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DEPARTMENT OF THE AIR FORCE  
HEADQUARTERS UNITED STATES AIR FORCE  
WASHINGTON DC

03 NOV 1994

MEMORANDUM FOR ALL STAFF JUDGE ADVOCATES AND MILITARY  
JUDGES

FROM: HQ USAF/JAG  
1420 Air Force Pentagon  
Washington, DC 20330-1420

SUBJECT: Commander Inquiries on Members Stating They are Homosexual

1. This is in response to the questions we have received about the impact of the U.S. Court of Appeals for the Ninth Circuit decision in Meinhold v. Department of Defense on the "new" homosexual policy. At the outset we stress that Meinhold is an "old" policy case. Neither the "new" DoD policy nor the Air Force implementation of the "new" DoD policy have been changed in response to the Meinhold decision. Nevertheless, the decision in Meinhold cannot be totally ignored. We need to make an effort to make each administrative discharge case for homosexual conduct as legally unassailable as possible.
2. In spite of weaknesses in the court's reasoning, the decision has been made not to request reconsideration en banc from the Ninth Circuit or seek certiorari from the U.S. Supreme Court in Meinhold. We thus are left with a precedent in the Ninth Circuit that specifically recognizes that it is constitutionally permissible to discharge members for homosexual conduct. At the same time, the precedent essentially allows a court to retroactively reinterpret military regulations under the guise of making them conform to the constitution. Using this technique, the Ninth Circuit added to the "old" policy a new requirement that discharges solely based upon statements be supported by evidence reasonably demonstrating that an individual has a "concrete," "fixed," or "expressed" desire to commit homosexual acts.
3. Because the "new" policy has the added weight of Congressional hearings and is based on federal statute, it remains to be seen whether the Ninth Circuit can apply the reasoning of Meinhold to the "new" policy. Consequently, commanders should continue to apply the "new" policy as written. To the extent possible, consistent with the facts, separations should be initiated based upon acts or marriages; even Meinhold supports discharge based upon acts. When evidence or acts or marriages is not

available, commanders should continue to initiate separations based upon statements alone.

4. Air Force policy requires a commander to have credible information that a basis for discharge exists prior to initiating an inquiry. We stress that the policy on homosexual conduct does not prohibit commanders from initiating inquiries on a member who states that he is a homosexual. In these cases, the inquiry establishes the facts and circumstances surrounding the statement, because statements of homosexuality have been used in an attempt to avoid military service or to avoid specific assignments or deployments. Factors of concern may include the timing of the statement in relation to an imminent PCS or receipt of education.
5. The most compelling cases for an inquiry are those in which the member has received substantial benefits from the government, such as advanced education or training, and then, just prior to entering on active duty, announce that they are homosexual. We have had five such cases since the implementation of the "new" policy, three involving medical school, one involving law school, and one involving graduate school. Four of the five cases have been processed within the Air Education and Training Command (AETC).
6. HQ AETC policy is that in cases in which a member states that he is a homosexual after receiving substantial government benefits, but before fulfilling his military obligations, a judge advocate normally will be appointed to conduct an inquiry. The purpose of the inquiry is to determine the truthfulness of the statement. The inquiry is conducted in accordance with DoD and Air Force policy. We recommend the practice of appointing judge advocates for these high profile cases, which usually involve physicians, because a judge advocate is much more likely to be able to perform a thorough inquiry within the parameters of the policy. A judge advocate need not be appointed as inquiry officer, however, in cases other than these high profile cases.
7. If after investigation, it is found that the statement is true and separation action is initiated against the member, the member may still be subject to recoupment action under 10 U.S.C. 2005. (See IMC 94-4 to AFR 39-10, AFI 36-3206, paragraph 4.37). A member, who is separated for the homosexual conduct of stating he is homosexual, is subject to recoupment if a finding is made that the member made the statement for the purpose of seeking separation. The fact that the statement is true does not protect the member from recoupment.
8. Whether a commander initiates an inquiry into a member who states he is homosexual is dependent upon the facts and circumstances of the case. For example, if the facts and circumstances raise concern that the

member is making a false official statement to avoid military service, the commander may initiate an inquiry. The purpose of the inquiry is to determine if the commander possesses credible information upon which to initiate separation action or if other action should be taken because the member has made a false statement to avoid service; the intent of the member in making the statement also should be examined as being highly probative to recoupment. The purpose of the inquiry is not to discover evidence of homosexual acts or to ferret out other homosexuals in the military. If acts or other military members are discovered during the proper course of the investigation, however, appropriate action may be taken.

9. If your commander wants to initiate an inquiry into a member who has received substantial government benefits, we recommend you discuss the proposed inquiry with your MAJCOM. A judge advocate inquiry officer is not always necessary, but may be prudent in cases involving substantial government benefits because advocacy organizations or outside counsel may be involved. two of our current cases are represented by the same civilian attorney, whom we are advised also represents several other similarly-situated members in the other services. If an officer other than a judge advocate conducts an inquiry in this type of case, we strongly recommend a judge advocate serve as a very close advisor to the IO.
10. Attached are tips for officers appointed to inquire into this type of case and some sample pattern questions. Our POC is Major Mike Gilbert at DSN 224-4075

[signature omitted]

RICHARD A. PETERSON  
Deputy Chief, General Law Division  
Officer of the Judge Advocate General

Attachments:

1. IO Tips
2. Sample Questions