

## Attachment 4

### GUIDELINES FOR FACT-FINDING INQUIRES INTO HOMOSEXUAL CONDUCT

#### A4.1. Responsibility :

A4.1.1. Only a commander in the member's chain of command 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.

A4.1.2. In every case, prior to initiating an inquiry, a commander must consult through the chain of command with a commander possessing general court-martial convening authority (GCMCA) and the servicing staff judge advocate of the initiating commander must consult with the servicing staff judge advocate of the GCMCA. A single base GCMCA, NAF or higher level GCMCA is not required to consult a higher headquarters prior to initiation of an inquiry, but may do so at his or her discretion.

A4.1.3. In addition to the requirement of [A4.1.2.](#), a commander desiring to initiate a substantial inquiry to determine whether or not a statement of homosexuality was made for the purpose of seeking separation from military service, as defined in [A4.2.6.](#), must submit a request for approval through the chain of command and the Vice Chief of Staff of the Air Force (AF/CV) to the Undersecretary of the Air Force (SAF/US). The request must explain why there is a clear interest in conducting the substantial inquiry, why it is expected that the expanded inquiry will result in additional relevant evidence and why the Air Force benefit in expanding the inquiry outweighs any foreseeable disadvantage of expanded inquiry. Any commander in the chain of command, AF/CV or SAF/US can disapprove the request and return it to the initiating commander. SAF/US approval of a request shall be communicated back through the chain of command to the initiating commander.

A4.1.4. A fact-finding inquiry may be conducted by the commander personally or by a person he or she appoints. Subject to the restrictions on substantial inquiries in homosexual statement cases, it may consist of an examination of the information reported or a more extensive investigation, as necessary.

A4.1.5. 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. A member who makes a voluntary statement acknowledging his or her homosexuality may, but will not be required to, provide the names of other individuals to be interviewed relevant to his or her statement. The fact that an individual is identified by the member to be interviewed does not, standing alone, provide credible evidence sufficient to initiate an inquiry of that individual. Should the alleged homosexuality of members other than the subject arise in the course of the substantial inquiry, they will not be inquired into further without the approval of the appropriate command authority or, when required, the Under Secretary of the Air Force. See paragraphs [A4.1.1.](#) and [A4.1.3.](#)

A4.1.6. If a commander has credible evidence of possible criminal conduct, he or she may follow the procedures outlined in the Manual for Courts-Martial and implementing regulations issued by the Secretary of the Air Force.

A4.1.7. The guidelines in this attachment do not apply to activities of the Defense Criminal Investigative Organizations (DCIO) and other DoD law enforcement organizations, which are governed by DoD Instruction 5505.8.

**A4.2. Definitions:**

A4.2.1. Bisexual. A person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in both homosexual and heterosexual acts.

A4.2.2. Commander. A commissioned officer who occupies a position of command.

A4.2.3. Homosexual. A person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

A4.2.4. Homosexual Conduct. "Homosexual conduct" is a homosexual act, a statement by the member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage.

A4.2.4.1. "A homosexual act" means any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires and any bodily contact (for example, hand holding or kissing, in most circumstances) that a reasonable person would understand to demonstrate a propensity or intent to engage in such an act.

A4.2.4.2. "A statement that a member is homosexual or bisexual, or words to that effect" means language or behavior that a reasonable person would believe was intended to convey the statement that a person engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts. This may include statements such as "I am a homosexual," "I am gay," "I am a lesbian," "I have a homosexual orientation," and the like.

A4.2.4.3. "A homosexual marriage or attempted marriage" is when a member has married or attempted to marry a person known to be of the same biological sex.

A4.2.4.4. "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.

A4.2.5. Sexual Orientation. An abstract sexual preference for persons of a particular sex, as distinct from a propensity or intent to engage in sexual acts.

A4.2.6. Substantial Inquiry to Determine Whether a Statement was Made for the Purpose of Seeking Separation from Military Service. A substantial inquiry to determine whether a statement was made for the purpose of seeking separation from military service is an inquiry that extends beyond questioning the member who made the statement, and/or a third party who reports that a member made a statement, individuals suggested by the member for interview and the member's immediate supervisory chain of command.

A4.2.7. "Threats" and "harassment," as used in paragraphs [A4.4.5.](#) and [A4.6.3.](#), are not technical terms and are used in the commonly understood sense. "Harassment" includes the use of derogatory or demeaning words, gestures or actions in regard to the sexual orientation of another or others.

**A4.3. Basis 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 circumstance 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.

A4.3.1. A basis for discharge exists if:

A4.3.1.1. The member has engaged in a homosexual act;

A4.3.1.2. 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

A4.3.1.3. The member has married or attempted to marry a person of the same sex.

**A4.4. Credible information** does not exist, for example, when:

A4.4.1. The individual is suspected of engaging in homosexual conduct, but there is no credible information, as described below, to support that suspicion; or

A4.4.2. The only information is the opinions of others that a member is homosexual; or

A4.4.3. The inquiry would be based on rumor, suspicion, or capricious claims concerning a member's sexual orientation; or

A4.4.4. 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.

A4.4.5. A member reports being threatened or harassed because he or she is labeled or perceived to be a homosexual. Such information, standing alone, does not constitute credible information justifying the initiation of an inquiry into alleged homosexual conduct by the member reporting the threats or harassment.

**A4.5. Credible information** exists, for example, when:

A4.5.1. 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 bisexual or is married to a member of the same sex; or

A4.5.2. A reliable person states that he or she heard, observed, or discovered a 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

A4.5.3. A reliable person states that he or she observed behavior that amounts to a nonverbal statement by a member that he or she is a homosexual or 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.

**A4.6. Procedures:**

A4.6.1. 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.

A4.6.2. Commanders must exercise sound discretion regarding when credible information exists. They must examine the information and decide whether an inquiry is warranted, whether an inquiry is necessary in light of the facts reported or whether no action should be taken.

A4.6.3. If a member reports threats or harassment based on being labeled or perceived to be a homosexual, the alleged threat or harassment must be addressed promptly by inquiry or investigation, as appropriate based on the surrounding facts. Assuring the physical safety of the complainant will be a primary consideration in any such case. A report of threats or harassment based on being labeled or perceived to be a homosexual does not constitute credible information justifying initiation of an inquiry or investigation of the complainant. Persons conducting an investigation or inquiry into the threats or harassment should not solicit allegations about the sexuality or possible homosexual conduct of the complainant. If information regarding alleged homosexual conduct by the complainant arises during an inquiry or investigation into threats or harassment, commanders must carefully consider the source of the information, and the circumstances under which it was provided, in assessing its credibility. The receipt of information alleging homosexual conduct on the part of the complainant does not negate the need to inquire into or investigate the facts and circumstances surrounding the original complaint of threats or harassment.

A4.6.4. Commanders or appointed inquiry officials must not ask about, and members may not be required to reveal, a member's sexual orientation. However, upon receipt of credible information of homosexual conduct (as described in A4.3.), commanders or appointed inquiry officials may ask members if they engaged in homosexual conduct. The member must first be advised of the DoD policy on homosexual conduct (and rights under Article 31, UCMJ, if applicable). If the member chooses not to discuss the matter further, the commander may consider other available information. Nothing in this provision precludes questioning a member about any information provided by the member in the course of the factfinding 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.

A4.6.5. At any given point of the inquiry, the commander or appointed inquiry official must be able to clearly and specifically explain which grounds for separation he or she is attempting to verify and how the information being collected relates to those specific separation grounds.

A4.6.6. A statement by a service member that he or she is a homosexual or 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 has a propensity or intent to engage in homosexual acts.

A4.6.7. The service member bears the burden of proving throughout the proceedings, by a preponderance of the evidence, 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.

**A4.7. Legal Effect:** The procedures set forth in this attachment create no substantive or procedural rights, such as excluding evidence from an administrative proceeding or court-martial. Command authorities will take appropriate action against any military member or civilian employee who violates these procedures.