and records sought are also so located.

(2) Such process may be issued by summary courts-martial, provost courts or the president or military judge of other military courts and may be directed to and may be executed by the marshals of the military court or any peace officer and shall be in

such form as may be prescribed by military department regulations issued under this chapter.

(3) All officers to whom such process may be so directed shall execute them and make return of their acts thereunder according to the requirements of those documents. Except as otherwise specifically provided in this chapter, no such officer may demand or require payment of any fee or charge for receiving, executing or returning such a process or for any service in connection therewith. [1961 c.454 §203; 1975 c.719 §33; 1981 c.178 §13]

398.410 Payment of fines and disposition thereof. Fines may be paid to a military court or to an officer executing its process. The amount of such a fine may be noted upon any state roll or account for pay of the delinquent and deducted from any pay or allowance due or thereafter to become due the delinquent, until the fine is liquidated. Any sum so deducted shall be turned in to the military court which imposed the fine and shall be paid over by the officer receiving it in like manner as provided for other fines and moneys collected under a sentence of a summary court-martial. Notwithstanding any other law, a fine or penalty imposed by a military court upon an officer or enlisted person shall be paid by the officer collecting it within 30 days to the State Treasurer and shall be deposited in the General Fund in the State Treasury, to be available for general governmental expenses. [1961 c.454 §204; 1963 c.169 §7]

398.412 Immunity for action of military courts. No action or proceeding may be prosecuted against the convening authority or a member of a military court or officer or person acting under its authority or reviewing its proceedings because of the approval, imposition, or execution of any sentence or the imposition or collection of a fine or penalty, or the execution of any process of a military court. [1961 c.454 §205; 1981 c.178 §14]

398.414 Presumption of jurisdiction. The jurisdiction of the military courts and boards established by this chapter shall be presumed and the burden of proof rests on any person seeking to oust those courts or boards of jurisdiction in any action or proceeding. [1961 c.454 §206]

398.416 Delegation of authority by Governor. The Governor may delegate any authority vested in the Governor under this chapter, and may provide for the subdelegation of any such authority, except with respect to the power given the Governor by ORS 398.112 and 398.126. [1961 c.454 §207; 1985 c.682 §52]

398.418 Payment of expenses. The Adjutant General shall have authority to pay all expenses incurred in the administration of state military justice from any fund appropriated to the Oregon Military Department. [1985 c.682 §12; 1989 c.360 §11]