

# **Report to the Secretary of Defense**

## **Review of the Effectiveness of the Application and Enforcement of the Department's Policy on Homosexual Conduct in the Military**



### **Office of the Under Secretary of Defense (Personnel and Readiness)**

#### **April 1998**

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#### **INTRODUCTION**

On February 28, 1994, after extensive hearings in Congress, the enactment of a federal statute, and coordination with Congressional Oversight Committees, the Department of Defense instituted its current policy on homosexual conduct in the military. As required by the federal statute (10 U.S.C. § 654), the DoD policy provides that engaging in homosexual conduct is grounds for discharge from the military. Congress expressly found that service by those who have a propensity to engage in homosexual conduct creates an unacceptable risk to morale, good order and discipline, and unit cohesion, and that the long-standing prohibition of homosexual conduct therefore continues to be necessary in the unique circumstances of military service.

The DoD policy also provides, however, that sexual orientation is a personal and private matter that is not a bar to military service unless manifested by homosexual conduct. It was the sense of Congress that applicants should not be asked about homosexuality as part of the processing of individuals for accession into the Armed Forces. Consequently, under the policy, applicants for military service may no longer be asked about their sexual orientation. Moreover, the services may not initiate investigations solely to determine a member's sexual orientation. Commanders may initiate an investigation only upon receipt of credible information that a service member has engaged in homosexual conduct, i.e., stated his or her homosexuality, committed a homosexual act, or entered into a homosexual marriage.

In April 1997, the Secretary of Defense tasked the Under Secretary of Defense for Personnel and Readiness to conduct a review of how well the Department's policies on homosexual conduct in the military are being applied

and enforced. The Department of Defense periodically reviews many of its personnel policies. Since the homosexual conduct policy had been in place for three years, a review was appropriate. Part of the tasking was to review the issues raised in a 1997 report by the Servicemembers Legal Defense Network and issues which members of Congress and others had brought to the Department's attention. The purpose of the review was to assure ourselves that we are doing all we can to ensure that our policy is faithfully executed.

The Under Secretary of Defense directed the Principal Deputy Assistant Secretary of Defense for Force Management Policy to head the review. A working group was formed consisting of legal and personnel representatives from each of the Military Services and from the Office of the Secretary of Defense. The working group met several times to evaluate the range of matters raised concerning application and enforcement of the Department's policy on homosexual conduct in the military.

Subsequently, senior representatives from each of the Services met with senior legal and personnel officials in the Office of the Secretary of Defense on several occasions to discuss policy implementation details. In addition, discussions were held on the Services' handling of individual incidents, their conduct of individual investigations and their processing of individual separation cases which were cited to the Department of Defense as possibly non-compliant with the Department's policy. The Services provided Office of the Secretary of Defense staff with selected case files, including commander directed investigations, records of administrative discharge hearings, and Inspector General investigations. Each such matter was carefully reviewed. New issues and cases brought to the attention of the Department between April 1997 and February 1998 were also reviewed.

The Defense Manpower Data Center was also tasked to provide various statistics about discharges based on homosexual conduct for Fiscal Years 1980 through 1997. The complete Fiscal Year 1997 statistics provided in this report were not available and verified by the Services until February 1998.

Proper implementation of the policy on homosexual conduct has been a high priority at the Department of Defense since the policy was instituted. The balance that the policy strikes between the prohibition of homosexual conduct in the military and the privacy rights of our service members has posed a challenge to the Services. Commanders must enforce the statutory ban on homosexual conduct while at the same time respecting the limits that the policy imposes on investigations of such conduct. Secretary Cohen has strongly stated that harassment or threats of violence against service members will not be tolerated; that fact finding inquiries into homosexual conduct may be initiated only when a commander has received credible information that there is a basis for discharge; that fact finding inquiries must be limited to the factual circumstances directly relevant to specific credible information received; and that fact finding inquiries must not be unduly intrusive.

This report presents the major conclusions of the review as well as a discussion of many of the matters considered in reaching those conclusions. In order to protect the privacy of current and former service members, this report does not discuss individual cases by name.

## **SUMMARY OF FINDINGS**

### **I. Data on Discharges for Homosexual Conduct**

The review examined the available statistical data concerning homosexual conduct discharges and found that the number of service members discharged for homosexual conduct has in fact risen since the new policy became effective in 1994. We believe that this increase is cause for some concern, although it continues to be an extremely small percentage of the total force. The review did not provide a complete explanation for the increase, but several facts did emerge upon closer analysis of the discharge data.

First, we found that the large majority of the discharges for homosexual conduct are based on the statements of service members who identify themselves as homosexual, as opposed to cases involving homosexual acts. The Services believe that most of these statement cases -- although not all of them -- involve service members who voluntarily elected to disclose their sexual orientation to their peers, supervisors or commanders. The increase in the number of discharges for homosexual conduct since Fiscal Year 1994 is attributable to this increase in statement cases. Discharges for homosexual acts and marriages have declined by 20 percent over the past three years. Second, most of those discharged under the policy are junior personnel with very little time in the military, and most of the increase in discharges for homosexual conduct has occurred in this sector. The number of cases involving career service members is relatively small. Third, the great majority of discharges for homosexual conduct are uncontested and are processed administratively. Finally, more than 98 percent of all members discharged in Fiscal Year 1997 under the policy received honorable discharges, general discharges under honorable conditions or uncharacterized discharges. (Separations of enlisted members in their first 180 days of military service are generally uncharacterized.) Discharges under other than honorable conditions or courts-martial for consensual homosexual conduct are infrequent and have invariably involved aggravating circumstances or additional charges.

## II. Application and Enforcement of the Homosexual Conduct Policy

As noted above, Department of Defense policy specifies that commanders may initiate investigations of suspected homosexual conduct only after receiving specific, credible information concerning the conduct of the service member in question. In the cases reviewed, we identified only isolated instances in which inquiries were made without the requisite factual basis, or in which the scope of an investigation was expanded in a way that was inconsistent either with the express terms of the policy or with its spirit. We concluded that concerns that there have been widespread "witch hunts" against suspected homosexuals and that there have been numerous other abuses in the course of investigations are unfounded, and Secretary Cohen has strongly emphasized that such abuses will not be tolerated.

Although we conclude that the Department's policy on homosexual conduct is generally being implemented properly, a number of areas were identified in which the policy could be usefully clarified or implementation could be otherwise enhanced. Steps have already been taken to address some of these issues. For example, last March, former Under Secretary of Defense Dorn issued a directive providing guidance on how threats against alleged homosexuals in the Armed Forces should be investigated. As explained below, this guidance made clear that the report of a threat should result in the prompt investigation of the threat itself, that investigators must not solicit allegations concerning the sexual orientation of the threatened member, and that the report of a threat alone is not credible information and is not a basis to initiate an investigation against the victim. The Department has also eliminated obsolete enlistment forms that could have resulted in improper questions by military recruiters.

## III. Recommendations

We recommend that the Department take action in several areas to address other concerns that have been raised with the implementation of the policy. These areas include:

- the use of pretrial agreements, or "plea bargains," to obtain evidence of consensual homosexual conduct;
- the scope of investigations in "coming out" cases, including cases where recoupment of financial benefits is at issue;
- the importance of consultation with higher headquarters before initiating investigations into alleged homosexual conduct;

- the need to reissue and expand the directive guidance issued by former Under Secretary Dorn concerning threats against service members based on their alleged homosexuality; and
- the need to ensure that the training of those charged with enforcing the Department's homosexual conduct policy is effective.

We believe that these are areas in which clear guidance to the field will be of significant benefit in ensuring a fair and even-handed application of our policies.

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