

(1) Threats or attempts to influence another's career or job for sexual favors;

(2) Rewards in exchange for sexual favors; or,

(3) Physical contact of a sexual nature which, if charged as a violation of the UCMJ, could result in a punitive discharge.

b. An incident is considered substantiated when there has been a court-martial conviction, nonjudicial punishment, or the commander determines, based on a preponderance of the evidence, that sexual harassment has occurred.

3. Homosexual Conduct

a. Policy

(1) Homosexual conduct is grounds for separation from the Marine Corps under the bases described in paragraph 4103.3b. Homosexual conduct includes homosexual acts, a statement by a member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage. A statement by a member that demonstrates a propensity or intent to engage in homosexual acts 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. A member's sexual orientation is considered a personal and private matter and is not a bar to continued service under this section unless manifested by homosexual conduct in the manner described in subparagraph 4103.3b.

(2) Congressional findings relating to the policy concerning homosexual conduct in the Armed Forces is contained in 10 U.S.C. 654(a). These findings are as follows:

(a) Section 8 of Article I of the Constitution of the United States commits exclusively to the Congress the powers to raise and support armies, provide and maintain a navy, and make rules for Government and regulation of the land and naval forces.

(b) There is no constitutional right to serve in the Armed Forces.

(c) Pursuant to the powers conferred by Section 8 of Article I of the Constitution of the United States, it lies within the discretion of the Congress to establish qualifications for and conditions of service in the Armed Forces.

(d) The primary purpose of the Armed Forces is to prepare for and to prevail in combat should the need arise.

(e) The conduct of military operations requires members of the Armed Forces to make extraordinary sacrifices, including the ultimate sacrifice, in order to provide for the common defense.

(f) Success in combat requires military units that are characterized by high morale, good order and discipline, and unit cohesion.

(g) One of the most critical elements in combat capability is unit cohesion, that is, the bonds of trust among individual service members that make the combat effectiveness of a military unit greater than the sum of the combat effectiveness of the individual unit members.

(h) Military life is fundamentally different from civilian life in that:

(1) The extraordinary responsibilities of the Armed Forces, the unique conditions of military service, and the critical role of unit cohesion, require that the military community, while subject to civilian control, exist as a specialized society; and

(2) Military society is characterized by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior that would not be acceptable in civilian society.

(i) The standards of conduct for members of the Armed Forces regulate a member's life for 24 hours each day beginning at the moment the member enters military status and not ending until that person is discharged or otherwise separated from the Armed Forces.

(j) Those standards of conduct, including the Uniform Code of Military Justice, apply to a member of the Armed Forces at all times that the member has a military status, whether the member is on base or off base, and whether the member is on duty or off duty.

(k) The pervasive application of the standards of conduct is necessary because members of the Armed Forces must be ready at all times for worldwide deployment to a combat environment.

(l) The worldwide deployment of United States military forces, the international responsibilities of the United States, and the potential for involvement of the Armed Forces in actual combat routinely make it necessary for members of the Armed Forces involuntarily to accept living and working conditions that are often spartan, primitive, and characterized by forced intimacy with little or no privacy.

(m) The prohibition against homosexual conduct is a long standing element of military law that continues to be necessary in the unique circumstances of military service.

(n) The Armed Forces must maintain personnel policies that exclude persons whose presence in the Armed Forces would create an unacceptable risk to the Armed Forces' high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

(o) The presence in the Armed Forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

b. Bases for Separation. A commissioned officer shall be separated under this paragraph if one or more of the following approved findings is made:

(1) The officer has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts, unless there are further approved findings that the officer has demonstrated that:

- (a) Such acts are a departure from the officer's usual and customary behavior;
- (b) Such acts under all the circumstances are unlikely to recur;
- (c) Such acts were not accomplished by the use of force, coercion, or intimidation;
- (d) Under the particular circumstances of the case, the officer's continued presence in the Marine Corps is consistent with the interest of the Marine Corps in proper discipline, good order, and morale; and
- (e) The officer does not have a propensity or intent to engage in homosexual acts.

(2) The officer has made a statement that he or she is a homosexual or bisexual, or words to that effect, unless there is a further approved finding that the officer has demonstrated 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. A statement by an officer that he or she is a homosexual or bisexual, or words to that effect, creates a rebuttable presumption that the officer engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts. The officer shall be advised of this presumption and given the opportunity to rebut the presumption by presenting evidence demonstrating that he or she does not engage in, attempt to engage in, have a propensity to engage in, or intend to engage in homosexual acts. Propensity to engage in homosexual acts means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts. In determining whether an officer has successfully rebutted the presumption that he or she engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts, any of the following may be considered:

- (a) Whether the officer has engaged in homosexual acts;
- (b) The officer's credibility;
- (c) Testimony from others about the officer's past conduct, character, and credibility;
- (d) The nature and circumstances of the officer's statement;
- (e) Any other evidence relevant to whether the officer is likely to engage in homosexual acts.

(This list is not exhaustive; any other relevant evidence may also be considered.)

(3) The officer has married or attempted to marry a person known to be of the same biological sex (as evidenced by the external anatomy of the persons involved).

c. Inquiry

(1) Responsibility

(a) The member's commander is authorized to initiate fact finding inquiries involving homosexual conduct. A commander may initiate a fact finding inquiry only when he or she has received credible information that there is a basis for discharge. Commanders are responsible for ensuring that inquiries are conducted properly and that no abuse of authority occurs.

(b) A fact finding inquiry may be conducted by the commander personally or by a person he or she appoints. It may consist of an examination of the information reported or a more extensive investigation as necessary.

(c) The inquiry should gather all credible information that directly relates to the grounds for possible separation. Inquiries shall be limited to the factual circumstances directly relevant to the specific allegations.

(d) If a commander has credible evidence of possible criminal conduct, he or she shall follow the procedures outlined in the current version of the Manual for Courts-Martial and JAGINST 5800.7C, JAGMAN.

(e) These inquiry provisions do not apply to activities of the Naval Criminal Investigative Service and other Defense criminal investigative organizations that are governed by DoDINST 5505.8.

(2) Bases for Conducting Inquiries. A commander will initiate an inquiry only if he or she has credible information that there is a basis for discharge. Credible information exists when the information, considering its source and the surrounding circumstances, supports a reasonable belief that there is a basis for discharge. It requires a determination based on articulable facts, not just a belief or suspicion.

(3) A basis for discharge exists if:

(a) The member has engaged in a homosexual act;

(b) The member has said that he or she is a homosexual or bisexual, or made some other statement that indicates a propensity or intent to engage in homosexual acts; or

(c) The member has married or attempted to marry a person of the same sex.

(4) Credible information does not exist, for example, when:

(a) The individual is suspected of engaging in homosexual conduct, but there is no credible information, as described, to support that suspicion;

(b) The only information is the opinions of others that a member is a homosexual;

(c) The inquiry would be based only on rumor, suspicion, or capricious claims concerning a member's sexual orientation; or

(d) The only information known is an associational activity such as going to a gay bar, possessing or reading homosexual publications, associating with known homosexuals, or marching in a gay rights rally in civilian clothes. Such activity, in and of itself, does not provide evidence of homosexual conduct.

(5) Credible information exists, for example, when:

(a) A reliable person states that he or she observed or heard a service member engaging in homosexual acts, or saying that he or she is a homosexual or is married to a member of the same sex;

(b) A reliable person states that he or she heard, observed, or discovered a service member make a spoken or written statement that a reasonable person would believe was intended to convey the fact that he or she engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts; or

(c) A reliable person states that he or she observed behavior that amounts to a non-verbal statement by a member that he or she is a homosexual or a bisexual (i.e., behavior that a reasonable person would believe was intended to convey the statement that the member engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts).

(6) Procedures

(a) Informal fact finding inquiries and administrative separation procedures are the preferred method of addressing homosexual conduct. This does not prevent disciplinary action or trial by court-martial when appropriate.

(b) Commanders shall exercise sound discretion regarding when credible information exists. They shall examine the information and decide whether an inquiry is warranted or whether no action should be taken.

(c) Commanders or appointed inquiry officials shall not ask, and members shall not be required to reveal, whether the member is a heterosexual, a homosexual, or a bisexual. However, upon receipt of credible information of homosexual conduct (as described above), commanders or appointed inquiry officials may ask members if they engaged in such conduct. The member should first be advised of the Marine Corps policy on homosexual conduct and, if applicable, the provisions of Article 31, UCMJ. Should the member choose not to discuss the matter further, the commander should consider other available information. Nothing in this provision precludes questioning a member about any information provided by the member in the course of the fact finding inquiry or any related proceeding; nor does it provide the member with any basis for challenging the validity of any proceeding or the use of any evidence, including a statement by the member, in any proceeding.

(d) At any point during the inquiry, the commander or appointed inquiry official must be able clearly and specifically to explain which grounds for separation he or she is attempting to verify and how the information being collected relates to those specific separation grounds.

(e) A statement by a service member that he or she is a homosexual or a bisexual creates a rebuttable presumption that the service member engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts. The service member shall be given the opportunity to present evidence demonstrating that he or she does not engage in, attempt to engage in, or have a propensity or intent to engage in homosexual acts. The service member bears the burden of proving, by a preponderance of the evidence, that he or she is not a person who engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts.

(7) Legal Effect. The procedures set forth in subparagraph 4103.3c create no substantive or procedural rights.

d. Disposition

(1) Based on the inquiry described above, the commander must determine whether there is probable cause (a reasonable belief) to believe a basis for administrative separation exists. If the commanding officer determines probable cause exists, the commanding officer shall initiate separation processing.

(2) If the commanding officer determines probable cause does not exist, the commanding officer shall terminate the inquiry and any administrative action already initiated.

(3) Certain homosexual conduct may constitute both a basis for administrative separation processing and a violation of the UCMJ. The UCMJ requires all allegations of misconduct to be thoroughly investigated. Upon review of the results of the investigation, the cognizant commanding officer has discretion to determine what, if any, disciplinary action is appropriate. The provisions for administrative discharge for homosexual conduct do not preclude disciplinary action under the UCMJ when such action is deemed appropriate by the cognizant commanding officer. In this regard, there is no right on the part of any individual to demand trial by court-martial in lieu of administrative separation processing.

e. Board of Inquiry Procedures. The following pertains to administrative separation processing based upon allegations of homosexual conduct:

(1) The board of inquiry shall be informed of the Congressional findings as enumerated in subparagraph 4103.3a(2) above.

(2) The commissioned officer shall bear the burden of proving throughout the proceeding, by a preponderance of the evidence, that retention is warranted under the limited circumstances described in subparagraphs 4103.3b(1) and 4103.3b(2).

(3) If the board determines that the basis for administrative separation is established by a preponderance of the evidence, but the member's retention is warranted under the limited circumstances described in subparagraphs 4103.3b(1) and 4103.3b(2), the case is closed.

(4) Finding regarding whether or not retention is warranted under the limited circumstances described in subparagraphs 4103.3b(1) or 4103.3b(2) is required if the member clearly and specifically raises such limited circumstances.

f. Limitations

(1) Nothing in these regulations requires that an officer be processed for separation when a determination is made that the officer engaged in acts, made statements, or married or attempted to marry a person known to be of the same sex for the purpose of avoiding military service and separation of the officer would not be in the best interest of the Marine Corps.

(2) Administrative separation processing is mandatory if, after completion of the inquiry described above, the commander determines probable cause exists to believe a basis for separation exists. No officer so processed shall be retained if the preponderance of the evidence supports the basis for separation unless warranted under the limited circumstances of subparagraphs 4103.3b(1) or 4103.3b(2).

4104. RETIREMENT OR RESIGNATION. An officer being processed for separation for cause may, at any time during proceedings, under this chapter, submit a qualified or unqualified resignation or a resignation for the good of the service, or, if eligible, request retirement under chapter 2 of this manual.

1. Resignations tendered under this paragraph shall not request an effective date. The resignation will be effective upon approval by the Secretary of the Navy. In addition, the resignation will not be input into the unit diary system unless approved by the Secretary of the Navy.

2. Normally, a reserve commission is not authorized for regular officers resigning under this paragraph.

3. Address requests for qualified or unqualified resignation to the Secretary of the Navy via the chain of command and the CMC (JAM). If a resignation is submitted in lieu of a recommendation for administrative separation, the resignation shall state that it is offered under this paragraph and shall contain the appropriate statement below corresponding to the type of discharge requested. If the resignation is submitted to avoid trial by court-martial, the resignation shall contain the statement in subparagraph 4104.3c and follow the procedures in paragraph 4104.4.

a. "I have been informed and understand that if my resignation in lieu of processing for administrative separation for cause is accepted, I shall subsequently receive a certificate of honorable discharge from the naval service."

b. "I have been informed and understand that if my resignation in lieu of processing for administrative separation for cause is accepted, I may subsequently receive a certificate of general discharge from the Marine Corps; that such a separation, although considered by the Navy Department to be under honorable conditions, is not the highest qualitative type of separation provided for officers of the naval service, and that, while I shall be entitled to the major portion of veteran's rights and benefits presently authorized for former officers whose service has been similar to my own, should any present or future statutes specifically require an honorable discharge as a condition precedent to the granting of rights and benefits thereunder, my eligibility for any such rights and benefits may be at least doubtful."