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HOMOSEXUAL ADMINISTRATIVE DISCHARGE BOARD / SHOW CAUSE HEARINGS

INTRODUCTION

With the recent implementation of the new homosexual conduct regulations throughout the Department of Defense, Code 34 continues to monitor individual cases to ensure full and fair application of the regulations. The following guidance is intended only for the recorders assigned to administrative separation boards or Boards of Inquiry, and should not be presented to the members, legal advisors, or the respondent's counsel. Our goal is not to dictate the final board results, but rather to ensure fair and consistent application of the DOD and DON regulations concerning homosexual conduct.

In order to ensure a fair result at any administrative proceeding, it is essential that the members appointed fully understand the applicable directives, regulations, and instructions. The recorder, as well as the legal advisor (if appointed), largely shoulders the burden of "educating" the members, when necessary, on the ins and outs of the applicable law or regulations. The regulations concerning homosexual conduct in the Navy, while lengthy and detailed, are actually quite straight forward. As these regulations are newly implemented, however, most military members will be considering and applying them for the first time at an administrative proceeding. Accordingly, it is important that the recorder take the necessary time to ensure that the members fully understand how the regulations work.

The objective is to ensure that the Navy's regulations are applied properly, and that the board results are fair, consistent, and appropriate, under the circumstances.

What follows are some generalized pointers – presented in bullet format – for conducting administrative discharge board or show cause hearings convened pursuant to the new homosexual conduct discharge policy. Though specifically derived from our experiences in "statement" cases vice "acts" cases, these tips are applicable to both.

I. GENERAL

- Call Code 34 to discuss cases.

Code 34 provided significant input to the drafters of the “new” policy and the implementing regulations. We are now deeply involved in defending both the “old” and “new” homosexual policies from judicial assault, and have been for several years. We have also provided assistant recorders for several high visibility cases in recent months. We are a valuable clearing house for information, insights and ideas, and a sounding board on how the policy should be applied at the administrative hearing stage of the process.

- When necessary and appropriate, Code 34 will send an assistant recorder.

In select cases, We have sent Code 34 attorneys to the field as assistant recorders. We will continue to do so when necessary. The factors to consider when asking for (or being offered) a Code 34 assistant are the likelihood of litigation, the precedential value of the issues presented by the case, the active involvement of organized homosexual litigation support groups, and press or congressional interest.

II. PRE-HEARING PREPARATION

- Know the statute. DoD Directive and CNO message thoroughly.

This is probably the single most important tip to pass along. The facts in these cases tend to be relatively straight forward, and usually not disputed. The case turns on the application of the regulations to those facts. Take particular note of the definitions. Understand completely the difference between homosexual “status”. They are themselves conduct which permit the reasonable inference of specific past and/or future acts. Carefully consider the implications of the rebuttal presumption in light of the express words used by the respondent in a particular case.

- Coordinate with Convening Authority before the hearing.

Ensure the CA knows all of the facts of the case and understands how the regulations apply to the case. Encourage the detailing of the legal advisor, preferably someone with prior judicial experience. Encourage the detailing of experienced, level headed officers as members.

- Obtain and review all prior administrative hearing records or court records in the case.

In some instances there may have been a prior

Administrative hearing or proceeding in federal district court. A careful review of these papers will reveal the nature of the case the respondent is likely to present.

- Be Creative.

The measure of success may well turn on thorough and innovative preparation for the hearing. As the advocate of the command, the recorder should use imagination to research the facts of the case. Where the case is promised on a statement alone, the recorder should attempt to find evidence to corroborate the statement and to sustain the presumption flowing logically from the statement. In terms of hearing preparation, the goal of the recorder is to build the strongest case possible. Although a statement alone may constitute a prime facie case, a recorder should present the board with additional evidence demonstrating that a discharge is warranted by the unequivocal desire of the respondent to commit criminal acts. For some specific ideas, call code 34.

III. VOIR DIRE

- Focus members on the policy.

Ask the members about their attitude towards homosexuality. Then ask them if they can agree to apply the regulations regardless of their personal feelings about homosexuality. A member should not be disqualified simply because he or she has an opinion regarding homosexual conduct in the military. A member can properly sit if he or she can put aside their personal feelings and beliefs and apply the regulations, as written.

IV. EVIDENTIARY ISSUES GENERALLY

- Evidence designed to attack the homosexual policy is not relevant.

There are many documents, studies, reports, etc., in existence concerning what the policy should be with regard to homosexuals in the military. If these documents are offered by the respondent, object. This is not an issue for Board consideration. The policy question was resolved by Congress and the President. The Board may not overrule the policy, nor choose to disregard the implementing regulations.

Occasionally, a respondent will offer the same documents to support the notion that the arguments underlying the rebuttable presumption are invalid. They will contend that just because a person admits a homosexual orientation doesn't mean they will commit homosexual acts, and these studies prove their point, Object. This is a thinly veiled attack on the policy. What evidence has the respondent offered to rebut the presumption raised by an admission of homosexuality? If the answer is none,

Then the real purpose for seeking admission of the documents is transparent. Even if some evidence is offered in rebuttal, the relevancy link between that evidence and the aforementioned studies is at best only tenuous.

V. OPENING STATEMENT

- Keep members focus strictly on the relevant issues.

Invite the members attention to the requirements of their appointing letter and the provisions of the CNO NAVADMIN 033/94. Walk them through it so they can understand how it works. Be certain the members understand their job is to apply the regulations to the facts in the case before them. It is not their prerogative to pass judgment on the policy itself.

For a statement case, explain to the members what the exact words of the respondent were and how you will show that the presumption flowing from that statement is that the respondent has committed prohibited acts and/or is likely to commit prohibited acts in the future. Review any additional evidence you have that supports the presumption. What evidence do you anticipate will be offered to rebut the presumption? Will you offer surrebuttal?

VI. WITNESSES

- Challenge evidence portraying the respondent as a model sailor.

Respondents frequently use witnesses to demonstrate good military character. Point out on cross (if possible) that public denunciation of homosexual policies may be inconsistent with good military character. The wearing of one's uniform, or identifying oneself as a member of USN while visibly supporting homosexual interests may violate Uniform Regulations and the Standards of Conduct. Where applicable, point out that the respondent has been serving in a less than demanding/non-operational billet. Has there been any adverse impact on the command?

VII. CASE IN REBUTTAL

If the respondent attempts to rebut the presumption, analyzes critically the language used. We have seen respondent offer statements, written or oral, sounding as though they were attempts at rebutting the presumption, but were instead nothing more than broad, general acknowledgments of the policy, or half- hearted commitments to obey the law.

VIII. CLOSING ARGUMENT

- Focus on the issues as you did in the opening argument.
Once again, review the policy with the members. Show them

how it specifically applies to the case. Drive home the reasonableness of the homosexual acts to the extent the evidence permits. Do not easily accept the characterization of respondent as a model sailor