

1977 S.C. Op. Atty. Gen. 135 (S.C.A.G.), 1977 S.C. Op. Atty. Gen. No. 77-168, 1977 WL 24510

Office of the Attorney General

State of South Carolina

Opinion No. 77-168

June 1, 1977

***1** A probationary sentence may be imposed by the reviewing authority but not by the courts-martial.

TO: Army Executive Officer

QUESTION: You have asked whether a court-martial convened under the Military Code of South Carolina can impose a probationary sentence?

CITATION OF AUTHORITIES:

Sections 44–3, South Carolina Code of Laws (1962), as amended;

Section 44–183, South Carolina Code of Laws (1962), as amended;

Section 44–203, South Carolina Code of Laws (1962), as amended;

[32 U. S. C. § 326 \(1956\)](#);

32 U. S. C. §§ 871, 872, 874 (1956) (Article 71, 72, 74, Uniform Code of Military Justice);

Army Regulation 27–10, Paragraph 2–36.

DISCUSSION:

Under the Military Code of South Carolina there are three classes of courts-martial: general court-martial; special court-martial; and summary court-martial. Section 44–183, South Carolina Code of Laws (1962), as amended, provides that courts-martial ‘shall be respectively constituted and guided in general procedure as similar courts-martial provided for by laws and regulations of the Armed Forces of the United States.’ This provision is consistent with Section 44–3, South Carolina Code of Laws (1962), as amended, which provides:

The Governor shall cause the National Guard of South Carolina always to conform to all such Federal laws and regulations as may from time to time be operative and applicable except where in conflicts with the laws of this State.

Therefore, it is necessary to look at federal law to determine if a probationary sentence may be imposed.

In this regard, [32 U. S. C. § 326](#) provides that courts-martial of the National Guard not in federal service shall be constituted similar to the courts of the Army and Air Force and shall have ‘the jurisdiction and powers, except as to punishments, and shall follow the forms and procedures, provided for those courts.’ Under 32 U. S. C. §§ 871–872 (Articles 71 and 72, U.C.M.J.), the convening authority may suspend all or a portion of the sentence imposed by court-martial and place the individual soldier on probation. (32 U. S. C. § 872 (Article 72, U.C.M.J.) makes provision for vacating the suspension upon a violation of probation. As to the procedure for vacating a suspended sentence, refer to paragraph 2–36, Army Regulation 27–10). Therefore, while the

courts-martial itself cannot impose a probationary sentence, under the federal law the convening authority can. The conclusion that a similar authority exists under South Carolina law is strengthened by the provisions of Section 44-203, South Carolina Code of Laws (1962), as amended, which authorizes reviewing authority (i.e. the appointing authority) to 'approve the sentence, reverse a finding of guilty or mitigate the terms of a sentence . . .'

CONCLUSION:

A probationary sentence may be imposed by the reviewing authority but not by the court-martial.

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