



GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE

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18 AUG 1995



MEMORANDUM FOR THE GENERAL COUNSELS OF THE MILITARY DEPARTMENTS
THE JUDGE ADVOCATE GENERAL OF THE ARMY
THE JUDGE ADVOCATE GENERAL OF THE NAVY
THE JUDGE ADVOCATE OF THE AIR FORCE
THE STAFF JUDGE ADVOCATE TO THE COMMANDANT OF THE
MARINE CORPS

SUBJECT: Policy on Homosexual Conduct in the Armed Forces

With reference to the policy on homosexual conduct in the armed forces, this memorandum is to provide guidance with respect to two issues: (1) investigative action a commander may take in "statements" cases; and (2) the circumstances in which a person who states that he or she is a homosexual claims that the rules preclude separation of anyone based on their sexual orientation.

With respect to the first issue, DoD Directives 1332.14 and 1332.30 provide that upon receipt of credible information that there is a basis for discharge, a commander may initiate a fact-finding inquiry, which may consist of an examination of the information reported or a more extensive inquiry, as necessary. The Directives further provide that the inquiry should gather all credible information that directly relates to the grounds for possible separation.

In 'statements' cases, the statute authorizes the service member to seek to demonstrate that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts. Included among the permissible issues into which a commander or inquiry officer may inquire in such cases are whether the service member has engaged in homosexual acts or marriages, attempted to engage in homosexual acts or marriages, or intends or has a propensity to engage in homosexual acts. In addition, the service member may be asked why he or she made the statement and what he or she meant by the statement.

With respect to the second issue, both the statute and Directives provide for discharge if a service member makes a statement that he or she is a homosexual, or words to that effect, unless the member demonstrates that he or she does not engage in, attempt or intend to engage in, or have a propensity to engage in homosexual acts. The Directives further make clear that a 'statement' that is grounds for discharge can include 'statements such as ... "I have a homosexual orientation."' see DoD Dir. 1332.14 (Encl. 3, Att. 4, sec. B,4.b); DoD Dir. 1332.30 (Encl. sec. 5 B,4.b). Thus, although "sexual orientation" (as



ENCLOSURE(1)

defined in the Directives') in itself is not a basis for discharge "unless manifested by homosexual conduct," see DoD Dir, 1332.14 (Encl. 3, Att. 1, 8 H.1); DOD Dir. 1332.30 (Encl. 2, s C), the Directives make clear that a statement that one has a "homosexual orientation" is treated like any other statement that one is a homosexual. It raises the presumption that one engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts, and will result in separation unless the member successfully rebuts the presumption.

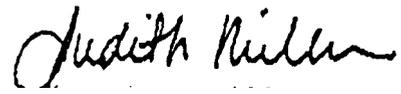
A member may not avoid the burden of rebutting the presumption merely by asserting that his or her statement of homosexuality was intended to convey only a message about sexual orientation, as defined in the Directives, and not to convey any message about propensity or intent to engage in homosexual acts. To the contrary, by virtue of the statement, the member bears the burden of proof that he or she does not engage in, and does not attempt, have a propensity, or intend to engage in homosexual acts. If the member in rebuttal offers evidence that he or she does not engage in homosexual acts or have a propensity or intent to do so, the offering of the evidence does not shift the burden of proof to the government, Rather, the burden of proof remains on the member throughout the proceeding. See DoD Dtr. 1332.14 (Encl. 3, Att. 1, sec. H.4.e); DoD Dir. 1332.30 (Encl. 2, sec. C.2).

In determining whether a service member has successfully rebutted the presumption, a Board may consider, among others evidences: 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 engage in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts,

Please take all necessary steps to ensure that these aspects of the policy are fully understood in the field. In connection therewith, please provide me within 30 days of the date of this memorandum with evidence that guidance and training for judge advocates and commanders in these regards is unambiguous and clear. If you contemplate sending new training materials or additional guidance to the field, please provide it to, me in draft form so that I may review it prior to implementation.

¹ The Directives define "sexual orientation" as '[a]n abstract sexual preference for persons of a particular sex, as distinct from a propensity or intent to engage in sexual acts.' DoD Dir. 1332.14 (Encl. 2, Definition 0); DoD Dir. 1332.30 (Encl. 1, Definition 16).

Thank you for your assistance.

A handwritten signature in black ink that reads "Judith Miller". The signature is written in a cursive style with a large initial "J" and a long, sweeping underline.

Judith A. Miller

FINDING WORKSHEET

A. Choose #1 or 2 below, and announce the following:

This administrative discharge board finds, by a vote of _____ to _____, that:

1. Respondent DID NOT state that he/she is a homosexual, bisexual, or words to that effect.
2. Respondent DID state that he/she is a homosexual, bisexual, or words to that effect, to wit:
[Fill in here the "statement"] _____

_____.

B. If #A1 above, then announce the following and STOP:

Accordingly, this board recommends that Respondent be retained in the Naval Service.

C. If #A2 above, you must now determine whether Respondent has rebutted the presumption that he engages in, attempts to engage in, or has the propensity or intent to engage in homosexual acts. Choose either #1 or 2 below and announce the following:

Further, this administrative discharge board finds, by a vote of _____ to _____, that Respondent

1. HAS
2. HAS NOT

demonstrated, by a preponderance of the evidence, that he does NOT engage in, attempt to engage in, or have a propensity or intent to engage in, a homosexual act or acts.

E. If #C1 above then announces the following and STOP:

Accordingly, the board recommends that Respondent be retained in the Naval Service.

F. If #C2 above, then announce the following:

Accordingly, this board recommends that respondent be separated from the Naval Services.