

VIRGINIA ACTS OF ASSEMBLY -- 2011 SESSION

CHAPTER 586

An Act to amend and reenact §§ 2.2-2666.1, 9.1-400, 9.1-801, 23-7.4:1, 44-1, 44-2, 44-5, 44-6, 44-16, 44-19, 44-21, 44-27, 44-32.1, 44-36, 44-40.1, 44-42, 44-44, 44-45, 44-46.1, 44-47, 44-48, 44-54.4, 44-54.6, 44-54.8 through 44-54.12, 44-75.2, 44-80 through 44-83, 44-88, 44-93.2, 44-93.3, 44-93.4, 44-96, 44-97.1 through 44-100, 44-102, 44-102.1, 44-104, 44-110, 44-115, 44-120, 46.2-743, 65.2-101, and 65.2-103 of the Code of Virginia and to repeal §§ 44-43, 44-52, and 44-116 of the Code of Virginia, relating to military laws of Virginia.

[S 1334]

Approved March 25, 2011

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-2666.1, 9.1-400, 9.1-801, 23-7.4:1, 44-1, 44-2, 44-5, 44-6, 44-16, 44-19, 44-21, 44-27, 44-32.1, 44-36, 44-40.1, 44-42, 44-44, 44-45, 44-46.1, 44-47, 44-48, 44-54.4, 44-54.6, 44-54.8 through 44-54.12, 44-75.2, 44-80 through 44-83, 44-88, 44-93.2, 44-93.3, 44-93.4, 44-96, 44-97.1 through 44-100, 44-102, 44-102.1, 44-104, 44-110, 44-115, 44-120, 46.2-743, 65.2-101, and 65.2-103 of the Code of Virginia are amended and reenacted as follows:

§ 2.2-2666.1. Council created; composition; compensation and expenses; meetings; chairman's executive summary.

A. The Virginia Military Advisory Council (the Council) is hereby created as an advisory council, within the meaning of § 2.2-2100, in the executive branch of state government, to maintain a cooperative and constructive relationship between the Commonwealth and the leadership of the several Armed Forces of the United States and the military commanders of such Armed Forces stationed in the Commonwealth, and to encourage regular communication on continued military facility viability, the exploration of privatization opportunities and issues affecting preparedness, public safety and security.

B. The Council shall be composed of 27 members as follows: the Lieutenant Governor, the Attorney General, the Secretary of Public Safety, the Adjutant General, the Chairman of the House Committee on Militia, Police and Public Safety and the Chairman of the Senate Committee on General Laws, or their designees; four members, one of whom shall be a representative of the Virginia State Defense Force, to be appointed by and serve at the pleasure of the Governor; and 17 members, including representatives of major military commands and installations located in the Commonwealth or in jurisdictions adjacent thereto, who shall be appointed by the Governor after consideration of the persons nominated by the Secretaries of the Armed Forces of the United States and who shall serve at the pleasure of the Governor. However, any legislative member who is appointed by the Governor shall serve a term coincident with his term of office. The provisions of § 49-1 shall not apply to federal civilian officials and military personnel appointed to the Council.

C. Legislative members of the Council shall receive such compensation as provided in § 30-19.12, and nonlegislative members shall receive such compensation as provided in § 2.2-2813 for the performance of their duties. All members shall be reimbursed for all reasonable and necessary expenses incurred in the performance of their duties as provided in §§ 2.2-2813 and 2.2-2825. Funding for the costs of compensation and expenses of the members shall be provided by the Department of Military Affairs.

D. The Council shall elect a chairman from among its membership. The vice-chairman of the Council shall be the Assistant to the Governor for Commonwealth Preparedness. The meetings of the Council shall be held at the call of the chairman or whenever the majority of members so request. A majority of the members shall constitute a quorum.

E. The chairman of the Council shall submit to the Governor and the General Assembly an annual executive summary of the interim activity and work of the Council no later than the first day of each regular session of the General Assembly. The executive summary shall be submitted as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents and reports and shall be posted on the General Assembly's website.

§ 9.1-400. Title of chapter; definitions.

A. This chapter shall be known and designated as the Line of Duty Act.

B. As used in this chapter, unless the context requires a different meaning:

"Beneficiary" means the spouse of a deceased person and such persons as are entitled to take under the will of a deceased person if testate, or as his heirs at law if intestate.

"Deceased person" means any individual whose death occurs on or after April 8, 1972, as the direct or proximate result of the performance of his duty, including the presumptions under §§ 27-40.1, 27-40.2, 51.1-813, and 65.2-402, as a law-enforcement officer of the Commonwealth or any of its political subdivisions; a correctional officer as defined in § 53.1-1; a jail officer; a regional jail or jail

farm superintendent; a sheriff, deputy sheriff, or city sergeant or deputy city sergeant of the City of Richmond; a police chaplain; a member of any fire company or department or rescue squad that has been recognized by an ordinance or a resolution of the governing body of any county, city or town of the Commonwealth as an integral part of the official safety program of such county, city or town; a member of the Virginia National Guard or the Virginia State Defense Force while such member is serving in the Virginia National Guard or the Virginia State Defense Force on official state duty or federal duty under Title 32 of the United States Code; any special agent of the Virginia Alcoholic Beverage Control Board; any regular or special conservation police officer who receives compensation from a county, city or town or from the Commonwealth appointed pursuant to the provisions of § 29.1-200; any commissioned forest warden appointed under the provisions of § 10.1-1135; any member or employee of the Virginia Marine Resources Commission granted the power of arrest pursuant to § 28.2-900; any Department of Emergency Management hazardous materials officer; any other employee of the Department of Emergency Management who is performing official duties of the agency, when those duties are related to a major disaster or emergency, as defined in § 44-146.16, that has been or is later declared to exist under the authority of the Governor in accordance with § 44-146.28; any employee of any county, city, or town performing official emergency management or emergency services duties in cooperation with the Department of Emergency Management, when those duties are related to a major disaster or emergency, as defined in § 44-146.16, that has been or is later declared to exist under the authority of the Governor in accordance with § 44-146.28 or a local emergency, as defined in § 44-146.16, declared by a local governing body; any nonfirefighter regional hazardous materials emergency response team member; or any conservation officer of the Department of Conservation and Recreation commissioned pursuant to § 10.1-115.

"Disabled person" means any individual who, as the direct or proximate result of the performance of his duty in any position listed in the definition of deceased person in this section, has become mentally or physically incapacitated so as to prevent the further performance of duty where such incapacity is likely to be permanent. The term shall also include any state employee included in the definition of a deceased person who was disabled on or after January 1, 1966.

"Line of duty" means any action the deceased or disabled person was obligated or authorized to perform by rule, regulation, condition of employment or service, or law.

§ 9.1-801. Public safety officer defined.

As used in this chapter, the term "public safety officer" includes a law-enforcement officer of this Commonwealth or any of its political subdivisions; a correctional officer as defined in § 53.1-1; a correctional officer employed at a juvenile correctional facility as the term is defined in § 66-25.3; a jail officer; a regional jail or jail farm superintendent; a member of any fire company or department or rescue squad that has been recognized by an ordinance or resolution of the governing body of any county, city or town of this Commonwealth as an integral part of the official safety program of such county, city or town; an arson investigator; a member of the Virginia National Guard or the Virginia State Defense Force while such a member is serving in the Virginia National Guard or the Virginia State Defense Force on official state duty or federal duty under Title 32 of the United States Code; any special agent of the Virginia Alcoholic Beverage Control Board; any police agent appointed under the provisions of § 56-353; any regular or special conservation police officer who receives compensation from a county, city or town or from the Commonwealth appointed pursuant to § 29.1-200; any commissioned forest warden appointed pursuant to § 10.1-1135; any member or employee of the Virginia Marine Resources Commission granted the power to arrest pursuant to § 28.2-900; any Department of Emergency Management hazardous materials officer; any nonfirefighter regional hazardous materials emergency response team member; any investigator who is a full-time sworn member of the security division of the State Lottery Department; any full-time sworn member of the enforcement division of the Department of Motor Vehicles meeting the Department of Criminal Justice Services qualifications, when fulfilling duties pursuant to § 46.2-217; any campus police officer appointed under the provisions of Chapter 17 (§ 23-232 et seq.) of Title 23; and any conservation officer of the Department of Conservation and Recreation commissioned pursuant to § 10.1-115.

§ 23-7.4:1. Waiver of tuition and certain charges and fees for eligible children and spouses of certain military service members, eligible children and spouses of certain public safety personnel, and certain foreign students.

A. There is hereby established the Virginia Military Survivors and Dependents Education Program. Qualified survivors and dependents of military service members, who have been admitted to any public institution of higher education or other public accredited postsecondary institution granting a degree, diploma, or certificate in the Commonwealth of Virginia, upon certification to the Commissioner of the Department of Veterans Services of eligibility under this subsection, shall be admitted free of tuition and all required fees.

The Virginia Military Survivors and Dependents Education Program shall be implemented pursuant to the following:

1. For the purposes of this subsection, "qualified survivors and dependents" means the spouse or a child between the ages of 16 and 29 of a military service member who, while serving as an active duty

member in the United States Armed Forces, United States Armed Forces Reserves, the Virginia National Guard, or Virginia National Guard Reserve, during military operations against terrorism, on a peacekeeping mission, as a result of a terrorist act, or in any armed conflict subsequent to December 6, 1941, was killed or is missing in action or is a prisoner of war, or of a veteran who, due to such service, has been rated by the United States Department of Veterans Affairs as totally and permanently disabled or at least 90% disabled, and has been discharged or released under conditions other than dishonorable. However, the Commissioner of the Department of Veterans Services may certify dependents above the age of 29 in those cases in which extenuating circumstances prevented the dependent child from using his benefits before the age of 30.

2. Such qualified survivors and dependents shall be eligible for the benefits conferred by this subsection if the military service member who was killed, is missing in action, is a prisoner of war, or is disabled (i) was a bona fide domiciliary of Virginia at the time of entering such active military service or called to active duty as a member of the Armed Forces Reserves or Virginia National Guard Reserve; (ii) is and has been a bona fide domiciliary of Virginia for at least five years immediately prior to the date on which the admission application was submitted by or on behalf of such qualified survivor or dependent for admission to such institution of higher education or other public accredited postsecondary institution; (iii) if deceased, was a bona fide domiciliary of Virginia on the date of his death and had been a bona fide domiciliary of Virginia for at least five years immediately prior to his death; (iv) in the case of a qualified child, is deceased and the surviving parent had been, at some time previous to marrying the deceased parent, a bona fide domiciliary of Virginia for at least five years or is and has been a bona fide domiciliary of Virginia for at least five years immediately prior to the date on which the admission application was submitted by or on behalf of such child; or (v) in the case of a qualified spouse, is deceased and the surviving spouse had been, at some time previous to marrying the deceased spouse, a bona fide domiciliary of Virginia for at least five years or is and has been a bona fide domiciliary of Virginia for at least five years prior to the date on which the admission application was submitted by such qualified spouse.

3. From such funds as may be appropriated and from such gifts, bequests and any gifts, grants, or donations from public or private sources, there is hereby established the Virginia Military Survivors and Dependents Education Fund for the sole purpose of providing financial assistance for board and room charges, books and supplies, and other expenses at any public institution of higher education or other public accredited postsecondary institution granting a degree, diploma, or certificate in the Commonwealth of Virginia for the use and benefit of qualified survivors and dependents.

Each year, from the funds available in the Virginia Military Survivors and Dependents Education Fund, the State Council of Higher Education for Virginia and its member institutions shall determine the amount and the manner in which financial assistance shall be made available to beneficiaries and shall make that information available to the Commissioner of the Department of Veterans Services for distribution.

The State Council of Higher Education for Virginia shall be responsible for disbursing to the institutions the funds appropriated or otherwise made available by the Commonwealth of Virginia to support the Virginia Military Survivors and Dependents Education Fund and shall report to the Commissioner of the Department of Veterans Services the beneficiaries' completion rate.

The maximum amount to be expended for each such survivor or dependent pursuant to this subsection shall not exceed, when combined with any other form of scholarship, grant, or waiver, the actual costs related to the survivor's or dependent's educational expenses allowed under this subsection.

4. The Commissioner of the Department of Veterans Services shall designate a senior-level official who shall be responsible for developing and implementing the agency's strategy for disseminating information about the Military Survivors and Dependents Education Program to those spouses and dependents who may qualify. The Department of Veterans Services shall coordinate with the United States Department of Veterans Affairs to identify veterans and qualified survivors and dependents. The Commissioner of the Department of Veterans Services shall report annually to the Governor and the General Assembly as to the agency's policies and strategies relating to dissemination of information about the Program. The report shall also include the number of current beneficiaries, the educational institutions attended by beneficiaries, and the completion rate of the beneficiaries.

B. The surviving spouse and any child between the ages of 16 and 25 whose parent or whose spouse has been killed in the line of duty while employed or serving as a law-enforcement officer, sworn law-enforcement officer, firefighter, special forest warden pursuant to § 10.1-1135, member of a rescue squad, special agent of the Department of Alcoholic Beverage Control, state correctional, regional or local jail officer, regional jail or jail farm superintendent, sheriff, or deputy sheriff, member of the Virginia National Guard while serving on official state duty or federal duty under Title 32 of the United States Code, or member of the Virginia State Defense Force while serving on official state duty, and any person whose spouse was killed in the line of duty while employed or serving in any of such occupations, shall be entitled to free undergraduate tuition and the payment of required fees at any public institution of higher education or other public accredited postsecondary institution granting a degree, diploma, or certificate in Virginia under the following conditions:

1. The chief administrative officer of the Alcoholic Beverage Control Board, emergency medical services agency, law-enforcement agency, or other appropriate agency or the Superintendent of State Police certifies that the deceased parent or spouse was employed or serving as a law-enforcement officer, sworn law-enforcement officer, firefighter, special forest warden pursuant to § 10.1-1135, or member of a rescue squad or in any other capacity as specified in this section and was killed in the line of duty while serving or living in the Commonwealth; and

2. The child or spouse shall have been offered admission to such public institution of higher education or other public accredited postsecondary institution. Any child or spouse who believes he is eligible shall apply to the public institution of higher education or other accredited postsecondary institution to which he has been admitted for the benefits provided by this subsection. The institution shall determine the eligibility of the applicant for these benefits and shall also ascertain that the recipients are in attendance and are making satisfactory progress. The amounts payable for tuition, institutional charges and required fees, and books and supplies for the applicants shall be waived by the institution accepting the students.

C. For the purposes of subsection B, user fees, such as room and board charges, shall not be included in this authorization to waive tuition and fees. However, all required educational and auxiliary fees shall be waived along with tuition.

D. Tuition and required fees may be waived for a student from a foreign country enrolled in a public institution of higher education through a student exchange program approved by such institution, provided the number of foreign students does not exceed the number of students paying full tuition and required fees to the institution under the provisions of the exchange program for a given three-year period.

E. Each public institution of higher education and other public accredited postsecondary institution granting a degree, diploma, or certificate in Virginia shall include in its catalogue or equivalent publication a statement describing the benefits provided by subsections A and B.

§ 44-1. Composition of militia.

The militia of the Commonwealth of Virginia shall consist of all able-bodied ~~citizens~~ *residents* of ~~this the Commonwealth who are citizens of the United States~~ and all other able-bodied persons resident in ~~this the Commonwealth~~ who have declared their intention to become citizens of the United States, who are at least ~~sixteen~~ 16 years of age and, except as hereinafter provided, not more than ~~fifty-five~~ 55 years of age. The militia shall be divided into four classes: the National Guard, which includes the Army National Guard and the Air National Guard; the Virginia ~~State~~ Defense Force; the naval militia; and the unorganized militia.

§ 44-2. Composition of National Guard.

A. The National Guard shall consist of the regularly enlisted militia and of commissioned and warrant officers, who shall be residents of the Commonwealth of Virginia and shall fall within the age limits and qualifications as prescribed in existing or subsequently amended National Guard regulations (army and air), organized, armed and equipped as hereinafter provided. Upon original enlistment members of the National Guard shall not be less than ~~seventeen~~ 17 nor more than ~~fifty-five~~ 55 years of age, or, in subsequent enlistments not more than ~~sixty-four~~ 64 years of age. ~~All enlistments in the National Guard of persons under the age of eighteen years made prior to June 27, 1958, shall be held, and the same are hereby declared valid and effective in all respects, if otherwise valid and effective according to the law then in force.~~

B. Notwithstanding the above, persons otherwise qualified but residing outside the Commonwealth of Virginia, may enlist or serve as commissioned or warrant officers in the National Guard.

§ 44-5. Exemptions from militia duty.

In addition to those exempted by the laws of the United States, the following persons shall be exempt from military duty under a state call:

(1) 1. The officers, judicial and executive, of the governments of the United States and the Commonwealth of Virginia;

(2) 2. The members of the General Assembly of the Commonwealth of Virginia and of the Congress of the United States;

(3) 3. Persons in the active military or naval services of the United States;

(4) ~~Customhouse clerks.~~

(5) 4. Persons employed by the United States in the transmission of the mail;

(6) 5. The judges and clerks of courts of record;

(7) 6. The mayor and councilmen of incorporated cities and towns;

(8) 7. Members of the governing bodies of counties;

(9) 8. Sheriffs, United States district attorneys, attorneys for the Commonwealth and city attorneys;

(10) ~~[Repealed.]~~

(11) ~~Lighthouse keepers.~~

(12) 9. Marine pilots;

(13) ~~[Repealed.]~~

(14) 10. All persons who because of religious belief shall claim exemption from military service, if

the conscientious holding of such belief by such person shall be established under such regulations as the President of the United States shall prescribe, shall be exempted from militia service in any capacity that the President shall declare to be combatant; *and*

(15) 11. Such other persons as may be designated by the Governor in the best interests of the public and of the Commonwealth.

§ 44-6. Maintenance of other troops.

In time of peace the Commonwealth shall maintain only such troops as may be authorized by the President of the United States; but nothing in this chapter shall be construed as limiting the rights of the Commonwealth in the use of the Virginia National Guard or Virginia State Defense Force within or without its borders in time of peace and nothing contained in this chapter shall prevent the organization and maintenance of State Police or constabulary.

§ 44-16. Records of Adjutant General.

The Adjutant General shall keep a record of all officers and enlisted personnel, and shall also keep in his office all records and papers required by law or regulations to be filed therein.

§ 44-19. Adjutant General to have charge of military property.

The Adjutant General shall have charge and care of all state military property and all United States military property issued to the Commonwealth of Virginia, and shall cause to be kept an accurate and careful account of all receipts and issues of the same. He shall require to be kept careful memoranda of all public military property on hand in the state arsenal or storehouses, and in the possession of the several organizations of the Virginia National Guard or issued to the Virginia State Defense Force, and shall guard such property against injury and loss to the extent of his ability. He shall require every accountable and responsible officer of the National Guard to account for every deficiency in public military property in his possession immediately after such deficiency is discovered. The Adjutant General shall have the care and control of the state military reservation near Virginia Beach, and of such other real estate as the Commonwealth may acquire for military purposes, and it shall be the duty of the Adjutant General to provide for the proper care of such property and buildings thereon. For the maintenance, upkeep and improvement of the military reservation or reservations, the Adjutant General may expend from the appropriation to the Department of Military Affairs such amounts as may be necessary.

§ 44-21. Bonds of Adjutant General and fiscal clerks.

The Adjutant General and his fiscal clerks shall each give bond, with sufficient sureties, to be approved by the Governor, as provided by law for other state officers. ~~The penalties of the bond shall be as follows: of the Adjutant General, \$10,000; of each of his fiscal clerks, \$3,000.~~

§ 44-27. Appointment and promotion of officers.

All officers of the National Guard shall be appointed and commissioned by the Governor, *through the Adjutant General*. as follows:

(1) ~~Appointments of second lieutenants shall, when practicable, be made from the enlisted personnel within the organization.~~

(2) ~~Commanding officers shall forward through channels the name of the best qualified enlisted person in their organization, accompanied by the necessary documents and his military records, with the commander's endorsement thereon, to the Adjutant General's office for consideration by the Governor.~~

(3) ~~Original appointments in new organizations, all appointments in the headquarters and headquarters detachment, and to all staffs higher than brigade, and the appointment of brigade and higher commanders shall be made upon the recommendation of the Adjutant General.~~

(4) Within the organization, insofar as practicable, all appointments and promotions shall be based on professional qualifications, efficiency, length of service in grade, length of commissioned service, and demonstrated command and staff ability at the appropriate level, and will be effected only when an appropriate vacancy exists in the applicable table of organization and equipment or table of organization or distribution.

§ 44-32.1. Administration of oaths of office and enlistment.

Any duly commissioned officer or warrant officer of the Virginia National Guard or any commissioned officer of any of the armed services of the United States may administer the oaths of office and enlistment to prospective officers and enlisted personnel desirous of becoming members of the Virginia National Guard and the National Guard of the United States. Any duly commissioned officer of the Virginia State Guard Defense Force, when called into service by the Governor, may administer oaths to prospective officers and enlisted personnel desirous of becoming members of the ~~state guard of Virginia Defense Force~~.

§ 44-36. Enlistment contract and oath.

Enlisted persons shall not be recognized as members of the National Guard until they shall have signed an enlistment contract and taken and subscribed to the oath of enlistment prescribed by present or subsequently amended National Guard regulations; or such oath of enlistment as shall be prescribed by the Governor of Virginia for members of the Virginia State Defense Force.

§ 44-40.1. Persons subject to the Virginia military laws.

All members of the Virginia National Guard are subject to the military laws of Virginia when under

orders to be present for duty, ~~not in federal service under Title 32 of the United States Code or while in a state active duty status.~~

§ 44-42. Kinds of courts-martial; how constituted and powers.

In the National Guard not in federal service, there shall be ~~general~~, special, and summary courts-martial, constituted like similar courts of the army and the air force. They shall have the jurisdiction and powers, except as to punishments, and shall follow the forms and procedures provided for such courts as are enumerated in the Manual for Courts-Martial United States.

§ 44-44. Special courts-martial.

A. In the National Guard, ~~not in federal service, for servicemembers on orders for duty under Title 32 of the United States Code or state active duty~~, the first commanding officer of each ~~garrison, fort, post, camp, air base, auxiliary air base, or other place, where troops are on duty, or brigade, regiment, wing, group, detached battalion, separate squadron, or other detached command, in the rank of colonel or above~~ may convene special courts-martial. Special courts-martial may also be convened by superior authority.

B. A special court-martial may not try a commissioned officer.

C. A special court-martial shall have the same powers of punishment as a general court-martial, except that of dismissal or dishonorable discharge. Any fine imposed by a special court-martial shall not exceed \$100 nor shall any period of confinement exceed 10 days. A special court-martial may award a bad conduct discharge. authority to impose any of the following fines and penalties:

1. A fine of not more than \$1,000;
2. Forfeiture of two-thirds pay per month for six months;
3. A reprimand;
4. Bad Conduct discharge;
5. Restriction to limits;
6. Imposition of extra duty;
7. Confinement for not more than three months;
8. Reduction of enlisted persons one or more pay grades; or
9. Any combination of these punishments.

§ 44-45. Summary courts-martial.

A. In the National Guard, ~~not in federal service for servicemembers on orders for duty under Title 32 of the United States Code or active state duty~~, the first commanding officer of each ~~garrison, fort, post, camp, air base, auxiliary air base, or other place where troops are on duty, or division, brigade, regiment, wing, group, squadron, battalion or detached company, or other detachment, in the rank of lieutenant colonel or above~~ may convene a summary court-martial, consisting of one commissioned officer. Proceedings conducted under the provisions of this section shall be informal.

B. A summary court-martial shall have the authority to impose fines of not more than ~~twenty-five~~ dollars \$500, to impose forfeitures of pay and allowances of two-thirds pay for one month, to restrict to limits, to impose extra duty, to require confinement for not more than ~~2 1/2~~ seven days, and to reduce enlisted persons one or more pay grades.

§ 44-46.1. Military judges.

A military judge shall be a commissioned officer of the National Guard, shall be so assigned as a legal officer, shall be admitted to the practice of law, and shall be certified for such duty by the Adjutant General.

The Adjutant General shall designate a military judge on a case-by-case basis to preside over courts-martial of the Virginia National Guard ~~not in federal service~~.

§ 44-47. Process and procedure.

In the Virginia National Guard, ~~not in federal service~~, military judges whenever they sit on a military court, and otherwise presidents of courts-martial and summary court officers, shall have power to issue warrants to arrest accused persons and to bring them before the court for trial whenever such persons shall have disobeyed an order in writing from the convening authority to appear before such court, a copy of the charge or charges having been delivered to the accused with such order, and to issue commitments in carrying out sentences of confinement, and to issue subpoenas and subpoenas duces tecum, and to enforce by attachment attendance of witnesses and the production of books and papers, and to sentence for a refusal to be sworn or to answer as provided in actions before civil courts. They shall also have power to punish for contempt occurring in the presence of the court.

§ 44-48. Review of judgments of courts-martial; procedure.

Judgments of ~~general~~, special and summary courts-martial shall be subject to review by the Adjutant General only, except that sentences of dismissal from the service or dishonorable Bad Conduct discharge shall also be subject to review by the Governor; and such judgments may be affirmed, set aside or modified; provided, however, no higher or greater sentence, punishment, penalty, fine or forfeiture than that imposed by the court-martial shall be approved; otherwise trials and proceedings, including nonjudicial punishment, pretrial proceedings, post-trial proceedings, search and seizure proceedings and proceedings by all courts and boards, including review proceedings, shall be in accordance with the Manual for Courts-Martial United States, as now existing or subsequently amended, procedure for courts

of inquiry, and retiring boards, and other procedures under military law, as may from time to time be prescribed by the appropriate secretary of the respective services.

§ 44-54.4. Organization; definitions.

The Virginia State Defense Force with a targeted membership of at least 1,200 shall be organized within and subject to the control of the Department of Military Affairs.

When called to state active duty, the mission of the Virginia State Defense Force shall be to (i) provide for an adequately trained organized reserve militia to assume control of Virginia National Guard facilities and to secure any federal and state property left in place in the event of the mobilization of the Virginia National Guard, (ii) assist in the mobilization of the Virginia National Guard, (iii) support the Virginia National Guard in providing family assistance to military dependents within the Commonwealth in the event of the mobilization of the Virginia National Guard, (iv) provide a military force to respond to the call of the Governor in those circumstances described in § 44-75.1.

Nothing in this article shall be construed as authorizing the Virginia State Defense Force or any part thereof to be called, ordered or in any manner drafted by federal authorities into the military service of the United States. However, no person by reason of his enlistment or appointment in the Virginia State Defense Force shall be exempted from military service under any law of the United States.

Members of the Virginia State Defense Force may serve in either of the following duty statuses:

1. "Training duty," which is the normal service and training performed by the Virginia State Defense Force in order to be prepared for state active duty, and which includes but is not limited to organization, administration, recruiting, maintenance of equipment and training.

2. "State active duty," which is the performance of actual military service for the Commonwealth when called by the Governor or his designee to active duty in service of the Commonwealth in accordance with Article 7 (§ 44-75.1 et seq.) of this chapter.

"Military duty" and "military service," as used in this title, shall include the activities of the members of the Virginia Defense Force while in training duty and state active duty status.

§ 44-54.6. Members, appointment and enlistment.

The age limitations of § 44-1 to the contrary notwithstanding, the Virginia State Defense Force shall consist of:

1. Such volunteers who of their own volition agree to service in conformity with regulations prescribed by the Adjutant General who are (i) ~~citizens residents~~ of the Commonwealth or any contiguous state, (ii) at least ~~sixteen~~ 16, provided that any volunteer under the age of eighteen shall have the written consent of at least one parent or guardian, and (iii) less than ~~sixty-five~~ 65 years of age may join the Virginia State Defense Force.

2. Such persons of the unorganized militia who may be drafted to fill the force structure of the Virginia State Defense Force or who may be ordered out for active duty until released from such service.

The Adjutant General may, on a case-by-case basis, authorize volunteer members of the Virginia State Defense Force to be retained beyond age ~~sixty-five~~ 65 to age ~~seventy-five~~ 75.

The officers of the Virginia State Defense Force shall be appointed by the Governor in conformity with regulations prescribed by the Adjutant General.

Enlisted members shall be enlisted and retained in conformity with regulations prescribed by the Adjutant General.

§ 44-54.8. Administration of oaths.

All commissioned officers of the Virginia State Defense Force and such other persons or officials as the Adjutant General prescribes are hereby authorized and empowered to administer oaths and affirmations in all matters pertaining to and concerning the Virginia State Defense Force, including but not limited to the enlistment of soldiers and the appointment of officers therein.

§ 44-54.9. Uniform; rank in precedence; command.

The Virginia State Defense Force shall be uniformed and shall conform to standards of dress and appearance in accordance with regulations prescribed by the Adjutant General. The uniform and insignia of the ~~State~~ Virginia Defense Force shall include distinctive devices identifying it as a state defense force and distinguishing it from the National Guard or the armed forces of the United States. The wearing of permanent military decorations awarded in the service of the armed forces of the United States or in the national guards of the several states is authorized.

The grade structure of the Virginia State Defense Force, to the extent practicable, shall be the same as that prescribed for the Army National Guard.

§ 44-54.10. Discipline.

All members of the Virginia State Defense Force on training duty or state active duty shall be subject to military discipline. Infractions of military discipline by members of the Virginia State Defense Force on state active duty shall be punishable under the provisions of § 44-40 and Article 4 (§ 44-42 et seq.) of this chapter.

§ 44-54.11. Discharge; dismissal.

Upon expiration of the term of service for which appointed or enlisted, a member of the Virginia State Defense Force shall be entitled to a discharge. However, no member shall be discharged by reason

of expiration of his term of service while on state active duty.

A member of the Virginia State Defense Force may be dismissed or discharged prior to the expiration of his term of service by sentence of a court-martial or for misconduct, inefficiency, unsatisfactory participation, personal hardship or for the convenience of the Commonwealth. Discharge proceedings shall be prescribed by the Adjutant General.

The Adjutant General may prescribe appropriate discharge certificates reflecting the character of the member's service.

§ 44-54.12. Arms, equipment and facilities.

The Virginia State Defense Force, to the extent authorized by the Governor and funded by the General Assembly, shall be equipped as needed for training and for state active duty. The Adjutant General, by regulation or otherwise, may authorize the use of privately owned real and personal property if deemed in the best interest of the Commonwealth.

To the extent permitted by federal law and contracts with the federal government or localities and to the extent that space is available, the Adjutant General in his discretion may authorize the use of armories and other facilities of the National Guard, other state facilities under his control, and all or portions of privately owned facilities under contract for the storage and maintenance of arms, equipment and supplies of the Virginia State Defense Force and for the assembly, drill, training and instruction of its members.

Members of the Virginia State Defense Force shall not be armed with firearms during the performance of training duty or state active duty, except under circumstances and in instances authorized by the Governor.

§ 44-75.2. Militia training duty.

Subject to the direction and orders of the Governor, the Adjutant General shall provide for the training and administration of the National Guard and the State Virginia Defense Force and shall require the members of the National Guard and the State Virginia Defense Force to attend such training when scheduled. Members of the National Guard may assist on an unpaid, volunteer basis in the training and administration of the State Virginia Defense Force. Whether training in a paid or unpaid status, members of the National Guard and State Virginia Defense Force shall at all times be subject to the orders of their respective commanders.

§ 44-80. Order in which classes of militia called into service.

The National Guard, the Virginia State Defense Force, the naval militia, and the unorganized militia or any part thereof may be ordered into service by the Governor in such order as he determines.

§ 44-81. Length of service when called out.

The National Guard, the Virginia State Defense Force, the naval militia, or the unorganized militia, when called into service by the Governor, shall serve for ~~sixty days after their arrival at the place of rendezvous, unless sooner discharged. But the Governor shall, at all times, have power to retain them in service for such time as, in his judgment, may be necessary; however, except when the whole National Guard or the whole Virginia State Defense Force is not required, no individual shall be retained for a longer period than sixty days except in instances where an individual soldier or airman of the National Guard voluntarily consents to service beyond sixty days such time as, in the Governor's judgment, may be necessary.~~

§ 44-82. How troops paid while in service; transportation to be furnished; movement of troops and supplies not to be delayed.

All officers and enlisted personnel of the National Guard, *Virginia Defense Force*, or naval militia, whenever called out in aid of the civil authorities, shall receive the compensation herein provided, and such compensation, and the necessary expenses incurred in furnishing supplies, subsistence, quartering, and transporting troops, shall be paid ~~monthly no later than 10 work days after the receipt of required payroll documentation by the Payroll Services Bureau of the Department of Accounts by the State Treasurer out of the military contingent fund, and out of any moneys not otherwise appropriated.~~ Such payments shall be made on warrants to be drawn by the Comptroller, on the State Treasurer, upon certificates of the officer in actual command of the troops, and upon payrolls prepared according to such forms as the state regulations shall prescribe. Such payrolls and certificates are to be transmitted to the Adjutant General through the regular military channels, and he shall approve them before such warrants shall be drawn. The Comptroller and the State Treasurer are hereby authorized and directed to draw the warrants and make the payments herein provided for in accordance with current or subsequently amended pay and allowances of United States armed forces.

The several transportation companies in this Commonwealth shall furnish transportation for troops so called out, stores, munitions and equipments, upon application of the officer in actual command, accompanied by a certificate from him of the number of personnel to be carried and their destination, and a copy of the order calling them out. For such transportation the transportation company shall be entitled to receive compensation from the Commonwealth. ~~And it shall be the duty of the Adjutant General to contract annually with the various transportation companies of the Commonwealth, for rates of transportation, should there be occasion for it, provided, that such rates shall not exceed any maximum fixed by law.~~

Transportation of troops and military supplies shall be as speedy as possible and have the right-of-way over all passenger and freight traffic on transportation lines within the Commonwealth, and failure to furnish transportation when called upon, or unnecessary delay in transporting such troops and supplies, shall be punishable by a fine of not less than \$1,000 or more than \$10,000.

§ 44-83. Pay and allowance of officers and enlisted persons.

When called into active state duty, not in the service of the United States, officers of the National Guard shall receive the same pay and allowances as prescribed for officers of like rank in the United States armed forces. For each day of such service, enlisted persons of the National Guard shall receive the same pay, rations, and allowances as enlisted persons of like grade of the United States armed forces. *For each day of service, members of the Virginia Defense Force called to state active duty shall receive the same pay, rations, and allowances as persons of like grade in the United States Armed Forces.* When rations are not issued, the value of the same shall be commuted and paid by the Adjutant General.

§ 44-88. Incorporation into the Virginia Defense Force.

Whenever the Governor orders out the unorganized militia or any part thereof, it shall be incorporated into the Virginia ~~State~~ Defense Force until relieved from service.

§ 44-93.2. Leaves of absence from nongovernmental employment.

A member of the Virginia National Guard, Virginia ~~State~~ Defense Force, or naval militia called to state active duty or military duty pursuant to Title 32 of the United States Code shall have the right to take leave without pay from his nongovernmental employment. No member of the National Guard, Virginia ~~State~~ Defense Force, or naval militia shall be forced to use or exhaust his vacation or other accrued leaves from his nongovernmental employment for a period of active service. The choice of leave shall be solely within the discretion of the member.

§ 44-93.3. Reemployment rights.

Upon honorable release from state active duty or military duty pursuant to Title 32 of the United States Code, a member of the Virginia National Guard, Virginia ~~State~~ Defense Force or naval militia shall make written application to his previous employer for reemployment within (i) 14 days of his release from duty or from hospitalization following release if the length of the member's absence by reason of service in the uniformed services does not exceed 180 days or (ii) 90 days of his release from duty or from hospitalization following release if the length of the member's absence by reason of service in the uniformed services exceeds 180 days. When released from such duty, they shall be restored to positions held by them when ordered to duty. If the office or position has been abolished or otherwise has ceased to exist during such leave of absence, they shall be reinstated in a position of like seniority, status and pay if the position exists, or to a comparable vacant position for which they are qualified, unless to do so would be unreasonable. This section shall not apply when the cumulative length of the absence and of all previous absences from a position of employment with that employer by reason of service in the uniformed services exceeds five years.

§ 44-93.4. Discrimination against persons who serve in the Virginia National Guard, Virginia Defense Force, or naval militia; and acts of reprisal prohibited.

A. A member of the Virginia National Guard, Virginia ~~State~~ Defense Force, or naval militia who performs, has performed, applies to perform, or has an obligation to perform state active duty or military duty pursuant to Title 32 of the United States Code shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

B. A person shall be considered to have denied a member of the Virginia National Guard, Virginia ~~State~~ Defense Force, or naval militia initial employment, reemployment, retention in employment, promotion, or a benefit of employment in violation of this section if the member's membership, application for membership, performance of service, application for service, or obligation for service is a motivating factor in that person's action, unless the person can prove by the greater weight of the evidence that the same unfavorable action would have taken place in the absence of the member's membership, application for membership, performance of service, application for service, or obligation for service.

§ 44-96. Military property exempt from levy and sale.

The uniforms, arms, and equipment required by law or regulations, of every commissioned and warrant officer and every enlisted person of the Virginia National Guard, Virginia ~~State~~ Defense Force, and naval militia shall be exempt from sale under any execution, distress, or other process for debt and taxes.

§ 44-97.1. Continuance or time for filing pleading, etc., where party or attorney is on active duty.

Any party to or attorney in an action or proceeding in any court, including the Supreme Court of Virginia, commission, or other tribunal having judicial or quasi-judicial powers or jurisdiction who has been ordered to participate in *state active duty*, annual active duty for training, or temporary active duty in the reserve forces of any of the armed services of the United States, National Guard, or naval militia shall be entitled to a continuance, not to exceed three weeks, as a matter of right during the period of

such duty, provided the continuance is requested at least four days prior to the first day for which the continuance is sought. The period required by any statute or rule for the filing of any pleading or the performance of any act relating thereto shall be extended for seven days after such active duty, provided a request is made four days prior to the date the pleading or act is due. The failure of any court, commission, or other tribunal to allow such continuance when requested to do so or the returning of such filing or act during the period hereinabove specified shall constitute reversible error. This section shall not prevent the granting of temporary injunctive relief or the dissolution or extension of a temporary injunction, but the right to such relief shall remain in the sound discretion of the court or other such tribunal.

§ 44-98. Interference with employment of members of Virginia National Guard, Virginia Defense Force, or naval militia.

A person, who either by himself, or with another, deprives a member of the Virginia National Guard, Virginia State Defense Force or naval militia of his employment, or prevents, by himself or another, such member being employed, or obstructs or annoys such member or his employer at his trade, business or employment, because such member of such organization is such member, dissuades any person from enlistment in the Virginia National Guard, Virginia State Defense Force or naval militia by threat or injury to him in his employment, trade or business, in case he shall so enlist, shall be guilty of a misdemeanor and on conviction thereof shall be fined in a sum not exceeding \$500, or imprisonment in jail not more than 30 days, or shall suffer both fine and imprisonment.

§ 44-99. Organizations may own property; suits.

Companies or other organizations of the Virginia National Guard, Virginia State Defense Force and naval militia shall have the right to own and keep real and personal property necessary for their use, which shall belong to and be under control of the active members of the unit; and the commanding officer of any unit shall have the right and power to maintain any suit, in his own name, to recover for the use of the unit any debts or effects belonging to the unit, or damages for the injury thereof; and no suit pending in his name shall be abated by his ceasing to be the commanding officer of the unit; but upon motion of the commander succeeding him, such commander shall be admitted to prosecute the suit in like manner and with like effect as if it had been originally instituted by him. Armories owned by such units shall be exempt from all state, county and municipal taxation.

§ 44-100. No action allowed on account of military duties; counsel for members sued or prosecuted.

No action or proceeding shall be prosecuted or maintained against a member of a military court, or officer or person acting under its authority or reviewing its proceedings, on account of the approval or imposition or execution of any sentence, or the imposition or collection of fine or penalty, or the execution of any warrant, writ, execution, process, or mandate of a military court, nor shall any member of the Virginia National Guard, Virginia State Defense Force, or naval militia be liable to civil action or suit or criminal prosecution for any act done while in the discharge of his military duty.

If any member of the Virginia National Guard, Virginia State Defense Force, or naval militia is sued civilly or arrested, indicted, or otherwise prosecuted for any act committed in the discharge of his official duty while on state duty, the Adjutant General may employ special counsel approved by the Attorney General to defend such member. The compensation for special counsel employed pursuant to this section shall, subject to the approval by the Attorney General, be paid out of the funds appropriated for the administration of the Department of Military Affairs.

§ 44-102. Commission not to vacate civil office.

Any citizen of ~~this~~ *the* Commonwealth may accept and hold a commission in the Virginia National Guard and receive pay therefrom or a commission in the Virginia State Defense Force or armed forces reserve of the United States, without thereby vacating any civil office or position or commission held by him; and the acceptance or holding of any such commission, and receiving pay therefrom shall not constitute such holding of an office of trust and profit under the government of ~~this~~ *the* Commonwealth and of the United States as shall be incompatible with the holding of any civil office, legislative or judicial, or position or commission under the government of ~~this~~ *the* Commonwealth.

§ 44-102.1. Rights, benefits and protections upon call to active duty.

Any right, benefit, or protection that may accrue to a member of the Virginia National Guard under the ~~Federal Soldier's and Sailor's~~ *federal Servicemembers* Civil Relief Act (50 U.S.C. App. § 501 et seq.), as a result of a call to federal active duty service under Title 10 of the United States Code shall be extended to a member of the Virginia National Guard called to active duty service under Title 32 of the United States Code, or to state active duty by the Governor, if the active duty orders are for a period of 30 consecutive days or more. In addition, if a member of the Virginia National Guard is called to state active duty by the Governor, the employer shall ensure that the member has the option of continuing, at the member's expense, his health care coverage, life insurance, or long-term care insurance.

§ 44-104. Care required and liability of officers.

All commissioned officers of the Virginia National Guard, Virginia State Defense Force and naval militia shall exercise the strictest care and vigilance for the preservation of the uniforms, arms, supplies, equipment and military property furnished to their several commands under the provisions of this

chapter. Any officer receiving public property for military use shall be responsible for the articles so received by him; and he shall not transfer such property, or any portion thereof, to another, either as a loan or permanently, without the authority of the Adjutant General, or his duly authorized representative.

§ 44-110. Punishment for sale, etc., of military property.

Whoever shall secrete, sell, dispose of, offer for sale, or in any manner pawn or pledge, or receive in pawn or pledge, or buy, or *intentionally fail to return after having been legally discharged from the National Guard* any of the arms, uniforms, or equipments, being the property of the United States or of the Commonwealth, knowing or having reason to believe the same to be the property of the United States or the Commonwealth, shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be imprisoned in jail for not less than ~~6~~ *six* months nor more than ~~1~~ *one* year, or in the discretion of the jury or judge, be fined not less than \$50 nor more than ~~\$100~~ *\$1,000*.

§ 44-115. Custom and usage of United States army, air force and navy; applicability of § 44-40 and Article 4 of this chapter.

All matters relating to the organization, discipline and government of the Virginia National Guard, not otherwise provided for by law or by regulations, shall be decided by the custom and usage of the United States army, air force or navy, as appropriate. In addition, all members of the Virginia State Defense Force, the naval militia, and the unorganized militia on state active duty shall be subject to military discipline. Infractions of military discipline shall be punishable under the provisions of § 44-40 and Article 4 (§ 44-42 et seq.) of this chapter.

§ 44-120. Protection of the uniform.

It shall be unlawful for any person, not an officer, warrant officer or enlisted person in the armed forces of the United States, to wear the duly prescribed uniform thereof, or any distinctive part of such uniform, or a uniform any part of which is similar to a distinctive part of the duly prescribed uniform of the armed forces of the United States.

The foregoing provision shall not be construed so as to prevent officers, warrant officers or enlisted persons of the National Guard, nor to prevent members of the organization known as the Boy Scouts of America, or such other organizations as the Secretary of Defense may designate, from wearing their prescribed uniforms; nor to prevent persons who in time of war have served honorably as officers of the armed forces of the United States and whose most recent service was terminated by an honorable discharge, muster out, or resignation, from wearing, upon occasions of ceremony, the uniform of the highest grade they have held in such service; nor to prevent any person who has been honorably discharged from the armed forces of the United States from wearing his uniform from the place of his discharge to his home, within three months after his discharge; nor to prevent the members of military societies composed entirely of honorably discharged officers and enlisted persons, or both, of the armed forces of the United States from wearing, upon occasions of ceremony, the uniform duly prescribed by such societies to be worn by members thereof; nor to prevent the instructors and members of the duly organized cadet corps of any educational institution offering a regular course in military instruction from wearing the uniform duly prescribed by appropriate respective authority to be worn by instructors and members of such cadet corps; nor to prevent the instructors and members of such duly organized cadet corps of such institution of learning offering a regular course in military instruction and at which an officer, warrant officer or enlisted person of the armed forces of the United States is lawfully detailed for duty as instructor in military science and tactics, from wearing the uniform duly prescribed by appropriate authority to be worn by instructors and members of such cadet corps; nor to prevent civilians attending a course of military instruction authorized and conducted by the military authorities of the United States from wearing while attending such a course the uniform authorized and prescribed by such military authorities to be worn during such course of instruction; nor to prevent any person from wearing the uniform of the armed forces of the United States, in any playhouse or theater or in motion picture films or television while actually engaged in representing therein a military character not tending to bring discredit or reproach upon the armed forces of the United States.

The uniform worn by ~~officers, warrant officers or enlisted persons of the National Guard, or by~~ members of military societies, or the instructors and members of the cadet corps referred to in the preceding paragraph, shall include some distinctive mark or insignia approved by the Secretary of Defense, to distinguish such uniforms from the uniform of the armed forces of the United States. The members of the military societies and the instructors and members of the cadet corps hereinbefore mentioned shall not wear the insignia of rank prescribed to be worn by the officers of the armed forces of the United States, or any insignia of rank similar thereto, unless otherwise authorized.

Any person who offends against the provisions of this section shall, on conviction, be punished by a fine not exceeding \$100, or by imprisonment not exceeding 30 days, or by both such fine and imprisonment.

§ 46.2-743. Special license plates for members of the Virginia Defense Force and certain veterans; fees.

A. On receipt of an application and written evidence that the applicant is an honorably discharged former member of one of the armed forces of the United States, the Commissioner shall issue to the applicant special license plates.

B. On receipt of an application and written evidence that the applicant is on active duty with, has been honorably discharged after at least six months of active duty service in, or has retired from the United States Marine Corps, the Commissioner shall issue to the applicant special license plates whose design incorporates an emblem of the United States Marine Corps. Unremarried surviving spouses of persons eligible to receive special license plates under this subsection may also be issued special license plates under this subsection.

C. On receipt of an application and written evidence that the applicant is on active duty with, has been honorably discharged after at least six months of active duty service in, or has retired from the United States Army, the Commissioner shall issue to the applicant special license plates whose design incorporates an emblem of the United States Army.

D. On receipt of an application and written evidence that the applicant is a veteran of World War II, the Commissioner shall issue special license plates to veterans of World War II. For each set of license plates issued under this subsection, the Commissioner shall charge, in addition to the prescribed cost of state license plates, a one-time fee of \$10 at the time the plates are issued.

E. On receipt of an application and written evidence that the applicant is a veteran of the Korean War, the Commissioner shall issue special license plates to veterans of the Korean War.

F. On receipt of an application and written evidence that the applicant is a veteran of the Vietnam War, the Commissioner shall issue special license plates to veterans of the Vietnam War.

G. On receipt of an application and written evidence that the applicant is a veteran of the Asiatic-Pacific Campaign, the Commissioner shall issue special license plates to veterans of that campaign. For each set of license plates issued under this subsection, the Commissioner shall charge, in addition to the prescribed cost of state license plates, a one-time fee of \$10 at the time the plates are issued.

H. On receipt of an application and written evidence that the applicant is a veteran of Operation Iraqi Freedom, the Commissioner shall issue special license plates to veterans of Operation Iraqi Freedom.

I. On receipt of an application and written evidence that the applicant is a veteran of Operation Enduring Freedom, the Commissioner shall issue special license plates to veterans of Operation Enduring Freedom.

J. On receipt of an application and written evidence that the applicant is a member of the Virginia State Defense Force, the Commissioner shall issue special license plates to members of the Virginia State Defense Force.

K. The provisions of subdivisions B 1 and B 2 of § 46.2-725 shall not apply to license plates issued under subsection A, D, E, F, H, I, or J of this section.

§ 65.2-101. Definitions.

As used in this title:

"Average weekly wage" means:

1. a. The earnings of the injured employee in the employment in which he was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury, divided by 52; but if the injured employee lost more than seven consecutive calendar days during such period, although not in the same week, then the earnings for the remainder of the 52 weeks shall be divided by the number of weeks remaining after the time so lost has been deducted. When the employment prior to the injury extended over a period of less than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed, provided that results fair and just to both parties will be thereby obtained. When, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impractical to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which during the 52 weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community.

b. When for exceptional reasons the foregoing would be unfair either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

2. Whenever allowances of any character made to an employee in lieu of wages are a specified part of the wage contract, they shall be deemed a part of his earnings. For the purpose of this title, the average weekly wage of the members of the Virginia National Guard, the Virginia Naval Militia and the Virginia State Defense Force, registered members on duty or in training of the United States Civil Defense Corps of this Commonwealth, volunteer firefighters engaged in firefighting activities under the supervision and control of the Department of Forestry, and forest wardens shall be deemed to be such amount as will entitle them to the maximum compensation payable under this title; however, any award entered under the provisions of this title on behalf of members of the National Guard, the Virginia Naval Militia or their dependents, or registered members on duty or in training of the United States Civil Defense Corps of this Commonwealth or their dependents, shall be subject to credit for benefits paid them under existing or future federal law on account of injury or occupational disease covered by the provisions of this title.

3. Whenever volunteer firefighters, volunteer lifesaving or volunteer rescue squad members, volunteer law-enforcement chaplains, auxiliary or reserve police, auxiliary or reserve deputy sheriffs, volunteer emergency medical technicians, members of volunteer search and rescue organizations, volunteer members of community emergency response teams, and volunteer members of medical reserve corps are deemed employees under this title, their average weekly wage shall be deemed sufficient to produce the minimum compensation provided by this title for injured workers or their dependents. For the purposes of workers' compensation insurance premium calculations, the monthly payroll for each volunteer firefighter or volunteer lifesaving or volunteer rescue squad member shall be deemed to be \$300.

4. The average weekly wage of persons, other than those covered in subdivision 3 of this definition, who respond to a hazardous materials incident at the request of the Department of Emergency Management shall be based upon the earnings of such persons from their primary employers.

"Award" means the grant or denial of benefits or other relief under this title or any rule adopted pursuant thereto.

"Change in condition" means a change in physical condition of the employee as well as any change in the conditions under which compensation was awarded, suspended, or terminated which would affect the right to, amount of, or duration of compensation.

"Client company" means any person that enters into an agreement for professional employer services with a professional employer organization.

"Coemployee" means an employee performing services pursuant to an agreement for professional employer services between a client company and a professional employer organization.

"Commission" means the Virginia Workers' Compensation Commission as well as its former designation as the Virginia Industrial Commission.

"Employee" means:

1. a. Every person, including aliens and minors, in the service of another under any contract of hire or apprenticeship, written or implied, whether lawfully or unlawfully employed, except (i) one whose employment is not in the usual course of the trade, business, occupation or profession of the employer or (ii) as otherwise provided in subdivision 2 of this definition.

b. Any apprentice, trainee, or retrainee who is regularly employed while receiving training or instruction outside of regular working hours and off the job, so long as the training or instruction is related to his employment and is authorized by his employer.

c. Members of the Virginia National Guard and the Virginia Naval Militia, whether on duty in a paid or unpaid status or when performing voluntary service to their unit in a nonduty status at the request of their commander.

Income benefits for members of the National Guard or Naval Militia shall be terminated when they are able to return to their customary civilian employment or self-employment. If they are neither employed nor self-employed, those benefits shall terminate when they are able to return to their military duties. If a member of the National Guard or Naval Militia who is fit to return to his customary civilian employment or self-employment remains unable to perform his military duties and thereby suffers loss of military pay which he would otherwise have earned, he shall be entitled to one day of income benefits for each unit training assembly or day of paid training which he is unable to attend.

d. Members of the Virginia State Defense Force.

e. Registered members of the United States Civil Defense Corps of this Commonwealth, whether on duty or in training.

f. Except as provided in subdivision 2 of this definition, all officers and employees of the Commonwealth, including (i) forest wardens; (ii) judges, clerks, deputy clerks and employees of juvenile and domestic relations district courts and general district courts; and (iii) secretaries and administrative assistants for officers and members of the General Assembly employed pursuant to § 30-19.4 and compensated as provided in the general appropriation act, who shall be deemed employees of the Commonwealth.

g. Except as provided in subdivision 2 of this definition, all officers and employees of a municipal corporation or political subdivision of the Commonwealth.

h. Except as provided in subdivision 2 of this definition, (i) every executive officer, including president, vice-president, secretary, treasurer or other officer, elected or appointed in accordance with the charter and bylaws of a corporation, municipal or otherwise and (ii) every manager of a limited liability company elected or appointed in accordance with the articles of organization or operating agreement of the limited liability company.

i. Policemen and firefighters, sheriffs and their deputies, town sergeants and their deputies, county and city commissioners of the revenue, county and city treasurers, attorneys for the Commonwealth, clerks of circuit courts and their deputies, officers and employees, and electoral board members appointed in accordance with § 24.2-106, who shall be deemed employees of the respective cities, counties and towns in which their services are employed and by whom their salaries are paid or in which their compensation is earnable. However, notwithstanding the foregoing provision of this subdivision, such individuals who would otherwise be deemed to be employees of the city, county, or town in which their services are employed and by whom their salaries are paid or in which their

compensation is earnable shall be deemed to be employees of the Commonwealth while rendering aid outside of the Commonwealth pursuant to a request, approved by the Commonwealth, under the Emergency Management Assistance Compact enacted pursuant to § 44-146.28:1.

j. Members of the governing body of any county, city or town in the Commonwealth, whenever coverage under this title is extended to such members by resolution or ordinance duly adopted.

k. Volunteers, officers and employees of any commission or board of any authority created or controlled by a local governing body, or any local agency or public service corporation owned, operated or controlled by such local governing body, whenever coverage under this title is authorized by resolution or ordinance duly adopted by the governing board of any county, city, town, or any political subdivision thereof.

l. Except as provided in subdivision 2 of this definition, volunteer firefighters, volunteer lifesaving or rescue squad members, volunteer law-enforcement chaplains, auxiliary or reserve police, auxiliary or reserve deputy sheriffs, volunteer emergency medical technicians, members of volunteer search and rescue organizations, volunteer members of regional hazardous materials emergency response teams, volunteer members of community emergency response teams, and volunteer members of medical reserve corps, who shall be deemed employees of (i) the political subdivision or state institution of higher education in which the principal office of such volunteer fire company, volunteer lifesaving or rescue squad, volunteer law-enforcement chaplains, auxiliary or reserve police force, auxiliary or reserve deputy sheriff force, volunteer emergency medical technicians, volunteer search and rescue organization, regional hazardous materials emergency response team, community emergency response team, or medical reserve corps is located if the governing body of such political subdivision or state institution of higher education has adopted a resolution acknowledging those persons as employees for the purposes of this title or (ii) in the case of volunteer firefighters or volunteer lifesaving or rescue squad members, the companies or squads for which volunteer services are provided whenever such companies or squads elect to be included as an employer under this title.

m. (1) Volunteer firefighters, volunteer lifesaving or rescue squad members, volunteer law-enforcement chaplains, auxiliary or reserve police, auxiliary or reserve deputy sheriffs, volunteer emergency medical technicians, members of volunteer search and rescue organizations and any other persons who respond to an incident upon request of the Department of Emergency Management, who shall be deemed employees of the Department of Emergency Management for the purposes of this title.

(2) Volunteer firefighters when engaged in firefighting activities under the supervision and control of the Department of Forestry, who shall be deemed employees of the Department of Forestry for the purposes of this title.

n. Any sole proprietor, shareholder of a stock corporation having only one shareholder, member of a limited liability company having only one member, or all partners of a business electing to be included as an employee under the workers' compensation coverage of such business if the insurer is notified of this election. Any sole proprietor, shareholder or member or the partners shall, upon such election, be entitled to employee benefits and be subject to employee responsibilities prescribed in this title.

When any partner or sole shareholder, member or proprietor is entitled to receive coverage under this title, such person shall be subject to all provisions of this title as if he were an employee; however, the notices required under §§ 65.2-405 and 65.2-600 of this title shall be given to the insurance carrier, and the panel of physicians required under § 65.2-603 shall be selected by the insurance carrier.

o. The independent contractor of any employer subject to this title at the election of such employer provided (i) the independent contractor agrees to such inclusion and (ii) unless the employer is self-insured, the employer's insurer agrees in writing to such inclusion. All or part of the cost of the insurance coverage of the independent contractor may be borne by the independent contractor.

When any independent contractor is entitled to receive coverage under this section, such person shall be subject to all provisions of this title as if he were an employee, provided that the notices required under §§ 65.2-405 and 65.2-600 are given either to the employer or its insurance carrier.

However, nothing in this title shall be construed to make the employees of any independent contractor the employees of the person or corporation employing or contracting with such independent contractor.

p. The legal representative, dependents and any other persons to whom compensation may be payable when any person covered as an employee under this title shall be deceased.

q. Jail officers and jail superintendents employed by regional jails or jail farm boards or authorities, whether created pursuant to Article 3.1 (§ 53.1-95.2 et seq.) or Article 5 (§ 53.1-105 et seq.) of Chapter 3 of Title 53.1, or an act of assembly.

r. AmeriCorps members who receive stipends in return for volunteering in local, state and nonprofit agencies in the Commonwealth, who shall be deemed employees of the Commonwealth for the purposes of this title.

s. Food Stamp recipients participating in the work experience component of the Food Stamp Employment and Training Program, who shall be deemed employees of the Commonwealth for the purposes of this title.

t. Temporary Assistance for Needy Families recipients not eligible for Medicaid participating in the

work experience component of the Virginia Initiative for Employment Not Welfare Program, who shall be deemed employees of the Commonwealth for the purposes of this title.

2. "Employee" shall not mean:

a. Officers and employees of the Commonwealth who are elected by the General Assembly, or appointed by the Governor, either with or without the confirmation of the Senate. This exception shall not apply to any "state employee" as defined in § 51.1-124.3 nor to Supreme Court Justices, judges of the Court of Appeals, judges of the circuit or district courts, members of the Workers' Compensation Commission and the State Corporation Commission, or the Superintendent of State Police.

b. Officers and employees of municipal corporations and political subdivisions of the Commonwealth who are elected by the people or by the governing bodies, and who act in purely administrative capacities and are to serve for a definite term of office.

c. Any person who is a licensed real estate salesperson, or a licensed real estate broker associated with a real estate broker, if (i) substantially all of the salesperson's or associated broker's remuneration is derived from real estate commissions, (ii) the services of the salesperson or associated broker are performed under a written contract specifying that the salesperson is an independent contractor, and (iii) such contract includes a provision that the salesperson or associated broker will not be treated as an employee for federal income tax purposes.

d. Any taxicab or executive sedan driver, provided the Commission is furnished evidence that such individual is excluded from taxation by the Federal Unemployment Tax Act.

e. Casual employees.

f. Domestic servants.

g. Farm and horticultural laborers, unless the employer regularly has in service more than two full-time employees.

h. Employees of any person, firm or private corporation, including any public service corporation, that has regularly in service less than three employees in the same business within this Commonwealth, unless such employees and their employers voluntarily elect to be bound by this title. However, this exemption shall not apply to the operators of underground coal mines or their employees. An executive officer who is not paid salary or wages on a regular basis at an agreed upon amount and who rejects coverage under this title pursuant to § 65.2-300 shall not be included as an employee for purposes of this subdivision.

i. Employees of any common carrier by railroad engaging in commerce between any of the several states or territories or between the District of Columbia and any of the states or territories and any foreign nation or nations, and any person suffering injury or death while he is employed by such carrier in such commerce. This title shall not be construed to lessen the liability of any such common carrier or to diminish or take away in any respect any right that any person so employed, or the personal representative, kindred or relation, or dependent of such person, may have under the act of Congress relating to the liability of common carriers by railroad to their employees in certain cases, approved April 22, 1908, or under §§ 8.01-57 through 8.01-62 or § 56-441.

j. Employees of common carriers by railroad who are engaged in intrastate trade or commerce. However, this title shall not be construed to lessen the liability of such common carriers or take away or diminish any right that any employee or, in case of his death, the personal representative of such employee of such common carrier may have under §§ 8.01-57 through 8.01-61 or § 56-441.

k. Except as provided in subdivision 1 of this definition, a member of a volunteer fire-fighting, lifesaving or rescue squad when engaged in activities related principally to participation as a member of such squad whether or not the volunteer continues to receive compensation from his employer for time away from the job.

l. Except as otherwise provided in this title, noncompensated employees and noncompensated directors of corporations exempt from taxation pursuant to § 501 (c) (3) of Title 26 of the United States Code (Internal Revenue Code of 1954).

m. Any person performing services as a sports official for an entity sponsoring an interscholastic or intercollegiate sports event or any person performing services as a sports official for a public entity or a private, nonprofit organization which sponsors an amateur sports event. For the purposes of this subdivision, "sports official" includes an umpire, referee, judge, scorekeeper, timekeeper or other person who is a neutral participant in a sports event. This shall not include any person, otherwise employed by an organization or entity sponsoring a sports event, who performs services as a sports official as part of his regular employment.

"Employer" includes (i) any person, the Commonwealth or any political subdivision thereof and any individual, firm, association or corporation, or the receiver or trustee of the same, or the legal representative of a deceased employer, using the service of another for pay and (ii) any volunteer fire company or volunteer lifesaving or rescue squad electing to be included and maintaining coverage as an employer under this title. If the employer is insured, it includes his insurer so far as applicable.

"Executive officer" means (i) the president, vice-president, secretary, treasurer or other officer, elected or appointed in accordance with the charter and bylaws of a corporation and (ii) the managers elected or appointed in accordance with the articles of organization or operating agreement of a limited

liability company. However, such term does not include noncompensated officers of corporations exempt from taxation pursuant to § 501 (c) (3) of Title 26 of the United States Code (Internal Revenue Code of 1954).

"Filed" means hand delivered to the Commission's office in Richmond or any regional office maintained by the Commission; sent by telegraph, electronic mail or other means of electronic transmission approved by the Commission or facsimile transmission; or posted at any post office of the United States Postal Service by certified or registered mail. Filing by first-class mail, telegraph, electronic mail or other means of electronic transmission or facsimile transmission shall be deemed completed only when the document or other material transmitted reaches the Commission or its designated agent.

"Injury" means only injury by accident arising out of and in the course of the employment or occupational disease as defined in Chapter 4 (§ 65.2-400 et seq.) of this title and does not include a disease in any form, except when it results naturally and unavoidably from either of the foregoing causes. Such term shall not include any injury, disease or condition resulting from an employee's voluntary:

1. Participation in employer-sponsored off-duty recreational activities which are not part of the employee's duties; or
2. Use of a motor vehicle that was provided to the employee by a motor vehicle dealer as defined by § 46.2-1500 and bears a dealer's license plate as defined by § 46.2-1550 for (i) commuting to or from work or (ii) other nonwork activity.

Such term shall include any injury, disease or condition:

1. Arising out of and in the course of the employment of (a) an employee of a hospital as defined in § 32.1-123; (b) an employee of a health care provider as defined in § 8.01-581.1; (c) an employee of the Department of Health or a local department of health; (d) a member of a search and rescue organization; or (e) any person described in clauses (i) through (iv), (vi), and (ix) of subsection A of § 65.2-402.1 otherwise subject to the provisions of this title; and

2. Resulting from (a) the administration of vaccinia (smallpox) vaccine, Cidofivir and derivatives thereof, or Vaccinia Immune Globulin as part of federally initiated smallpox countermeasures, or (b) transmission of vaccinia in the course of employment from an employee participating in such countermeasures to a coemployee of the same employer.

"Professional employer organization" means any person that enters into a written agreement with a client company to provide professional employer services.

"Professional employer services" means services provided to a client company pursuant to a written agreement with a professional employer organization whereby the professional employer organization initially employs all or a majority of a client company's workforce and assumes responsibilities as an employer for all coemployees that are assigned, allocated, or shared by the agreement between the professional employer organization and the client company.

"Staffing service" means any person, other than a professional employer organization, that hires its own employees and assigns them to a client to support or supplement the client's workforce. It includes temporary staffing services that supply employees to clients in special work situations such as employee absences, temporary skill shortages, seasonal workloads, and special assignments and projects.

§ 65.2-103. Coverage of members of the Virginia National Guard, Virginia Defense Force and naval militia during response to orders.

A claim for workers' compensation benefits shall be deemed to be in the course of employment with the Virginia National Guard, Virginia State Defense Force, or naval militia for any member thereof who, reacting to an order to report received while he is outside an assigned shift or work location, undertakes in direct obedience to a lawful military order travel by the most expeditious route to his designated place of state active duty pursuant to §§ 44-54.4, 44-75.1, and 44-78.1. Nothing in this section shall prohibit an employer from using any defense otherwise available under this title.

2. That §§ 44-43, 44-52, and 44-116 of the Code of Virginia are repealed.