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# Wisconsin Legislative Council

## STAFF BRIEF

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### STUDY COMMITTEE ON WISCONSIN NATIONAL GUARD SEXUAL MISCONDUCT PROCEDURES

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The Wisconsin Legislative Council is a nonpartisan legislative service agency. Among other services provided to the Wisconsin Legislature, staff of the Wisconsin Legislative Council conduct study committees under the direction of the Joint Legislative Council.

Established in 1947, the Joint Legislative Council directs study committees to study and recommend legislation regarding major policy questions facing the state. Study committee members are selected by the Joint Legislative Council and include both legislators and citizen members who are knowledgeable about a study committee's topic.

This staff brief was prepared by the Wisconsin Legislative Council staff as an introduction for study committee members to the study committee's topic.

# INTRODUCTION

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In recent years, various news organizations have reported concerns that the Wisconsin National Guard failed to properly handle or respond to allegations of sexual assault and sexual harassment within the Guard. In March 2019, in response to these reports and similar concerns raised to various federal and state officials, Governor Tony Evers and U.S. Senator Tammy Baldwin requested that the federal National Guard Bureau's Office of Complex Investigations (OCI) conduct an assessment of the Wisconsin National Guard's sexual assault and harassment reporting procedures, investigation protocols, and accountability measures.

The OCI assessment, completed in November 2019, reported that the investigatory team "found that the Wisconsin National Guard's programs and systems for handling allegations of sexual assault, sexual harassment, and other workplace or service-related misconduct were non-compliant with federal law and regulation, and in various respects, deficient or failing." Shortly after the assessment was released, then-Adjutant General Maj. Gen. Donald Dunbar resigned at the request of Governor Evers. Governor Evers then ordered the Wisconsin National Guard to submit a corrective action plan. In addition, the Wisconsin Department of Justice (DOJ) reviewed more than 30 allegations of sexual assault that had been investigated by the Wisconsin National Guard between 2009 and 2019. Although this review did not result in any new criminal charges, the DOJ made a number of observations regarding the cases it reviewed.

In response to legislative interest in ensuring that state law provides adequate mechanisms for addressing sexual misconduct within the Wisconsin National Guard, the Joint Legislative Council (JLC) created the Study Committee on Wisconsin National Guard Sexual Misconduct Procedures and directed it to study the Wisconsin National Guard's procedures for investigating and addressing sexual misconduct. The JLC specifically directed the study committee to review the findings and recommendations contained in previously completed investigations into the Wisconsin National Guard's procedures, with a particular focus on OCI's assessment of the Wisconsin National Guard's sexual assault and harassment report procedures, investigation protocols, and accountability measures. It further directed the study committee to recommend legislation that enhances oversight of the Wisconsin National Guard as it relates to sexual misconduct, ensures state law complies with relevant federal requirements, and amends the Wisconsin Code of Military Justice where necessary.

To assist the committee members in carrying out this charge, this staff brief provides information on the following topics:

- **Part I** provides an overview of the organization and administration of the Wisconsin National Guard.
- **Part II** describes general concepts regarding the rules of conduct and discipline that apply to the Wisconsin National Guard and highlights certain requirements related to sexual assault and sexual harassment.
- **Part III** briefly summarizes the OCI assessment's findings and the Wisconsin DOJ's observations from the cases it reviewed.

## PART I | WISCONSIN NATIONAL GUARD

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The Wisconsin National Guard is the organized militia of the state and is headed by the state Adjutant General. The Guard is an armed military force that is organized, trained, equipped, and available for deployment under official orders in both state and national emergencies. The Guard has dual missions, federal and state. Its federal mission is to provide trained units to the U.S. Army and Air Force in time of war or national emergency. Its state mission is to help civil authorities protect life and property and preserve peace, order, and public safety in times of natural or human-caused emergencies.

### ORGANIZATION AND ADMINISTRATION

The Wisconsin Department of Military Affairs administers the Wisconsin National Guard under the direction of the Adjutant General. Like all state National Guards, the Wisconsin National Guard is comprised of two separate components: the Air National Guard and the Army National Guard. [s. [321.30 \(2\)](#), Stats., and [10 U.S.C. ss. 10105](#) and [10111](#).] The Wisconsin Army National Guard and Wisconsin Air National Guard are each headed by a Deputy Adjutant General. When in active duty service of the United States, the Army National Guard is a component of the U.S. Army, and the Air National Guard is a component of the U.S. Air Force. [[10 U.S.C. ss. 10106](#) and [10112](#).] Under federal law, the Army National Guard and Air National Guard are “an integral part of the first line defenses of the United States.” [[32 U.S.C. s. 102](#).]

### Wings, Divisions, and Brigades

Each component of the National Guard is further divided to allocate responsibilities and command. The Air National Guard is divided into wings. Overall, approximately 2,300 individuals serve in the Wisconsin Air National Guard. The following wings are based in Wisconsin:<sup>1</sup>

- 115th Fighter Wing, Truax Field.
- 128th Air Control Squadron and Combat Readiness Training Center, Volk Field.
- 128th Air Refueling Wing, General Mitchell International Airport.

The Army National Guard is divided into divisions and brigades. Overall, approximately 7,700 soldiers serve in the Wisconsin Army National Guard. The following units are based in Wisconsin:<sup>2</sup>

- 32nd “Red Arrow” Infantry Brigade, Camp Douglas.
- 64th Troop Command, Madison.
- 157th Maneuver Enhancement Brigade, Milwaukee.
- 426th Regiment Regional Training Institute, Fort McCoy.

### Adjutant General

The Adjutant General supervises and directs the Department of Military Affairs and has specific duties and powers described in the state statutes. [s. [15.31](#), Stats.] The Adjutant General is

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<sup>1</sup> <https://ng.wi.gov/about/wiang>.

<sup>2</sup> <https://ng.wi.gov/about/wiarng>.

appointed by the Governor and serves a five-year term. To be eligible to serve as Adjutant General, a person must hold the federally recognized minimum rank of full colonel, be a current participating member of one of certain National Guard units or other reserve components, and be fully qualified to receive federal recognition at the minimum rank of brigadier general and have successfully completed a war college course or the military equivalent acceptable to the appropriate service. [s. [15.31](#), Stats.]

The Adjutant General's duties include the following:

- Serving as the Governor's military chief of staff.
- Advising the Governor on military issues.
- Having control over all military property and records.
- Preparing the training of National Guard members.

[s. [321.04 \(1\)](#), Stats.]

State law also authorizes the Adjutant General to make printed policies, regulations, and instructions for the governance of the National Guard, among other powers. [s. [321.04 \(2\)](#), Stats.]

## DUAL MISSION

As a hybrid state and federal organization that serves as both the state's militia and as part of the U.S. Air and Army National Guard, the Guard serves a dual mission. Describing this unique structure, one court observed, "[t]he Guard occupies a distinct role in the federal structure that does not fit neatly within the scope of either state or national concerns." On the one hand, the court explained, "[i]n each state the National Guard is a state agency, under state authority and control. At the same time, federal law accounts, to a significant extent, for the composition and function of the Guard.

The Wisconsin National Guard is a hybrid organization that serves as the organized militia of Wisconsin and as part of the U.S. National Guard. The federal government provides funding and materiel.

Accordingly, the Guard may serve the state in times of civil strife within its borders while also being available for federal service during national emergencies." [*Knutson v. Wisconsin Air Nat'l Guard*, 995 F.2d 765, 767 (7th Cir. 1993).]

Under this hybrid structure, the Governor and the Governor's appointed Adjutant General command each state National Guard, while the federal Defense Department, the Secretaries of the Army and Air Force, and the National Guard Bureau prescribe regulations and issue orders to organize, discipline, and govern the Guard. [[32 U.S.C. ss. 110](#) and [314 \(a\)](#).]

## Federal Authority

The U.S. Constitution gives Congress the authority "[t]o provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress." [[U.S. Const. art. I, s. 8](#).]

In addition to prescribing regulations and issuing orders to organize, discipline, and govern the Guard, the federal government "provides virtually all of the funding, the materiel, and the leadership for the State Guard units." [*Perpich v. Dep't of Def.*, 496 U.S. 334, 351 (1990).]

Although states are responsible for training the National Guard and rely on their units under gubernatorial command “to respond to local emergencies,” training must conform to regulations prescribed by the Secretaries of the Army and the Air Force. [[32 U.S.C. ss. 501-505.](#)] States that fail to comply with federal regulations risk forfeiture of federal funds allocated to organize, equip, and arm state Guards. [[32 U.S.C. ss. 101, 107, 108](#) and [501.](#)]

## State Authority

Under the Wisconsin Constitution, the Governor is the commander and chief of the military and naval forces of the state. The Wisconsin Constitution grants to the Legislature the authority “to determine who shall constitute the militia of the state, and [to] provide for organizing and disciplining the same in such manner as shall be prescribed by law.” [Wis. Const., [art. 4, s. 29](#) and [art. 5, s. 4.](#)]

The Legislature exercised that authority by enacting subch. IV of ch. 321, Stats. Among other provisions, that subchapter designates the Wisconsin National Guard as the militia of this state, establishes various state requirements relevant to the Guard, and sets forth the circumstances in which the Governor may call the Wisconsin National Guard to state active duty. [See, s. [321.39](#), Stats.] As will be discussed in Part II, the Legislature also exercised its authority to provide for the discipline of the National Guard through the creation of the Wisconsin Code of Military Justice in ch. 322, Stats.

The Wisconsin Constitution grants the Legislature the authority to organize and discipline the Wisconsin National Guard.

As was mentioned, the Adjutant General may “make, publish, and have printed regulations, and instructions for the governance of the national guard.” [s. [321.04 \(2\) \(a\)](#), Stats.] Accordingly, the Adjutant General may enact certain policies through The Adjutant General (TAG) Memoranda. Unlike the actions of most other state agencies, Wisconsin National Guard actions (or inactions), including TAG memoranda, are not considered “rules” and are therefore exempt from the rule-making process. [s. [227.01 \(13\) \(i\)](#), Stats.]

## FEDERAL AND STATE STATUS

When carrying out their National Guard duties, Wisconsin National Guard members may be in either “federal status” or “state status.” Wisconsin National Guard members may therefore be asked to perform a broad range of duties and serve as part of “two overlapping but distinct organizations” — the Wisconsin National Guard and the National Guard of the United States. Any person who enlists in the Wisconsin National Guard simultaneously enlists with the National Guard of the United States. [[10 U.S.C. s. 12107 \(b\).](#)]

Despite this dual enlistment classification, a National Guard member typically only serves in one capacity at a time. In other words, as the U.S. Supreme Court has explained, “[m]embers of a state National Guard must keep three hats in their closet—a civilian hat, a state militia hat, and an army hat—only one of which is worn at any particular time.” [*Perpich v. Dept. of Def.*, 496 U.S. 334, 348 (1990).] What “hat” a member is wearing generally determines what entity has jurisdiction over that member.

## Federal Status

Title 10 of the U.S. Code allows the federal government to activate into federal status, or “federalize,” Wisconsin National Guard members when necessary. Among other circumstances under which National Guard units may be called into service under Title 10, members may be called to active federal duty to provide trained units to the U.S. Army and Air Force in times of

war or national emergency or to assist with the response to a national emergency declared by the President. [[10 U.S.C. ss. 10102](#) and [12301 \(a\)](#).]

When serving under Title 10 orders, National Guard members are under the direction of the Secretary of Defense and the President and are subject to the laws and regulations of the U.S. Army or U.S. Air Force, as applicable. [[10 U.S.C. s. 12405](#).]

## State Status

Wisconsin National Guard members serve in state status in two situations: (a) when ordered to “state active duty” by the Governor; and (b) when ordered to duty under Title 32 of the U.S. Code. When the Guard is in state status, the Governor is commander-in-chief.

### State Active Duty

The Governor may order Wisconsin National Guard members into state active duty to respond to certain specific types of events, as prescribed by statute. Specifically, the Governor may activate the Guard in any of the following circumstances:

- In the case of war, insurrection, rebellion, riot, invasion, terrorism, or resistance to the execution of state or federal law.
- In the event of natural public disaster.
- If the Governor declares a state of emergency relating to public health.
- In order to assess damage or potential damage and to recommend responsive action as a result of one of the above events.
- Upon application of any U.S. marshal, village president, city mayor, town board chairperson, or sheriff.

National Guard members can be activated into federal status under Title 10 or state status under state law or Title 32.

[s. [321.39](#), Stats.]

## Title 32

The Secretary of the Army or Secretary of the Air Force may call National Guard units to active duty under Title 32. Unlike for units activated under Title 10, units activated under Title 32 remain under state control, despite being called into duty under federal requirements.

Typical duties for National Guard members activated under Title 32 include inactive duty for training (sometimes called weekend drill), full-time National Guard duty, annual training, and “other duty in addition to” that training. [See *Congressional Research Service*, Reserve Component Personnel Issues: Questions and Answers, [CRS Report](#), November 2, 2021; [32 U.S.C. ss. 101 \(19\)](#) and [502 \(f\) \(1\)](#).] Examples of the “other duty” that may be required include support of operations or missions undertaken by the member’s unit at the request of the President or Secretary of Defense and homeland defense duty. [[32 U.S.C. ss. 502 \(f\) \(2\)](#) and [904 \(a\)](#).]

## Full-Time Jobs Within the National Guard

Similar to other reserve components of the armed forces, members of the National Guard may typically pursue other occupations in addition to their National Guard service. When National Guard members are not called into full-time, active-duty service or performing required

training, they may work civilian jobs in their home communities.<sup>3</sup> Some National Guard members may also work full-time jobs for the Guard, in addition to their part-time service as a National Guard member. For example, some members work as military technicians, a civilian employee job for the National Guard that involves instructing or training Guard members or maintaining and repairing supplies and equipment and requires Guard membership. Military technicians are federal civilian employees who work under the direction of the state Adjutant General. [[10 U.S.C. s. 10216](#) and [32 U.S.C. s. 709](#).]

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<sup>3</sup> Legislative Reference Bureau, *Wisconsin National Guard Activations*, [LRB Reports](#) (May 2020).



## PART II | RULES OF CONDUCT AND DISCIPLINE

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As with most aspects of the National Guard, the conduct and discipline of members have both state and federal components. State law provides that “The applicable rules of discipline and regulations of the U.S. armed forces shall constitute the rules and discipline and the regulations for the national guard.” [s. [321.36](#), Stats.] Federal law also provides that “the President shall prescribe regulations, and issue orders, necessary to organize, discipline, and govern the national guard.” [[32 U.S.C. s. 110](#).] These rules of discipline are found in Department of Defense (DOD) and Chief of the National Guard Bureau policies and regulations, TAG memoranda, U.S. Army and U.S. Air Force Rules, the Uniform Code of Military Justice, and the Wisconsin Code of Military Justice. Enforcement of rules of discipline can be through administrative measures or formal courts-martial, depending on the circumstances.

### RULES AND POLICIES APPLICABLE TO THE NATIONAL GUARD

As reserve components of the U.S. Army and the U.S. Air Force, the Wisconsin Army National Guard and Wisconsin Air National Guard must generally follow the rules and regulations that govern the conduct of members of the Army and Air Force, as applicable. As military departments within the U.S. DOD, the Army and Air Force, and by extension the Wisconsin Army National Guard and Wisconsin Air National Guard, are also subject to DOD policies and regulations.

The National Guard is subject to certain federal regulations applicable to the armed forces.

Federal law designates the National Guard Bureau as “the channel of communications on all matters pertaining to the National Guard, the Army National Guard of the United States, and the Air National Guard of the United States between (1) the Department of the Army and Department of the Air Force, and (2) the several states.” [[10 U.S.C. s. 10501](#).] Among other responsibilities, federal law charges the National Guard Bureau with “ensuring that units and members of the Army National Guard and the Air National Guard are trained by the States in accordance with approved programs and policies of, and guidance from the Chief [of the National Guard Bureau], the Secretary of the Army, and the Secretary of the Air Force.” Federal law also empowers the National Guard Bureau to “[issue] directives, regulations, and publications consistent with approved policies of the Army and Air Force, as appropriate.” [[10 U.S.C. s. 10503](#).] These directives, in turn, are carried out by state National Guards under the direction of state Adjutants General.

### Sexual Assault Prevention and Response Policies

The DOD has implemented a Sexual Assault Prevention and Response (SAPR) program by [policy](#). This policy establishes specific procedures for, and responsibilities related to, preventing and responding to sexual assault. DOD policy delegates to the National Guard Bureau Chief various responsibilities related to the SAPR program. These responsibilities include establishing and implementing SAPR policy and procedures for National Guard members under Title 32. [DODD 6495.01.] Chief, National Guard Bureau Instructions (CNGBI) specify the responsibilities of state adjutants general, commanders, sexual assault response coordinators (SARCs), and victim advocate coordinators, among others. [See, e.g., CNGBI 1300.01A.]

A complete description of DOD’s SAPR policy is beyond the scope of this brief; however, very generally, under this program, National Guard members who are sexually assaulted while performing active service or inactive duty training are entitled to the support of the SAPR program. The program requires that victims receive the assistance of a SARC and victim

advocate, be given emergency medical care, and be offered a sexual assault forensic examination. [DODI 6495.02, Vol. 1, ss. 4.c, 4.j, 4.k, and 4.l.]

That policy also allows sexual assault victims to file a restricted or unrestricted report. A restricted report is a report in which a sexual assault victim may confidentially disclose the assault to certain specified individuals, such as the SARC or healthcare personnel, and receive medical treatment and the assignment of a SARC and SAPR victim advocate, without triggering an investigation. A restricted report is not reported to law enforcement or to the victim's command to initiate an official investigation, unless the victim consents or an established exception applies. [DODI 6495.02, Vol. 1, Glossary.] In comparison, an unrestricted report of sexual assault is reported to law enforcement and may be used to initiate an official investigation. [DODI 6495.02, Vol. 1, Glossary, and DODD 6495.01, Glossary.]

Under National Guard Bureau policy, adjutants general are responsible for ensuring that reports of sexual assault within non-federalized forces are handled by trained SAPR personnel.

DOD policies and Chief, National Guard Bureau Instructions also specify what entities are responsible for investigating allegations of sexual assault depending on the circumstances.<sup>4</sup> Which entity has jurisdiction to investigate an allegation of sexual assault generally determines what procedures and consequences may be used to hold an offender accountable. Possible consequences for an individual against whom an allegation of sexual assault is made vary depending on what entity has jurisdiction to investigate the allegations. They include criminal prosecution under state law, military prosecution under the applicable military code of justice, and discipline under military administrative procedures.

## Equal Opportunity Policies

DOD policy also establishes an equal opportunity program, which addresses issues of workplace discrimination and harassment, including sexual harassment, and prescribes procedures and requirements for addressing discrimination and harassment complaints. [See, DOD Instruction 1020.03]. The Chief of the National Guard Bureau, is responsible for ensuring that the military equal opportunity programs and policies within National Guard organizations are consistent with this policy.

Greatly simplified, DOD's equal opportunity policy allows a service member to file an informal or formal complaint if the member believes he or she has been discriminated against or harassed. Under the policy, an informal complaint "should be addressed at the lowest appropriate level." A formal sexual harassment complaint must be forwarded to a superior officer, investigated, and reported on more quickly than formal complaints that do not involve sexual harassment. [DODI 1020.03 ss. 4.2 and 4.4.] A formal sexual harassment complaint that involves sexual assault allegations must be reported to a sexual assault response coordinator for victim support services and reported for investigation to the appropriate military criminal investigative organization. [DODI 1020.03 ss. 4.1 and 4.3.]

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<sup>4</sup> Very generally, Chief, National Guard Bureau Instructions require that "all unrestricted reports of sexual assault be referred to the appropriate military criminal investigative organization (MCIO) or civilian law enforcement (LEO) and the [SARC]." These instructions further require state National Guard units to comply with state law. The instructions also provide that if the Adjutant General determines, after referral to the applicable MCIO or LEO, that further investigation is necessary, the Adjutant General may request OCI to provide an administrative investigation into the allegation of a sexual assault. [CNGBI 0400.01B.]

In addition to these federal requirements, various provisions of state law may also apply to allegations of discrimination or harassment in the Wisconsin National Guard. For example, under state law, no person may be denied membership in, or segregated within, the National Guard on the basis of sex or sexual orientation, among other characteristics. [s. [321.37](#), Stats.] Additionally, harassment that rises to the level of criminal behavior, such as stalking, could be punished under the state criminal code.

## MILITARY JUSTICE

Members of the Wisconsin National Guard are subject to the Wisconsin Code of Military Justice (WCMJ), which codifies offenses that may be punished under the code and establishes procedures for enforcing the code. If on Title 10 status, National Guard members are subject instead to the federal Uniform Code of Military Justice (UCMJ).

Misconduct by a National Guard member may be punished by non-judicial punishment or courts-martial under the WCMJ or UCMJ, administrative actions, or state criminal law, as appropriate.

### Wisconsin Code of Military Justice

The WCMJ applies to members of the state military forces. Under the code, “[s]ubject matter jurisdiction is established if a nexus exists between an offense under this code and the state military force.” The WCMJ prohibits various conduct related to sexual assault and other sexual misconduct. [ss. [322.120](#) and [322.1203](#), Stats.]

The WCMJ was recodified in 2007.<sup>5</sup> More recently, 2013 Wisconsin Act 201 amended the WCMJ to modify crimes relating to stalking and sexual offenses, among other topics.

### Procedures Under the WCMJ

The WCMJ provides for three types of courts-martial: general, special, and summary. A conviction under a general court-martial for any military offense for which an accused may receive a sentence of confinement for more than one year is a felony conviction. Except for convictions by a summary court-martial, all other offenses are misdemeanors. A conviction under a summary court-martial, which is considered the least serious type, is not considered a criminal conviction. [s. [322.056](#), Stats.]

A court-martial may only be initiated by certain commanding officers, referred to as the convening authority. The type of court-martial dictates who may act as a convening authority. Very generally, for general and special courts-martial, the convening authority “details,” or assigns: a trial counsel, who acts as the prosecutor; defense counsel; and members of the court-martial, who are chosen for their qualifications. Members of the court-martial vote on both the findings and sentence, with a two-thirds vote required for a conviction. [See subchs. [IV](#) and [V](#), ch. 322, Stats.] The military judge rules on all questions of law and interlocutory questions that arise. During the trial, trial counsel, defense counsel, and court-martial have equal opportunity to obtain witnesses and other evidence. Potential punishments under a court-martial include forfeiture of pay, confinement, and for general courts-martial, dishonorable discharge and dismissal. [ss. [322.017](#), [322.018](#), [322.019](#), and [322.026](#), Stats.]

The WCMJ also authorizes a commanding officer to impose non-judicial punishment for minor offenses. Non-judicial punishment may be imposed without the intervention of a court-martial.

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<sup>5</sup> According to the committee that recommended the recodification, the legislation recodifying the WCMJ, “to the greatest extent possible, retain[ed] the structure and language of the Uniform Code of Military Justice on which the revised WCMJ is based ....” Wisconsin Legislative Council, *Special Committee on Recodification of Chapter 21, Military Affairs*, [Report to the Legislature](#), June 18, 2007.

Potential consequences that may be imposed under this authority include admonition, reprimand, forfeiture of pay, and reduction in rank. [s. [322.015](#), Stats.]

## **Uniform Code of Military Justice**

Similar to the WCMJ, the UCMJ codifies offenses that may be punished under the code and establishes procedures for enforcing the code. The UCMJ, however, only applies to members of the National Guard who have been activated to federal status under Title 10. [[10 U.S.C. s. 802](#).] The UCMJ's punitive articles are similar in substance to the WCMJ's punitive articles, though some recent modifications to the UCMJ are not replicated in the WCMJ.

## **Administrative Investigation**

In place of initiating proceedings under the WCMJ, a commander may use various administrative measures or tools to maintain order and discipline. These options, which are initiated at the commander's direction, typically involve a single appointed investigating officer, who may conduct interviews, collect evidence, and then make findings and recommendations. [See AR 15-6.]

Examples of administrative measures include: requiring informal counseling; issuing a memorandum of counseling or reprimand; annotating misconduct on a member's evaluation or performance report; withholding or delaying promotions; changing a member's duty assignments, shift assignments, or transfers; administratively demoting a member; removing an active guard or reserve member from full-time orders; and initiating administrative separation from the National Guard. [National Guard Bureau OCI Report of Assessment of the Wisconsin National Guard (Assessment), p. 75.]

## **CIVILIAN CRIMINAL CODE**

In addition to being accountable for their conduct under various military rules, regulations, and codes, National Guard members are also subject to state criminal law. The WCMJ provides that "A proper civilian court has primary jurisdiction of a non-military offense<sup>6</sup> when an act or omission violates both [the WCMJ] and local criminal law." In these cases, a civilian law enforcement agency investigates the allegation and a civilian prosecutor determines whether to file criminal charges. If the civilian prosecuting agency declines to prosecute or dismisses the charge before jeopardy attaches, the National Guard may initiate court-martial proceedings. Regardless of the civilian prosecutor's decision, however, the National Guard may choose to investigate an allegation further or initiate administrative action. [s. [322.002](#), Stats.]

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<sup>6</sup> The WCMJ defines "non-military offenses" as "offenses which are in the state's civilian penal statute and are not offenses under this code." [s. [322.001 \(16\)](#), Stats.] This definition appears, on its face, to be inconsistent with the provision of the WCMJ that grants a proper civilian court "primary jurisdiction of a non-military offense when an act or omission violates both [the WCMJ] and local criminal law."

## PART III | ASSESSMENTS OF WISCONSIN NATIONAL GUARD'S SEXUAL ASSAULT AND SEXUAL HARASSMENT PROCEDURES

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In March 2019, in response to allegations that the Wisconsin National Guard mishandled and failed to address allegations of sexual assault and sexual harassment within the Guard, Governor Tony Evers and U.S. Senator Tammy Baldwin requested that the National Guard Bureau's Office of Complex Investigations (OCI) assess the Wisconsin National Guard's sexual assault and harassment reporting procedures, investigation protocols, and accountability measures. OCI conducted this assessment throughout 2019 and completed an [assessment](#) detailing its findings in November 2019. The Wisconsin Department of Justice additionally reviewed more than 30 allegations of sexual assault that the Wisconsin National Guard had investigated between 2009 and 2019, and provided observations regarding those cases.

### OFFICE OF COMPLEX INVESTIGATIONS ASSESSMENT

The OCI investigators divided their findings among the following five “lines of effort”: (1) sexual assault prevention and response; (2) investigations of sexual assault; (3) sexual harassment and equal opportunity; (4) command climate; and (5) accountability.<sup>7</sup> The investigators made 22 findings and 21 recommendations across these five lines of effort.

Summarizing these findings, the investigators reported that “the Wisconsin National Guard’s programs and systems for handling allegations of sexual assault, sexual harassment, and other workplace or service-related misconduct were non-compliant with federal law and regulation, and in various respects, deficient or failing.” In particular, the investigators faulted the Wisconsin National Guard’s decision to conduct internal, command-directed investigations of sexual assault allegations, which the investigators stated was “in direct violation of Department of Defense; Chief, National Guard Bureau; and Service regulations and policies.” And, “[m]ore importantly,” the investigators observed, “these internal investigations were deficient in a number of ways that adversely impacted commands’ efforts to properly support victims of sexual assault and hold offenders accountable.”

The investigators nevertheless also observed that, “[d]espite the issues with program compliance, the overall climate within the Wisconsin National Guard is positive.” According to the investigators, “[s]ervice members reported a high level of confidence and trust in their immediate leaders which has resulted in high retention across the force.”

### Sexual Assault Prevention and Response

As explained in Part II, DOD has implemented rules and regulations establishing specific procedures for, and responsibilities related to, preventing and responding to sexual assault. OCI made the following findings regarding the Wisconsin National Guard’s SAPR program:

- The Wisconsin National Guard’s written policies on sexual assault were not consistent with current federal law, regulations, and policy.

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<sup>7</sup> Investigators interviewed complainants of sexual assault, sexual harassment, and retaliation; Wisconsin National Guard senior leaders; officials from the Wisconsin DOJ; and local law enforcement officials. OCI also conducted an anonymous survey of Guard members and reviewed Guard documents, including documents regarding internal policies and regulations, internal and external inspections, military justice and administrative disciplinary actions, and internal and external investigations of criminal and non-criminal matters. [Assessment, p. 9.]

- While there were examples of optimal victim support on the part of the SARCs, ineffective program management tools hampered optimal SAPR program performance.
- Manpower, resourcing, and credentialing were deficient, which contributed to program inefficiencies and diminished performance.
- While the SAPR program training completion rate appeared to be relatively on par with national averages, anecdotal evidence from interviews as well as survey results revealed gaps in awareness of prevention and response processes, protocols, and strategies.
- The Wisconsin Army National Guard and Air National Guard SAPR programs did not coordinate and collaborate effectively for purposes of facilitating state-level program management.
- There were instances in which the commanders and leaders did not attend to or prioritize victims' needs and interests.

## **Sexual Assault Investigations**

DOD policy requires a unit commander who receives an unrestricted report of sexual assault to “immediately refer the matter to the appropriate [military criminal investigative organization].” An investigator must then conduct a thorough inquiry into the allegation. OCI reported that of 35 unrestricted reports of sexual assault in the Wisconsin National Guard that were reported from May 1, 2009 to May 31, 2019:

- Four were investigated by local law enforcement.
- Three were investigated by Army Criminal Investigations Divisions.
- Five were investigated by OCI.
- Twenty-two were investigated by the Wisconsin National Guard using internal investigative capabilities to conduct command-directed administrative investigations.
- One case was never investigated.

The investigators found that the Wisconsin National Guard’s decision to handle 22 allegations of sexual assault using internal command-directed investigations violated various regulations and policies of the DOD, National Guard Bureau Chief, Army, and Air Force. The investigators further found that this decision impacted the quality and legality of the investigations, and that, “As a result of the varying and disputable quality of the investigations, the credibility of the sexual assault investigations in the state suffered to the detriment of all parties.”

## **Sexual Harassment and Equal Opportunity**

Under National Guard Bureau Instructions, the Adjutant General is responsible for the state equal opportunity program. The state equal employment manager (SEEM) manages the military equal opportunity program and serves as the Adjutant General’s “central point of contact for all complaints of discrimination arising within the state National Guard.” The SEEM is responsible for tasks such as monitoring and tracking the progress of equal opportunity program complaints, notifying an office in the National Guard Bureau of all complaints so that they may be tracked, and overseeing equal opportunity counselors in each unit.

Additionally, DOD policy required every state National Guard to implement a Retaliation Protection Plan in 2017 to encourage personnel to participate in the equal employment



opportunity complaint process without fear of retaliation. Commands are also required to convey the opportunity to make an anonymous complaint.

With respect to these obligations, OCI found the following:

- The Wisconsin National Guard's written policies on preventing and responding to allegations of sexual harassment and a hostile work environment did not reflect contemporary federal law or DOD and NGB policies.
- The equal employment opportunity and harassment policies did not provide adequate protections for complainants.
- The equal opportunity and equal employment opportunity programs lacked adequate resources, command emphasis, and fully trained and qualified personnel, which impacted the filing and disposition of sexual harassment and hostile work environment complaints.
- The SEEM did not have unimpeded access to the Adjutant General regarding equal employment opportunity and equal opportunity program issues and training.
- The SAPR program did not effectively coordinate or collaborate regarding sexual assault and harassment allegations with equal opportunity or equal employment opportunity officials.

## **Command Climate**

OCI found issues with favoritism and fear of retaliation or reprisal for reporting misconduct. In OCI's survey of over 2,200 responding Wisconsin National Guard service members and civilian personnel, approximately half of Air and Army National Guard personnel agreed with a statement that favoritism was not present within the Wisconsin National Guard. Interviews with service members revealed a view among unit members that officers and enlisted leaders extend favoritism based on familiar relationships. Of members who were interviewed, about five percent of Army National Guard members and about eight percent of Air National Guard members reported experiencing or witnessing retaliation or reprisal for reporting misconduct.

## **Accountability**

OCI made five findings related to accountability within the Wisconsin National Guard. Specifically, it found the following:

- Lower unit commanders were limited in their ability to exact accountability of offenders in a timely manner by a TAG Policy Memorandum that reserved the right to the Adjutant General and any general officer in command of a force within the Wisconsin National Guard.
- A general perception existed within the Wisconsin National Guard that the Adjutant General and other senior leaders did not hold offenders accountable.
- The Wisconsin National Guard lacked sufficient internal controls to manage the administration of discipline for service member misconduct.
- The Wisconsin National Guard inconsistently held offenders accountable for substantiated allegations of sexual assault and sexual harassment.
- The Wisconsin National Guard did not comply with service-specific regulatory requirements for reporting unfavorable information on substantiated misconduct.

## WISCONSIN NATIONAL GUARD'S RESPONSE

After OCI released the assessment in December 2019, then-Adjutant General Maj. Gen. Donald Dunbar resigned at the request of Governor Evers.<sup>8</sup> Governor Evers also issued [Executive Order #62](#), which required:

- The Wisconsin National Guard to submit a corrective action plan to the Governor for approval.
- A general officer appointed by the National Guard Bureau and approved by the Governor to oversee the implementation of the plan.
- The Wisconsin National Guard to undergo review by the National Guard Bureau to re-assess sexual assault and harassment reporting procedures, investigation protocols, and accountability measures.
- An office of ombudsman to help survivors and complainants in the review of allegations of sexual assault, harassment, and retaliation within the Wisconsin National Guard.

Governor Evers approved the [corrective action plan](#) in February 2020 and announced in February 2022 that OCI officially closed out its assessment.<sup>9</sup> According to the announcement:

Highlights of the plan included full Wisconsin National Guard implementation of National Guard Bureau and Department of Defense policies, regulations, and instructions including specific provisions that refer all allegations of sexual assault to local law enforcement and National Guard Bureau's judge advocate and the Office of Complex Investigations.

In addition, the Wisconsin National Guard developed two new sets of program instructions as part of the plan – one focused on sexual assault reporting, investigation, and accountability, and another focused on sexual harassment reporting, investigation, and accountability.

## WISCONSIN DEPARTMENT OF JUSTICE REVIEW

In 2021, the Wisconsin DOJ concluded a review of more than 30 sexual assault cases that had been investigated by the Wisconsin National Guard between 2009 and 2019. The review did not result in any new criminal charges, but included the following observations:<sup>10</sup>

- Some cases involved fraternization between members of different grades or ranks, contrary to Army regulations, and the consumption of alcohol by alleged offenders.
- In some of the cases, Wisconsin National Guard investigations were not conducted in a trauma-informed manner.

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<sup>8</sup> Laurel White, *Wisconsin National Guard Head Resigns in Wake of Federal Investigation*, Wisconsin Public Radio (December 9, 2019), <https://www.wpr.org/wisconsin-national-guard-head-resigns-wake-federal-investigation>.

<sup>9</sup> *Governor Evers Announces Wisconsin National Guard Completes OCI Requirements After Making Improvements in Sexual Assault Response Programs*, [Wisconsin National Guard](#), February 14, 2022.

<sup>10</sup> *AG Kaul Announces Conclusion of Review of Sexual Assault Cases Previously Investigated by the Wisconsin National Guard*, [Wisconsin DOJ](#) (Aug. 19, 2021).



- In some cases, survivors were not kept well-informed of the status of their report.

According to DOJ, of the cases it reviewed:

- Three were already prosecuted by a district attorney's office.
- Four were previously investigated by local law enforcement and declined for prosecution by a district attorney's office.
- At least 12 involved conduct that could not be prosecuted because they involved conduct outside the statute of limitations.
- Three were referred by DOJ for further review by a district attorney's office.
- Three were not referred by DOJ at the victim's request.
- Seven were determined to not warrant further investigation or referral.
- One did not have enough information to conduct a review.