

### *Section 5G—Homosexual Conduct*

**5.35. Congressional Findings on Homosexual Conduct.** Congress has determined that the policy on homosexual conduct in the armed forces is based upon the following findings, which are codified at Title 10, U. S. C., Section 654(a):

5.35.1. Section 8 of Article 1 of the Constitution of the United States commits exclusively to Congress the powers to raise and support armies, provide and maintain a navy, and make rules for the government and regulation of the land and naval forces.

5.35.2. There is no constitutional right to serve in the armed forces.

5.35.3. Pursuant to the powers conferred by Section 8 of Article 1 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.

5.35.4. The primary purpose of the armed forces is to prepare for and to prevail in combat should the need arise.

5.35.5. 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.

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

5.35.7. 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.

5.35.8. Military life is fundamentally different from civilian life in that:

5.35.8.1. 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

5.35.8.2. The 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.

5.35.9. 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.

5.35.10. 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.

5.35.11. 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.

5.35.12. 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 conditions and

working conditions that are often spartan, primitive, and characterized by forced intimacy with little or no privacy.

5.35.13. 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.

5.35.14. 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.

5.35.15. 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.

### **5.36. Basis for Discharge:**

5.36.1. Homosexual conduct is grounds for separation from the military service under the terms set forth in paragraph **5.36.2**. 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 unless manifested by homosexual conduct in the manner described in paragraph **5.36.2**:

5.36.2. A member shall be separated under this section if one or more of the following approved findings is made:

5.36.2.1. The member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts, unless there are approved further findings that:

5.36.2.1.1. Such acts are a departure from the member's usual and customary behavior;

5.36.2.1.2. Such acts under all the circumstances are unlikely to recur;

5.36.2.1.3. Such acts were not accomplished by use of force, coercion, or intimidation;

5.36.2.1.4. Under the particular circumstances of the case, the member's continued presence in the Air Force is consistent with the interest of the Air Force in proper discipline, good order, and morale; and

5.36.2.1.5. The member does not have a propensity or intent to engage in homosexual acts.

5.36.2.2. The member 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 member 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 a service member that he or she is a homosexual or bisexual, or words to that effect, 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 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 a member 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, some or all of the following may be considered: **NOTE:** This list is not exhaustive; any other relevant evidence may also be considered:

5.36.2.2.1. Whether the member has engaged in homosexual acts.

5.36.2.2.2. The member's credibility.

5.36.2.2.3. Testimony from others about the member's past conduct, character, and credibility.

5.36.2.2.4. The nature and circumstances of the member's statement.

5.36.2.2.5. Any other evidence relevant to whether the member is likely to engage in homosexual acts.

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

**5.37. Types of Separation.** discharge under this section for homosexual conduct may be:

5.37.1. Described as an entry level separation if:

5.37.1.1. The airman is in entry level status; and

5.37.1.2. Characterization as under other than honorable conditions is not warranted according to paragraph **5.37.3**.

5.37.2. Characterized as honorable or general according to **Chapter 1, Section 1B**, if:

5.37.2.1. The airman is not in entry level status; and

5.37.2.2. Characterization as under other than honorable conditions is not warranted according to paragraph **5.37.3**.

5.37.3. Characterized as under other than honorable conditions only if it is found that during the current term of service the airman attempted, solicited, or committed a homosexual act:

5.37.3.1. By using force, coercion, or intimidation;

5.37.3.2. With a person under 16 years of age;

5.37.3.3. With a subordinate in circumstances that violate customary military superior-subordinate relationships;

5.37.3.4. Openly in public view;

5.37.3.5. For compensation;

5.37.3.6. Aboard a military vessel or aircraft; or

5.37.3.7. In another location subject to military control under aggravating circumstances noted in the finding that have an adverse impact on discipline, good order, or morale comparable to the impact of such activity aboard a vessel or an aircraft.

**5.38. Recoupment of Advanced Educational Assistance, Special Pay, or Bonuses in Homosexual Conduct Cases.** Where the applicable statute, regulation or agreement authorizes recoupment when separation is “voluntary” or because of “misconduct,” the following special rules apply only in homosexual conduct cases:

5.38.1. A separation for homosexual conduct is “voluntary” when the member made the homosexual statement; committed, attempted or solicited the homosexual act; or entered or attempted to enter the homosexual marriage for the purpose of seeking separation. Circumstantial evidence may be considered in determining the member’s intent.

5.38.2. Homosexual conduct is “misconduct” if:

5.38.2.1. An under other than honorable conditions discharge is authorized (see paragraph [5.37.3.](#)), whether or not the member is actually discharged under other than honorable conditions.

5.38.2.2. The homosexual conduct is punishable under the UCMJ (provisions governing sexual conduct), whether or not the member is punished under the UCMJ.

5.38.3. The discharge board, or separation authority if the member waives the board, must make specific written findings as to whether the member is subject to recoupment for one or more of the reasons in [5.38.1.](#) or [5.38.2.](#) Specific findings are required even if the member does not raise this issue as a “dispute.”

5.38.3.1. If an inquiry officer is appointed, he or she shall make specific written findings as to whether the prospective separation is voluntary or because of misconduct.

**5.39. The FY94 National Defense Authorization Act** amended 10 U.S.C. 2005 to require the Secretary of the Air Force to appoint an investigating officer when a person disputes owing a debt for advanced education assistance funds. The investigating officer will examine the facts of the case and hear evidence presented by the person who may owe the debt and other parties, as appropriate, in order to determine the validity of the debt. The investigating officer then makes findings and recommendations in a report for the Secretary. The discharge board or, if the board is waived, the separation authority, will make these findings and recommendations in lieu of an investigating officer. Accordingly, respondents must be provided notice that their right to an examination of the propriety of the disputed debt of advance education assistance funds will be accomplished by the board or discharge authority in lieu of an investigating officer appointed by the Secretary.

**5.40. Action Required of the Commander:** The unit commander:

5.40.1. Determines the extent and type of investigation needed to find whether probable cause for discharge exists based on the type of information received.

5.40.2. Must initiate discharge processing if a basis for discharge according to paragraph [5.36.](#) is found. All airmen recommended for discharge for homosexual conduct are given an opportunity to have the case heard by an administrative discharge board.

5.40.3. Is not required to comply with paragraph [5.2.](#) Preprocessing counseling and rehabilitation are not applicable.

5.40.4. Will refer to the guidelines for fact-finding inquiries into homosexual conduct when determining whether to initiate an inquiry into the alleged homosexual conduct by an Air Force member ([Attachment 4](#)).

**5.41. Recommendations of the Administrative Discharge Board.** If the board finds:

5.41.1. The evidence supports one or more of the circumstances authorizing discharge for homosexual conduct, the board must recommend discharge unless there is a further finding that retention is warranted under the limited circumstances described in paragraph **5.36**. (See paragraph **5.37**.)

5.41.2. There is not sufficient evidence to show one or more of the circumstances authorizing discharge for homosexual conduct has occurred, the board must recommend retention unless the case involves another basis for discharge. In that event the board may recommend stopping the action to discharge for homosexual conduct.

5.41.2.1. Discharge for the reason supported by the evidence if:

5.41.2.1.1. The respondent has been duly notified and given a chance to respond to the allegations that are the basis of the recommendation; and

5.41.2.1.2. The procedural requirements for such discharge have been met; for example, pre-processing counseling and rehabilitation.

**5.42. When Retention Is Considered:**

5.42.1. The member 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 paragraph **5.36.2**.

5.42.2. Findings regarding the existence of the limited circumstances warranting a member's retention under paragraph **5.36** are required of the board or the discharge authority only if:

5.42.2.1. The member clearly and specifically raises such limited circumstances; or

5.42.2.2. The board or discharge authority relies upon such circumstances to justify the member's retention.

**5.43. Other Authorized Disposition.** Nothing in this regulation:

5.43.1. Limits the authority of the Secretary of the Air Force to take appropriate action in a case to ensure that there has been compliance with the provisions of this section.

5.43.2. Authorizes a member to seek Secretarial review.

5.43.3. Precludes discharge in appropriate circumstances for another reason set forth in this regulation.

5.43.4. Precludes trial by court-martial in appropriate cases.

5.43.5. Requires that a member be processed for separation when a determination is made by the member's commander that:

5.43.6. The member engaged in acts, made statements, or married or attempted to marry a person known to be of the same biological sex for the purpose of avoiding or terminating military service; and

5.43.7. Separation of the member would not be in the best interest of the Air Force.

#### 5.44. Separation Authority:

5.44.1. The SPCM authority personally takes final action on recommendations for discharge for homosexual conduct if:

5.44.1.1. The board recommended retention and referral to the Office of the Secretary of the Air Force under paragraph 1.2. is not contemplated.

5.44.1.2. The board recommended discharge described as an entry level separation or characterized as honorable or general.

5.44.1.3. The member waived the board and the circumstances warranting discharge under other than honorable conditions do not exist. To find when such discharge is authorized, see paragraph 5.37.3. (See paragraph 5.37.).

5.44.2. The GCM authority personally takes final action on the case if:

5.44.2.1. The board recommends discharge under other than honorable conditions.

5.44.2.2. The member waived the board and one or more of the circumstances warranting discharge under other than honorable conditions exist.

5.44.2.3. The GCM authority does not support the convening authority's recommendation for referral to the Office of the Secretary of the Air Force under paragraph 1.2.

5.44.2.4. The initiating commander is also the SPCM authority. (See paragraph 5.37.)

5.44.3. If the member waives the board hearing and the separation authority directs a type of separation less favorable than the commander recommends, the approving correspondence must include a detailed statement of the reasons for the less favorable characterization. **NOTE:** If the SPCM authority is also the GCM authority, the vice commander may be designated, in writing, to personally act on this action.

**5.45. Suspension of Discharge.** Airmen approved for discharge under this provision are not eligible for probation and rehabilitation under **Chapter 7**. If the member has lengthy service, the provisions of **Chapter 6, Section 6F**, apply. If the member is retirement eligible, the provisions of **Chapter 6, Section 6E** apply.

#### **Section 5H—Misconduct**

**5.46. Policy.** Airmen in the active military service are required to maintain, both on and off duty, the high standards of personal conduct set for Air Force members. They occupy a unique position in society, representing the military establishment 24 hours a day. This special status carries with it a permanent obligation to uphold and maintain the dignity and good reputation of the Air Force at all times and in all places. Therefore, unacceptable conduct any time adversely affects military duty performance.

**5.47. Types of Misconduct.** Airmen are subject to discharge when there is evidence of one or more of the acts or patterns of misconduct described in this section (paragraph 5.3.1.). If this requirement is met, the entire military record may be considered in deciding whether the member should be discharged or retained.