

# **Exhibit 6**



DEPARTMENT OF THE AIR FORCE  
435TH AIR BASE WING (USAFE)

19 June 2008

MEMORANDUM FOR 435 ABW/CC

FROM: 435 ABW/JA

SUBJECT: Discharge Legal Review – Staff Sergeant Anthony J. Loverde, (REDACTED) 1618, 37 AS

1. RECOMMENDATION FOR DISCHARGE: We have reviewed the administrative discharge action against SSgt Loverde and find it legally sufficient to support an administrative discharge under AFI 36-3208, paragraph 5.36.2. We support the commander's recommendation for an Honorable discharge service characterization.
2. BASIS FOR THE ACTION: On 22 April 2008, SSgt Loverde wrote a statement in which he identified himself as a homosexual and expressed a desire to live an openly homosexual lifestyle. Lt Col Brain A. Yates, 37 AS/CC, determined SSgt Loverde's statement to be credible and not made for the purpose of avoiding service. On 9 June 2008, Lt Col Yates initiated the discharge action pursuant to AFI 36-3208, *Administrative Separation of Airmen*, paragraph 5.36.2.
3. MATTERS SUBMITTED BY THE SSGT LOVERDE: On 10 June 2008, SSgt Loverde consulted counsel and submitted a conditional waiver of his discharge board rights. SSgt Loverde's condition was that he receives no less than an Honorable discharge. Although SSgt Loverde has waived his right to a board, he requests a consideration for retention.
4. DISCUSSION:
  - a. There are no errors that affect the SSgt Loverde's rights in this administrative discharge action.
  - b. Before recommending this discharge, the commander reviewed the facts of SSgt Loverde's case. On 22 April 2008, SSgt Loverde identified himself as a homosexual to MSgt Jon Welch, 37 AS/CCF, via e-mail. MSgt Welch immediately notified his commander, Lt Col Yates, who then determined SSgt Loverde's statement to be credible and not made for the purpose of avoiding service.
  - c. SSgt Loverde stated in his response that he would like to stay on active duty, if possible. On 21 May 2008, the Court of Appeals for the Ninth Circuit ruled on Witt v. Department of the Air Force, a case brought by an Air Force nurse against the Air Force for a homosexual discharge, and stated that the military must meet a heightened scrutiny standard when discharging a military member for homosexual conduct. In the Witt case, "heightened scrutiny" meant that the Air Force had to prove that important governmental interests were at stake, that the discharge would significantly further those interests, and that the discharge was necessary to further those interests.

d. However, the Ninth Circuit's ruling in the Witt case does not apply to the facts at hand. AFI 36-3208, paragraph 5.36.2. states that a member shall be separated if the member 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 is a homosexual 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. SSgt Loverde has made a statement and his commander deemed it credible and not made to avoid service. Therefore, discharge is appropriate in this case.

5. OTHER MATTERS: Before SSgt Loverde can be discharged, he must be medically qualified for worldwide service and separation under AFI 36-3208, paragraph 6.3. SSgt Loverde had his appointment on 11 June 2008, but his medical report is not yet available. In accordance with AFI 36-3208, paragraph 6.11, the legal review is not dependent upon a completed medical report. The MPF Personnel Relocation Element Unit makes sure the separation, if approved, is not executed until the member is found qualified for worldwide duty or is processed through the Air Force Personnel Center (AFPC).

#### 6. CHARACTERIZATION OF SERVICE:

a. Characterization of service must be based on the quality of the member's service in the current enlistment. SSgt Loverde has seven years and three months of military service. His current enlistment began on 1 February 2006, for a term of four years. Although the SSgt Loverde's Total Active Federal Military Service is more than 20 months, neither an Enlisted Performance Report (EPR) nor a Letter of Evaluation (LOE) is required for this type of discharge.

b. The service of an Airman discharged for homosexual conduct may be characterized as Honorable, General, or Under Other Than Honorable Conditions (UOTHC). An Honorable characterization is warranted when an Airman's service has generally met Air Force standards of acceptable conduct and performance of duty or when a member's service is otherwise so meritorious that any other characterization would be inappropriate.

c. An Under Honorable Conditions (General) characterization is warranted when an Airman's service has been honest and faithful, but significant negative aspects of the Airman's conduct outweigh positive aspects of the Airman's military record.

d. A UOTHC characterization is warranted only if it is found that during the current term of service the Airman attempted, solicited, or committed a homosexual act by force, coercion, or intimidation; with a person younger than 16-years old; with a subordinate in violation of customary supervisory relationships; openly in public view; aboard a military vessel or aircraft; or under other aggravating circumstances prejudicial to good order and discipline. No evidence exists that the SSgt Loverde engaged in any homosexual act warranting the consideration of a UOTHC characterization.

e. SSgt Loverde has waived his right to a discharge board on the condition that he receives an Honorable discharge. Furthermore, SSgt Loverde has no documented instances of

misconduct. Since no misconduct was involved in the homosexual conduct forming the basis of this discharge action, Lt Col Yates recommends an Honorable discharge characterization and we concur.

7. PROBATION AND REHABILITATION: Under AFI 36-3208, *Administrative Separation of Airmen*, paragraph 7.2.6.4, Airmen are not eligible for probation and rehabilitation (P&R) if the reason for discharge is homosexual conduct.

8. ACTIONS WHICH MAY BE TAKEN: As the Special Court-Martial Convening Authority, you have the following options:

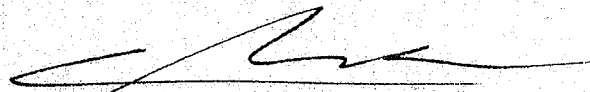
a. Find the evidence does not support the recommendation for separation and terminate this action;

b. Approve SSgt Loverde's conditional waiver and direct that he be separated from the United States Air Force with an Honorable characterization;

c. Find that a General characterization is appropriate and return the case file for notification to the member of the possibility of a General characterization; or

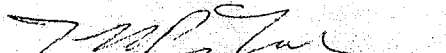
d. Return the case file for processing with an administrative discharge board hearing.

9. RECOMMENDATION: Sign Attachment 1 to approve the SSgt Loverde's separation from the United States Air Force for homosexual conduct with an Honorable service characterization.



CHRISTOPHER M. WU, Capt, USAF  
Assistant Staff Judge Advocate

I have reviewed the foregoing memorandum, concur with the findings and recommendations, and adopt them as my own.



JEFFREY P. RUDE, Lt Col, USAF  
Staff Judge Advocate

Attachments:

1. Proposed Memo for 435 ABW/CC
2. Commander's Recommendation Letter with attachments, dated 10 June 2008