



## ASSISTANT SECRETARY OF DEFENSE

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MEMORANDUM FOR THE ASSISTANT SECRETARY OF THE ARMY (MANPOWER  
RESERVE AFFAIRS)  
ASSISTANT SECRETARY OF THE NAVY (MANPOWER  
AND RESERVE AFFAIRS)  
ASSISTANT SECRETARY OF THE AIR FORCE (MANPOWER,  
RESERVE AFFAIRS, INSTALLATIONS, & ENVIRONMENT)

SUBJECT: Training Guidance For DoD Policy On Homosexual Conduct in the Armed Forces

On 19 July 1993 the Secretary of Defense issued a memorandum concerning homosexual conduct in the Armed Forces. The memorandum directs the Secretaries of the Military Departments to ensure that all members of the Armed Forces are aware of their specific responsibilities in carrying out this new policy. Of particular concern are personnel involved in recruiting, accession processing, commander's inquiries, criminal investigations, and administrative separations.

To assist you in meeting this requirement, the attached training plan is offered as an approach to the education of your personnel on the new policy. It is intended to provide a starting point. Each Service will ensure that those responsible for policy implementation and administration are aware of their responsibilities under the new policy.

Although this briefing is designed for personnel involved in policy implementation and personnel administration, it is evident that information regarding the policy will continue to be of interest to all members of the Armed Forces. The policy must be explained clearly and precisely to ensure that the policy is fully and consistently effectuated.

Edwin Dorn

Attachment:  
as stated

cc:  
Assistant Secretary of Defense (Reserve Affairs)  
Director, Joint Staff  
Chief, Office of Personnel and Training  
Department of Transportation

DoD

POLICY ON HOMOSEXUAL CONDUCT

TRAINING PLAN

## BACKGROUND

On 29 January 1993, the President directed the Secretary of Defense to develop a policy "ending discrimination on the basis of sexual orientation in determining who may serve in the Armed Forces of the United States." The President further directed that the policy be implemented in a manner that is "practical, realistic, and consistent with the high standards of combat effectiveness and unit cohesion our Armed Forces must maintain."

On 5 April 1993, the Secretary of Defense directed that a Military Working Group (MWG) be formed to develop and assess alternative policy options to meet the President's requirements. Fairness and objectivity were major aims of the MWG's process. In pursuit of those aims, the MWG met with individuals and groups holding a broad spectrum of views on the subject. This included meetings with uniformed and civilian experts from inside and outside the Department of Defense (DoD), including the Service members, Service members, Service members, Service members, and Coast Guardsmen who would be most affected by the policy. To broaden understanding of the issue, the MWG also compared experiences of the militaries of other countries, researched available literature, and performed statistical analyses of military separation data obtained from the Services.

Also in April 1993, the Secretary of Defense commissioned RAND's National Defense Research Institute to provide information and analysis that would be useful in helping formulate the draft policy. A multidisciplinary team of researchers was drawn from a number of departments at RAND. Their research and analysis was provided to the Secretary of Defense prior to the decision announced by the Secretary and the President on July 19, 1993.

After comprehensive study and with the concurrence of the Joint Chiefs of Staff, the Secretary of Defense has established a policy determined to be in the best interest of the United States Armed Forces. The provisions of the National Defense Authorization Act for Fiscal Year 1994 related to this issue are fully consistent with this new policy.

Although this briefing is designed for personnel involved in policy implementation and personnel administration, it is evident that information regarding the policy will continue to be of interest to all members of the Armed Forces. The policy must be explained clearly and precisely to ensure that the policy is fully and consistently effectuated.

This training plan is offered to assist all Services in accomplishing that goal.

## THE POLICY

It is the policy of the Department of Defense to judge the suitability of persons to serve in the Armed Forces on the basis of their conduct. Sexual orientation is considered a personal and private matter and homosexual orientation is not a bar to service entry or continued service. Homosexual conduct, however, is grounds for separation from the Military Services.

This policy must be well understood by all personnel with specific responsibilities for its implementation and administration. Of particular concern are those personnel involved in recruiting, accession processing, commanders' inquiries, criminal investigations, and administrative separations. Terminology is particularly important to the dialogue.

A. Key Policy Features:

1. Sexual orientation is a personal and private matter. Officials of the Armed Forces will not ask and Service members will not be required to reveal their sexual orientation.

2. Homosexual orientation alone is not a bar to service entry or continued service unless manifested by homosexual conduct.

3. When a member engages in homosexual conduct, he or she is subject to administrative separation. Homosexual conduct includes a homosexual act, a statement by the member that demonstrates a propensity or intent to engage in homosexual acts, of a homosexual marriage of attempted marriage.

4. A statement by a member that demonstrates a propensity or intent to engage in homosexual acts -- such as a statement by the member that he or she is a homosexual -- is grounds for separation not because it reflects the member's sexual orientation, but because the statement indicates a likelihood that the member engages in or will engage in homosexual acts.

5. Neither commanders' inquiries (for administrative reasons or for minor offenses) nor military criminal law enforcement investigations (for criminal violations) will be conducted absent credible information of homosexual conduct.

6. Credible information exists when the information, considering its source and the surrounding circumstances, supports a reasonable belief that a Service member has engaged in homosexual conduct. Credible information consists of articulable facts, not just a belief or suspicion.

7. Service members may be discharged if they are found to have engaged in homosexual conduct.

B. Accessions Policy:

Applicants for service in the Armed Forces will not be required to disclose their sexual orientation or answer questions about their orientation. They will be briefed on departmental policies governing separation policy for members of the Armed Forces.

### C. Commander's Inquiry and Investigative Policy:

Commanders may initiate inquiries or investigations into homosexual conduct as defined by DoD policy. However, no inquiries or investigations will be conducted solely to establish an individual's sexual orientation, nor will Service members be asked or required to answer questions concerning their sexual orientation. The informal fact-finding inquiry is the preferred method of addressing homosexual conduct. If there is credible information of possible criminal conduct, commanders should consider seeking the assistance of law enforcement or the appropriate Defense Criminal Investigative Organization. A statement by a member that he or she is a homosexual continues to be a basis for initiating an informal fact-finding inquiry. No inquiries or investigations will be conducted absent credible information of conduct that would be the basis for discharge or for a court-martial. Inquiries and investigations will not go beyond establishing the elements of the offense or basis for discharge. Inquiries and investigations shall be limited to the factual circumstances directly relevant to the specific allegations.

### D. Separation Policy:

Service members may be discharged if they engage in homosexual conduct. Homosexual conduct is any act involving bodily contact, actively undertaken or passively permitted between members of the same sex for the purpose of sexual gratification, or any bodily contact that a reasonable person would understand to demonstrate a propensity or intent to engage in homosexual acts, and attempts or solicitations to engage in such acts; a statement by the member that he or she is a homosexual or bisexual or that otherwise demonstrates a propensity or intent to engage in homosexual acts; or a homosexual marriage or attempted homosexual marriage. Normally, administrative separations involving homosexual conduct will be under honorable conditions, unless there are aggravating circumstances, such as force, coercion or acts with a minor.

## BRIEFING PLAN

Title of Briefing: DoD Policy on Homosexual Conduct

Briefer: Commander, commanding officer or officer-in-charge

Instructional Materials:     Background Fact Sheet  
                                  Policy Fact Sheet  
                                  Hypothetical Teaching Scenarios  
                                  Service Regulations

Briefing Goals:

(1) To inform personnel responsible for policy implementation and personnel administration about the DoD Policy. Of particular concern are personnel involved in recruiting, accession processing, commander's inquiries, criminal investigations, and administrative separations.

(2) To clarify the policy and its implementation, and answer questions related to associated definitions and hypothetical scenarios.

Teaching Approach:

(1) Tailor the briefing to your audience. Do not change the message while tailoring it. The requirement is that each audience member knows and understands the policy.

(2) Introduce the topic and define the briefing goals.

(3) Hand out the Policy Fact Sheet.

(4) Conduct the briefing, and guide a discussion informing the audience of their specific area of responsibility in implementing this policy.

(5) Discuss selected policy-related scenarios.

(6) Conduct a Q & A session.

(7) Conclude briefing by summarizing your expectations related to each member's role in properly implementing this policy.

## BRIEFER'S GUIDANCE SHEET

Conduct a briefing to train personnel involved in policy implementation and personnel administration within your organization about this policy.

- You may consult with the legal office, the chaplain, the Inspector General, and military criminal investigation agencies prior to giving the briefing-
- Encourage a legal office representative to attend and respond to questions.

Realize that effective implementation and compliance with this policy is directly related to the professionalism of your presentation.

- The briefing IS informational, IS a clarification of policy, and IS factual.
- The briefing IS NOT sensitivity, IS NOT a forum to debate the policy, IS NOT a “gripe” session, and IS NOT intended to discuss personal values or beliefs.

Divide your audience into appropriate groups where practical.

Learn the key policy features and refer back to them in any discussion.

## HYPOTHETICAL TEACHING SCENARIOS FOR COMMANDERS AND PERSONNEL INVOLVED IN RECRUITING, ACCESSION PROCESSING, CRIMINAL INVESTIGATIONS, AND ADMINISTRATIVE SEPARATIONS

The following hypothetical scenarios are for training purposes only. They are not meant to prescribe “correct” outcomes, but to illustrate how relevant personnel should approach issues that may arise under the DoD policy on homosexual conduct in the Armed Forces. The scenarios do not establish any evidentiary standards or create any substantive or procedural rights.

1. Situation: During a commander’s “open-door” period, a young Service member comes into the commander’s office and states that he believes he may be homosexual. The commander advises the Service member of the military’s policy on homosexual conduct, and the Service member replies, “Maybe I shouldn’t say anything else.” The commander advises him he might wish to discuss the matter with the chaplain.

Issues: The commander wonders whether he should initiate separation action on the basis of the Service member’s statement that he believes he may be a homosexual. Should he refer the case to a Military Criminal Investigative Organization (MCIO) for an investigation to determine if the Service member has committed any homosexual acts since entering the service? Should he initiate a commander’s inquiry to determine if grounds for administrative separation exist?

Discussion: While the Service member’s commander may initiate a commander’s inquiry based on the Service member’s statement that he believes he may be a homosexual, he probably would not at this time. The statement, by itself, is ambiguous and quite possibly could indicate a young Service member’s confusion over some aspect of his sexual identity. It is not at all clear that the Service member intended to make a statement that he is homosexual.

Since the Service member has not indicated that he has committed any criminal act, this case should not be referred to any military law enforcement agency. Had the Service member stated he had engaged in a homosexual act or acts, the commander would also advise the Service member of his rights under Article 31b of the UCMJ.

2. Situation: An officer observes two male junior enlisted Service members walking and holding hands while off-duty and on liberty. The Service members are wearing civilian clothes and are in an isolated wooded public park and, except for the officer, they are alone. He reports the incident to the commanding officer (CO) and adds that he is surprised to find out they appear to be homosexuals. He asks the CO what he proposes to do about the incident. The CO decides he will call the two Service members into his office, separately, and ask them about the officer's observations.

Issue: Was the CO's action appropriate? If not, what action should he have taken?

Discussion: The officer's observation of the two enlisted Service members walking and holding hands in the park constitutes credible information of homosexual conduct if the officer is someone the CO otherwise trusts and believes. The two Service members' hand-holding in these circumstances indicates a homosexual act and therefore the commanding officer may follow-up and inquire further. Probably, the extent of the inquiry will be two confidential one-on-one conferences between the CO and the two Service members to inquire into the incident.

Before the Service members are asked to discuss or explain the incident, the CO should advise them of the military's policy on homosexual conduct. Should they decline to discuss the matter, the questioning should stop. At that point, the CO may consider other relevant information and decide whether to initiate administrative separation actions based on the information he possesses.

4. Situation: A Service member tells his commanding officer (CO) that he is a homosexual. Based on the Service member's statement of his homosexuality, his CO begins immediately to process the Service member for separation from the Service. Three days later, the Service member complains that he has been receiving both written and spoken threats from unidentified Service members who are apparently aware of his homosexuality, and who have stated they are going to beat him up.

Issue: What actions should the Service member's CO take?

Discussion: The CO should ask for investigative assistance from the Military Criminal Investigative Organization with respect to the threat and take all reasonable means to protect the safety of the Service member, as he would any other Service member under his command. The CO should initiate a criminal investigation into the threats received by the Service member.

The Service member's statement that he is a homosexual should not be investigated by the MCIO because a statement that a member is a homosexual does not, by itself, constitute credible information of a crime. The CO is appropriately initiating action under the Service's administrative separation procedures.

The CO may consider transferring the Service member to another location. His final decision on this matter would depend on the nature of the threats and the investigative findings.

3. Situation: A Service member has been observed entering, leaving, and generally “hanging around” a downtown gay bar. The commander is notified of the observations but isn’t sure what action, if any, she should take.

Issues: What should the commander do? Can the commander administratively discharge the Service member for going to a gay bar? Should she conduct a commander’s inquiry?

Discussion: Given the absence of any information, credible or otherwise, of the occurrence of either a crime or otherwise proscribed conduct, the commander should not begin an inquiry into this matter. Going to a gay bar is not a crime, nor does it, in itself, constitute a “nonverbal statement” by the Service member that he is a homosexual. A commander may begin an inquiry, however, if a member engages in behavior that a reasonable person would believe is intended to convey the statement that the member is a homosexual or bisexual. The commander in this case may wish to point out to her subordinate that favorite is known to be an establishment catering to homosexuals.

5. Situation: A metropolitan area publication, oriented to the activities and interests of the area's homosexual community, prints a story under the headline, "Gays in Government," purporting to list government workers believed to be homosexuals. The story contains the names of two enlisted Service members stationed at a nearby military installation. The Service members' commander receives an anonymous letter containing a copy of the article "Gays in Government" and after reading it wonders whether he should conduct an inquiry into the matter or begin administrative separation action on the two Service members for homosexuality. He has never before seen a copy of the publication that printed the article and the story gives no supporting documentation for why any of the individuals listed were believed to be homosexual.

Issue: What action should the commander take in regard to the purported "outing" of the two enlisted Service members?

Discussion: The commander should not initiate any inquiry based on the title. The article purports to identify the two Service members as homosexuals, but does not allege any criminal or otherwise proscribed homosexual conduct. A commander should begin an inquiry only if he has credible information indicating proscribed homosexual conduct.

The commander might call the two Service members into his office separately, advise them of the title, and remind them of the DoD policy regarding homosexual conduct. He should advise them that he is conducting no further inquiry into the matter at this time and will consider the matter closed, unless he receives credible information of proscribed homosexual conduct.

6. Situation: A noncommissioned officer (NCO) is watching the local TV news coverage of the gay rights parade when he notices a female Service member assigned to his unit marching in the parade in civilian clothes, carrying a handmade placard. As the television camera zooms in on the Service member's sign, the NCO can clearly read the handwritten words "Lesbians in the military say, 'Lift the Ban!'" The next morning, the NCO reports the incident to his commander.

Issue: Should the commander inquire into what meaning his Service member had intended to convey by carrying that particular sign in the gay rights parade?

Discussion: A Service member's carrying of a banner or sign in a gay rights activity would not in and of itself constitute credible information indicating proscribed homosexual conduct. In this case, however, the Service member chose to carry a sign that could reasonably be interpreted as making a statement that she is a homosexual. It would be reasonable for her commander to inquire whether the Service member's actions were intended to inform the public that she was a "lesbian Service member."

A Service member's statement that he or she is a homosexual, or words to that effect, is evidence that the Service member engages in homosexual acts or has an intent or propensity to do so. Therefore, the commander may inquire into the incident further. Before questioning his subordinate about the incident, the commander should advise her of the military's policy on homosexual conduct. Should the Service member choose not to discuss the matter further, the discussion should end. The commander would then decide whether to initiate administrative discharge procedures based on the information provided by the NCO.

## Recommended for Investigators and Commanders

7. Situation: The commander of a military installation calls up his Military Criminal Investigative Organization commander and requests that he stop by to discuss a “problem” In the nearby civilian community, a new social club has recently opened and is known to be frequented almost exclusively by homosexuals. Thursday nights are advertised as “military night” with Service members being offered free admission and reduced price on alcoholic beverages. The commander wants his military law enforcement agents to coordinate with the local police to conduct surveillance of the gay bar on “military night” and compile a list of all Service members frequenting the club. He proposes that military law enforcement agents trace license numbers of all vehicles parking in the club’s parking lot that display DoD identification stickers.

Issue: Is this type of “stake-out” permitted under the new policy?

Discussion: No. The installation commander does not have credible information that a specific crime has been committed. Even if the commander had received reports that numerous military members had been observed entering and exiting the purported gay bar, absent evidence of a crime, there would be no basis to conduct a surveillance operation as requested by the installation commander.

The MCIO commander reminds the installation commander that military law enforcement agents currently receive copies of all arrest documents relating to lewd and lascivious behavior or other criminal conduct occurring in the local community, which is punishable under the UCMJ.

Note: This exemplifies a key change to the DoD policy on investigations. Even though the military authorities have information of an off-post gay bar frequented by Service members, they may not conduct an investigation absent a specific allegation of a criminal act. Frequenting a gay bar is not a criminal act.

There is no legal impediment to either local civilian or military law enforcement activities investigating alleged criminal activity at public locations. In this case, however, where no specific criminal activity is alleged, surveillance would have had the singular purpose of actively seeking out possible homosexuals. This is contrary to the DoD Policy on Investigations of Sexual Misconduct, which specifically precludes any investigation solely to establish an individual’s sexual orientation. In addition, a fact-finding inquiry by the commander for purposes of administrative separation would not be appropriate, as going to a gay bar does not constitute credible information of proscribed homosexual conduct.

## Recommended for Investigators and Commanders

8. Situation: A Service member walks into his barracks room and observes two other enlisted men engaging in an act of sodomy. He notifies his supervisor and the military law enforcement agents. The military law enforcement agents respond to the barracks where the two suspects are placed under apprehension and advised of their rights. During the course of the apprehension, the military law enforcement agents find, in plain view, photographs of one of the suspects engaging in anal sodomy with other Service members, some of whom are known to the supervisor. They also find a personal letter from the same suspect, addressed to another man and signed "All my love, Sugar." These items are taken as evidence. The enlisted men's commander calls the Military Criminal Investigative Organization and advises that the two enlisted men have admitted, under rights advisement, to committing an act of sodomy.

The commander wants the MCIO to continue the investigation by scouring every photograph and the letter to attempt to compile a list of other possible homosexual Service members. Once the list is compiled, the commander wants the MCIO to question both suspects in detail concerning whether they know if anyone on the list is a homosexual or has committed homosexual acts. The commander says he wants the MCIO to hunt out any and all homosexuals within his unit.

Issues: Should the MCIO continue the investigation after the suspects have admitted to the offense of sodomy? If yes, how should the investigation proceed? Should the MCIO comply with the commander's direction to ferret out any homosexuals in the unit?

Discussion: The MCIO would not normally initiate an investigation of consensual adult private sexual conduct. However, in this case the act of sodomy occurred not in private but in a shared barracks room, and therefore may be investigated. Even so, under the new policy, the MCIO should continue its investigation into alleged homosexual conduct only so long as necessary to develop the relevant facts and circumstances surrounding the offense. In cases of consensual sodomy in which the Service members involved in the sexual act admit to the crime, the case will usually be closed and further investigation halted. The Service members would not be asked about other partners with whom they may have had sex, absent evidence of other criminal activity.

In this case, in the routine course of investigating the act of sodomy, the MCIO has discovered credible information of additional alleged criminal acts -- the photographs. The MCIO should investigate the facts surrounding the acts depicted in the photos. This would include questioning the suspect depicted in the photos concerning his sexual partners shown in the photographs engaging in criminal activity. Other Service members in the pictures who are identified by the suspect may be questioned regarding the activities at issue.

(Situation 8 continued)

As to the letter, the fact that it is written to another man and signed, "All my love, Sugar" may indicate another homosexual relationship involving one of two Service members found committing sodomy. Furthermore, if the MCIO were to follow the commander's instructions and proceed to "hunt" for any and all homosexuals, they would probably scrutinize the letter closely to compile a list of other names referenced therein. This way they could question each and every possible homosexual and, in turn, compile additional lists of other homosexuals. Such an approach to investigating possible incidents of homosexuality is expressly prohibited. At any given point in a criminal investigation involving homosexuality, the investigating agents must be able clearly and specifically to explain which criminal acts they are investigating and how the investigation relates to those criminal acts. No criminal investigations should be made into whether a person is homosexual, but only to investigate criminally proscribed acts. In this case, unless the letter has evidentiary value relating to one of the suspects, the MCIO should give the letter to the commander and not use it to launch investigations of any other persons. The commander may evaluate it for credible information and possible grounds for administrative discharge.

## Recommended for Investigators and Commanders

9. Situation: While investigating a fraud case involving "E-Mail" transmissions between two officers, the Military Criminal Investigative Organization obtains the commander's authorization to search one of the suspect's computer files stored on his personal computer at home. During the search of the computer, the MCIO agent notices that the suspect subscribes to a computer information service apparently catering to a homosexual and bisexual clientele. The agent scrolls through the directory and notes that the computer service has a directory entitled "Gay Military Service Members" and lists the names, ranks and addresses of approximately 400 persons. The agent contacts his supervisor and asks whether, based on this list which purports to identify approximately 400 homosexuals in the military, the MCIO should investigate any or all of the names listed for sodomy or other crimes involving homosexual acts.

Issues: Should the MCIO investigate anybody on the list for crimes involving homosexual acts? What should the MCIO do with the list?

Discussion: The MCIO should not initiate an investigation of any of the names listed on the computer file. There is no alleged crime to investigate. Names on a list are not credible information of any crimes. Not only do the files disclose nothing more than the names of purported homosexuals, as opposed to information of alleged homosexual acts, but the information is not "credible information" because nothing is known about how the information came to be stored in the computer file or the reliability of the information. The information is also not a basis for administrative separation and should not be referred to the individual's commander. The MCIO should leave the file alone and not take further action.

## Recommended for Investigators and Commanders

10. Situation: A Military Criminal Investigative Organization office has received several complaints from both military and civilian personnel concerning homosexual acts occurring in a restroom at one of the gymnasiums on a military installation. Several different witnesses have provided names of Service members and civilians who have been seen numerous times in the restroom performing primarily oral sodomy, but in several incidents anal intercourse. In addition to naming individuals, Service members working out at the gym have provided specific times during the day that appear to be the “busy times” for homosexual activity. The agent in charge of the MCIO office decides to send a covert MCIO agent into the restroom to investigate and develop further information concerning the allegations.

Issue: Can the MCIO investigate alleged acts of sodomy using undercover techniques?

Discussion: Yes. The eyewitness accounts of frequent incidents of criminal activity on the military installation warrants an investigation. Once they have credible information to establish that criminal acts are being committed, MCIOs may utilize any reasonable investigative technique to prove the elements of the crime.

In this case, the MCIO has knowledge of repeated and frequent acts of sodomy occurring at specific times at one of the installation gymnasiums. Use of an undercover agent would be appropriate in this instance. Care must be taken in authorizing the use of surveillance techniques, such as hidden audio and video surveillance, but in the circumstances recited here, such techniques would be permitted.

11. Situation: An enlisted member sees an officer known to him walk into a well-known homosexual bar. A couple of days later, the enlisted member sees the officer walking closely with another man late at night in a park. The enlisted member tells the officer that he knows he is a homosexual and that if the officer does not pay him \$10,000, he will report him to the Military Criminal Investigative Organization. The officer does not say anything, and immediately goes to the MCIO to report that the enlisted member is trying to blackmail him. The MCIO does not ask if the officer is a homosexual because, under these circumstances, it would be improper for the MCIO to question him about his sexual orientation. However, the MCIO begins an investigation of the enlisted member's alleged extortion of the officer.

Issues: Was the MCIO's action proper? Should they have investigated the officer for being a homosexual?

Discussion: The officer provided credible information of alleged extortion by the enlisted member. There is no credible information that the officer has committed any homosexual act, let alone any criminal act. Therefore, the MCIO's approach to the investigation -- investigating alleged criminal activity of the enlisted member, but not inquiring further the sexual orientation of the officer -- is proper.

Scenarios 12 and 13 are recommended for personnel that deal with administrative separations. These scenarios illustrate the operation of the “rebuttable presumption” that arises when a Service member states that he or she is a homosexual. The scenarios are examples of how Administrative Discharge Boards might treat cases in which a Service member attempts to rebut the presumption; they do not establish any evidentiary standards or create any substantive or procedural rights.

12. Situation: An enlisted Service member states to his commanding officer that he is a homosexual. He also tells this to several other enlisted members. An Administrative Discharge Board is convened. At the Board hearing, the member does not dispute that he stated on several occasions that he is a homosexual. He promises, however, that he will not engage in any homosexual acts during the remainder of his term of enlistment. The member presents no other evidence.

Issue: How should the Board consider whether the Service member has successfully rebutted the presumption?

Discussion: A statement by a Service member that he or she is a homosexual creates a rebuttable presumption that the member engages in or has a propensity or intent to engage in homosexual acts. This means that the statement itself is evidence that the member engages in or is likely to engage in homosexual acts. If the member fails to demonstrate that he or she in fact does not engage in homosexual acts and is not Likely to do so, he or she may be discharged.

In determining whether a Service member has successfully rebutted the presumption, a Board may consider, among other things: whether the member has engaged in homosexual acts; the member’s credibility; testimony from others about the member’s past conduct, character, and credibility; the nature and circumstances of the statement; and any other evidence relevant to whether the member is likely to engage in homosexual acts.

If the only evidence that the member presented was his promise that he would not engage in any homosexual acts during the remainder of his term of enlistment, the Board would determine whether that promise, in light of the Board’s assessment of the member’s credibility and the nature and circumstances of his statements that he was a homosexual, was sufficient to demonstrate that he does not engage in homosexual acts and is not likely to do so. If the Board determines that the member’s evidence is insufficient to demonstrate that he does not engage in homosexual acts and is not likely to do so, it would recommend that the member be separated. If, however, the Board determines that the member’s evidence is sufficient to demonstrate that he does not engage in homosexual acts and is not likely to do so, it would recommend that the member be retained.

13. Situation. An officer tells his best friend, another officer, that he has recently come to terms with his sexuality and has decided that he is a homosexual. He says, however, that he has not engaged in any homosexual acts during his six years of military service, and that he will continue to refrain from such acts. Although the officer asks his friend not to tell anyone else about their conversation, the friend tells the commanding officer (CO). Having determined that the friend's account of the officer's statement constitutes credible evidence of homosexual conduct, the CO then asks the officer whether he told his friend that he is a homosexual. The officer answers, "Yes."

At a Board of Inquiry hearing, the Service presents the testimony of the officer's friend and the CO about the officer's statements to them. There is no evidence that the officer engaged in any homosexual acts.

The officer presents testimony from several fellow officers and subordinate enlisted persons, all males. Those individuals testify that the officer has never stated or suggested to them that he is a homosexual and has never made any sexual advances or engaged in sexual innuendo toward them or anyone they know. They also state that the officer is an outstanding leader, that he is always truthful and conscientious, and that they believe he is fully capable of abiding by all Service regulations, including its restrictions on homosexual conduct. Finally, the officer himself testifies that, although he considers himself a homosexual, he has not engaged in any homosexual acts during his six years of service and that he intends to continue to refrain from such acts during the remainder of his term of service.

Issue: How should the Board consider whether the officer has successfully rebutted the presumption?

Discussion: The officer's statement to his friend that he is a homosexual created a rebuttable presumption that the officer engages in or has the propensity or intent to engage in homosexual acts. The question for the Board is whether the officer's evidence succeeded in rebutting that presumption by demonstrating that the officer in fact does not engage in homosexual acts and is unlikely to do so. In making that determination, the Board could consider, among other things: the evidence that the officer had not engaged in any homosexual acts; the officer's credibility; the testimony from other Service members about the officer's past conduct, character, and credibility; and the nature and circumstances of the officer's statements to his friend and commanding officer. If the Board determines that this evidence demonstrated that the officer did not engage in homosexual acts and was not likely to do so, it would find that the officer had rebutted the presumption and would recommend that he be retained. If, however, in weighing all the evidence, the Board determines that the officer had not rebutted the presumption, it would recommend separation.

Scenario 14 is recommended for personnel involved in the accession process.

14. Situation: An applicant comes into a recruiting station and says that he would like to enlist. Although, in accordance with DoD policy, the recruiter does not ask any questions about the applicant's sexual orientation or sexual conduct, the applicant states, of his own accord: "I am a homosexual."

Issue: What should the recruiter do after hearing the applicant's statement?

Discussion: Applicants will not be asked or required to reveal their sexual orientation during the accession process. In addition, applicants will not be asked whether they have engaged in homosexual conduct unless independent evidence is received indicating that an applicant has engaged in such conduct or unless the applicant volunteers a statement that he is a homosexual or bisexual, or words to that effect.

If an applicant nevertheless comes into a recruiting office and volunteers a statement that he is a homosexual, that applicant will be rejected, unless he can demonstrate that he does not engage in homosexual acts and does not have an intent or propensity to do so. In this scenario, once the applicant said "I am a homosexual," the recruiter could tell him that the Service assumes that the applicant's statement means that he engages in homosexual acts or has a propensity or intent to do so. The recruiter could then ask the applicant if this is what he meant. If the applicant answers "Yes," the applicant could be rejected.