

1 IAN HEATH GERSHENGORN
 Deputy Assistant Attorney General
 2 MELINDA L. HAAG
 United States Attorney
 3 VINCENT M. GARVEY
 Deputy Director
 4 PAUL G. FREEBORNE
 Virginia Bar No. 33024
 5 RYAN B. PARKER
 Utah Bar No. 11742
 6 U.S. Department of Justice
 Civil Division
 7 Federal Programs Branch
 P.O. Box 883
 8 Washington, D.C. 20044
 Telephone: (202) 353-0543
 9 Facsimile: (202) 616-8460
 E-mail: paul.freeborne@ usdoj.gov

10 Attorneys for Federal Defendants

11 **UNITED STATES DISTRICT COURT**
 12 **NORTHERN DISTRICT OF CALIFORNIA**

14 MICHAEL D. ALMY, ANTHONY J.
 LOVERDE, and JASON D. KNIGHT,

16 Plaintiffs,

17 v.

18 UNITED STATES DEPARTMENT OF
 DEFENSE, ROBERT M. GATES, Secretary of
 19 Defense; DEPARTMENT OF THE AIR FORCE;
 MICHAEL B. DONLEY, Secretary, Department
 20 of the Air Force; DEPARTMENT OF THE
 NAVY; and RAY MABUS, Secretary,
 21 Department of the Navy,

22 Defendants.

)
) Case No. 3:10-cv-5627 (RS)
)
) EXHIBITS TO DEFENDANTS'
) MEMORANDUM OF POINTS AND
) AUTHORITIES IN SUPPORT OF
) DEFENDANTS' MOTION TO
) DISMISS OR, IN THE ALTERNATIVE,
) CROSS-MOTION FOR SUMMARY
) JUDGMENT AND OPPOSITION TO
) PLAINTIFFS' MOTION FOR PARTIAL
) SUMMARY JUDGMENT
)
) Hearing Date: Thursday, October 13,
) 2011
)
) Time: 1:30 P.M.
)
) Courtroom: San Francisco Courthouse,
) Courtroom 3 - 17th Floor 450 Golden
) Gate Avenue, San Francisco, CA 94102
)

28 Exhibits to Defendants' Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss or, in the Alternative, Cross-Motion for Summary Judgment and Opposition to Plaintiffs' Motion for Partial Summary Judgment, *Almy v. United States Department of Defense*, Case No. 3:10-cv-5627 (RS)

EXHIBITS

1. Memorandum for Secretaries of the Military Departments, “Repeal of Don’t Ask, Don’t Tell” and Future Impact on Policy, dated January 28, 2011
2. Declaration of Patrick A. Count, Department of the Navy, with Enclosures
3. Declaration of Kathy Wardlaw, PhD, Department of the Navy, with Enclosures
4. Declaration of Feroz A. Essa, Department of the Air Force
5. Declaration of Mark Sakowski, Department of the Navy
6. Federal Rule of Civil Procedure 56(d) Declaration of Counsel, Paul G. Freeborne

Memorandum for Secretaries of the Military Departments,
“Repeal of Don’t Ask, Don’t Tell” and Future Impact on Policy,
dated January 28, 2011



UNDER SECRETARY OF DEFENSE
4000 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-4000

JAN 28 2011

PERSONNEL AND
READINESS

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS

SUBJECT: Repeal of Don't Ask Don't Tell and Future Impact on Policy

On December 22nd, 2010, the President signed legislation that will lead to the eventual repeal of 10 U.S.C. § 654 and its implementing regulations (commonly known as "Don't Ask, Don't Tell"). The legislation provides that repeal will take effect 60 days after the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff certify to Congress that the Armed Forces are prepared to implement repeal in a manner that is consistent with the standards of military readiness, military effectiveness, unit cohesion, and recruiting and retention of the Armed Forces. Until such time, there are no changes to 10 U.S.C. § 654 nor any existing Department or Service policies.

The purpose of attachment one is twofold: 1) to provide the Department's Policy Guidance that will take effect on the date of repeal (the exact date is not yet known) and 2) to inform the Military Services about the steps each should take immediately in order to prepare for the effective date of repeal.

Additionally, the second attachment contains those changes to Department Instructions and Directives that will be effective on the date of repeal.

It remains the policy of the Department of Defense that sexual orientation is a personal and private matter, to treat all members with dignity and respect, and to ensure maintenance of good order and discipline. Leaders will be essential to implementing this change in policy fairly and consistently. A clear focus on leadership, professionalism, and respect will enable any change in policy to be executed with minimum disruption to the force.

A handwritten signature in black ink that reads "Clifford L. Stanley".

Clifford L. Stanley

Attachments:
As stated

cc:
Chairman of the Joint Chiefs of Staff
Coast Guard, Commandant (CG1)
General Counsel of the Department of Defense

DADT Repeal Policy Guidance

On the effective date of repeal of Don't Ask, Don't Tell (DADT), which is yet to be determined, this policy guidance will apply to all military personnel serving in the Armed Forces of the United States, including those serving in the Reserve components of the Armed Forces.

In order to prepare to implement the below policy guidance on the effective date of repeal of DADT, each Service is immediately directed to identify its specific instructions and regulations related to all policy areas affected by the future repeal of DADT and prepare draft changes based on the below policy guidance. It is critical to reemphasize that these policy changes will not be effective until the date of repeal.

Separations

Upon repeal, Services may no longer separate Service members under the homosexual conduct policy set forth under 10 U.S.C. § 654 and its implementing regulations. Service members will no longer be subject to administrative separation based solely on legal homosexual acts, a statement by a Service member that he or she is a homosexual or bisexual (or words to that effect), or marriage or attempted marriage to a person known to be of the same biological sex. Members who have an approved separation date after the effective date of repeal based on proceedings commenced solely under 10 U.S.C. § 654 and its implementing regulations will have that separation cancelled and will return to duty.

Additionally, on the date of repeal, Services will cease all pending investigations, separations, discharges, or administrative proceedings commenced solely under 10 U.S.C. § 654, and its implementing regulations. Services may reprocess if facts afford another appropriate reason for separation other than 10 U.S.C. § 654 and its implementing regulations. In those cases already begun in which 10 U.S.C. § 654 and its implementing regulations represent one of multiple reasons for separation, Services will make a case-by-case determination as to whether to proceed with the separation or to start the proceedings over again.

DoD discharge codes JB, RA, RB, RC for discharges under 10 U.S.C. § 654 and its implementing regulations will be discontinued.

Accessions and Recruiting Policy

Upon repeal, statements about sexual orientation or lawful acts of homosexual conduct will not be considered as a bar to military service or admission to Service academies, ROTC or any other accession program. Sexual orientation will continue to be a personal and private matter. Applicants for enlistment or appointment may not be

asked, or be required to reveal, their sexual orientation. All applicants, regardless of any statements in regard to sexual orientation, will be treated with professionalism and respect.

The required briefings given to applicants for enlistment and appointment regarding standards of personal conduct in the armed forces and separations policy will be amended appropriately to reflect the new policy.

Re-Accessions

Upon repeal, former Service members who were discharged solely under 10 U.S.C. § 654 and its implementing regulations may apply to re-enter the Armed Forces. They will be evaluated according to the same criteria and Service requirements applicable to all prior-Service members seeking re-entry into the military at that time. There will be no preferential treatment for Service members separated solely under 10 U.S.C. § 654 and its implementing regulations. They will be processed as any other re-accession applicant under Service policies. Services shall continue to consider a Service member's previous performance and disciplinary record when determining suitability for re-entry.

Services will waive re-entry codes on DD Forms 214 that are based upon separations under 10 U.S.C. § 654 and its implementing regulations. Applicants will then be processed on a case-by-case basis in accordance with Service policies.

In considering applications for re-accessions, the Services will not consider to the detriment of an applicant any separation that was solely for under 10 U.S.C. § 654, and its implementing regulations. For example, former Service members who were separated with an honorable discharge (or an uncharacterized discharge for those occurring during initial training), and who have a separation code in their records reflecting a separation under 10 U.S.C. § 654 and its implementing regulations, shall be considered for re-entry according to the most favorable re-entry classification. The military requirements of the Services will continue to dictate re-accession criteria.

Standards of Conduct

Upon repeal, existing standards of conduct shall continue to apply to all Service members regardless of sexual orientation. Enforcement of service standards of conduct, including those related to public displays of affection, dress and appearance, and fraternization will be sexual orientation neutral. All members are responsible for upholding and maintaining the high standards of the U.S. military at all times and at all places. Services retain the authority provided by law, Department and Service regulations to counsel, discipline, and involuntarily separate those Service members who fail to obey established standards.

Leaders at all levels are entrusted to ensure the impartial administration of these standards and to hold Service members accountable. In cases where conduct is prohibited, leaders shall be expected to take such appropriate corrective or disciplinary action as they determine may be necessary to preserve morale, good order and discipline, unit cohesion, military readiness, and combat effectiveness.

In order to meet the intent of this policy guidance, each Service is directed to immediately review its standards of personal and professional conduct policies and procedures to ensure that they provide adequate guidance in relevant areas, apply uniformly to all personnel, and promote an environment free from personal, social or institutional barriers that prevent Service members from rising to their highest potential. Place special emphasis in such review on the following areas: public displays of affection (PDA), dress and appearance, nepotism, unprofessional relationships, conflicts of interest, and zero tolerance for harassment and hazing. Standards of conduct shall clearly address the responsibility of leaders, supervisors, and subordinate personnel at all levels to foster unit cohesion, good order and discipline, respect for authority, and mission accomplishment.

Additional Guidance

Moral and Religious Concerns/Freedom of Speech

Policies regarding Service members' individual expression and free exercise of religion already exist and are adequate. In today's military, people of different moral and religious values work, live and fight together. This is possible because they treat each one another with dignity and respect. This will not change. There will be no changes regarding Service member exercise of religious beliefs, nor are there any changes to policies concerning the Chaplain Corps of the Military Departments and their duties. The Chaplain Corps' First Amendment freedoms and their duty to care for all will not change. When Chaplains are engaged in the performance of religious services, they may not be required to engage in practices contrary to their religious beliefs. Service members will continue to respect and serve with others who may hold different views and beliefs.

Equal Opportunity

All Service members, regardless of sexual orientation, are entitled to an environment free from personal, social, or institutional barriers that prevent Service members from rising to the highest level of responsibility possible. Harassment or abuse based on sexual orientation is unacceptable and will be dealt with through command or inspector general channels.

Sexual orientation will not be considered along with race, color, religion, sex, and national origin as a class under the Military Equal Opportunity (MEO) program and therefore will not be dealt with through the MEO complaint process.

In order to meet the intent of this policy guidance, DoD, Military Departments, and Service MEO programs will immediately review their current MEO Programs as established in DODD 1350.2 *Department of Defense Military Equal Opportunity (MEO) Program* to ensure consistency with this policy.

Collection and Retention of Sexual Orientation Data

Sexual orientation is a personal and private matter. DoD components, including the Services are not authorized to request, collect, or maintain information about the sexual orientation of Service members except when it is an essential part of an otherwise appropriate investigation or other official action.

Personal Privacy

The creation of separate bathroom facilities or living quarters based on sexual orientation is prohibited, and Commanders may not establish practices that physically segregate Service members according to sexual orientation.

Personal privacy is a concern for many Service members. Members of the Armed Forces accept living and working conditions that are often austere, primitive, and characterized by forced intimacy with little or no privacy. Consistent with current policy, Commanders will continue to maintain the discretion to alter berthing or billeting assignments in accordance with Service policy in the interest of maintaining morale, good order and discipline, and consistent with performance of the mission.

Benefits

There will be no changes at this time to eligibility standards for military benefits, including applicable definitions. Service members and their opposite-sex spouses receive a range of entitlements and benefits depending on eligibility. The Defense of Marriage Act, 1 U.S.C. § 7, and the existing definition of “dependent” in some laws, prohibit extension of many military benefits—such as medical care, travel and housing allowances, and other benefits—to same-sex couples.

All Service members will continue to have various benefits for which they may designate beneficiaries in accordance with the rules governing each program. Some Service members may not have taken full advantage of these designations prior to repeal of DADT. The Services will reemphasize the opportunity to designate beneficiaries for these benefits to all its Service members. Such benefits include the following:

1. Service Member's Group Life Insurance (SGLI) Beneficiary
2. Post Vietnam-Era Veterans Assistance Program (VEAP) Beneficiary
3. G.I. Bill Death Beneficiary
4. Death Gratuity Beneficiary
5. Final Settlement of Accounts Beneficiary
6. Wounded Warrior Act Designated Caregiver
7. Thrift Savings Plan (TSP) Beneficiary
8. Survivor Benefit Plan Beneficiary

Although there will be no changes to benefits eligibility on the date of repeal, the Department will continue to study existing benefits to determine those, if any, that should be revised, based on policy, fiscal, legal, and feasibility considerations, to give the Service member the discretion to designate a person or persons of their choosing as a beneficiary.

Medical Policy

There will be no changes to existing medical policies. The Surgeons General of the Military Departments have determined that repeal of DADT does not affect the military readiness of the force and that changes to medical policies are not necessary.

Duty Assignment

There will be no changes to assignment policies. All Service members will continue to be eligible for world-wide assignment without consideration of sexual orientation. Service members assigned to duty, or otherwise serving in countries in which homosexual conduct is prohibited or restricted, will abide by the guidance provided to them by their local commanders.

Release from Service Commitments

There will be no new policy to allow for release from service commitments for Service members opposed to repeal of 10 U.S.C. § 654 or to serving with gay and lesbian Service members. Service members may request to be voluntarily discharged under the plenary authority of the Military Department Secretary concerned, or other appropriate authority based upon the specific facts of each case. Such discretionary discharge may only be granted when the Military Department Secretary concerned has determined the early separation would be in the best interest of the Service.

Claims for Compensation and Retroactive Full Separation Pay

The Department will not authorize compensation of any type, including retroactive full separation pay, for those previously separated under 10 U.S.C. §654 and its implementing regulations.

Declaration of Patrick A. Count,
Department of the Navy, with Enclosures

1 IAN HEATH GERSHENGORN
2 Deputy Assistant Attorney General
3 MELINDA L. HAAG
4 United States Attorney
5 VINCENT M. GARVEY
6 Deputy Director
7 PAUL G. FREEBORNE
8 Virginia Bar No. 33024
9 RYAN B. PARKER
10 Utah Bar No. 11742
11 U.S. Department of Justice
12 Civil Division
13 Federal Programs Branch
14 P.O. Box 883
15 Washington, D.C. 20044
16 Telephone: (202) 353-0543
17 Facsimile: (202) 616-8460
18 E-mail: paul.freeborne@usdoj.gov

19
20 Attorneys for Federal Defendants

21
22 **UNITED STATES DISTRICT COURT**
23 **NORTHERN DISTRICT OF CALIFORNIA**
24

25 MICHAEL D. ALMY, ANTHONY J.)
26 LOVERDE, and JASON D. KNIGHT,)
27)
28 Plaintiffs,)
29)
30 v.)
31)
32 UNITED STATES DEPARTMENT OF)
33 DEFENSE; ROBERT M. GATES, Secretary of)
34 Defense; DEPARTMENT OF THE)
35 AIR FORCE; MICHAEL B. DONLEY,)
36 Secretary, Department of the Air Force;)
37 DEPARTMENT OF THE NAVY; and RAY)
38 MABUS, Secretary, Department of the Navy,)
39)
40 Defendants.)

Case No. 10-cv-05627-RS
**DECLARATION OF PATRICK
COUNT IN SUPPORT OF
DEFENDANT'S MOTION TO
OR, IN THE ALTERNATIVE,
CROSS MOTION FOR
SUMMARY JUDGMENT**
Hearing Date: Thursday, October
13, 2011
Time: 1:30 P.M.
Courtroom: San Francisco
Courthouse: Courtroom 3-17th
Floor, 450 Golden Gate Avenue,
San Francisco, CA 94102

1 I, Patrick A. Count, make the following declaration in the above-cited case on the basis of
2 personal knowledge and information available to me in the course of my official duties:

3 1. I am an officer in the United States Navy. I have served in the Navy for 21 years. I
4 am presently serving as the Information Operations Plans Chief at U.S. European Command in
5 Stuttgart, Germany. My previous tours of duty include Carrier Strike Group Eight, Norfolk, VA
6 (July 2006-October 2008), Navy Information Operations Command Fort Gordon (February
7 2003-July 2006), U.S. Navy Forces Central Command, Manama, Bahrain (January 2002-January
8 2003), U.S. Naval Postgraduate School, Monterey, CA (Jun 1999-December 2001), Naval
9 Security Group Activity, Misawa, Japan (July 1996-May 1999), the Defense Language Institute,
10 Monterey, CA (June 1995-June 1996), Naval Reserve Officer Training Corps unit, University of
11 South Carolina, Columbia, SC (January 1992-May 1995), Naval Security Group Activity, Fort
12 Meade, MD (December 1990-October 1991), Naval Security Group Activity, Athens, Greece
13 (September 1988-December 1990), Naval Technical Training Center, Pensacola, FL (June 1988-
14 August 1988), Naval Technical Training Center Detachment, Goodfellow AFB, San Angelo, TX
15 (January 1988-May 1988), Defense Language Institute, Monterey, CA (January 1987-December
16 1987), and Recruit Training Center / Naval Training Command, San Diego, CA (October 1986-
17 December 1986).

18 2. From November 2004 to July 2006, I served as the Executive Officer (XO) at Navy
19 Information Operations Command (NIOC) at Fort Gordon, Georgia, formerly known as Naval
20 Security Group Activity Fort Gordon. Records indicate that on or about January 14, 2005, CTI3
21 Jason D. Knight checked onboard the command.

22 3. Shortly after CTI3 Knight reported onboard, in early February 2005, I was informed
23 by the Command Master Chief, CMDCM(SW) Adrian D. Williams, USN, that CTI3 Knight

1 made both a verbal and an email admission to being a homosexual. CMDCM Williams advised
2 me that he met with CT13 Knight on or about February 2, 2005, and that is when CT13 Knight
3 verbally admitted to being a homosexual. A copy of CMDCM Williams' memo summarizing
4 this meeting is attached as enclosure 1 and accurately reflects the discussion.

5 4. Upon being notified of CT13 Knight's verbal admission and email, at the direction of
6 the Commanding Officer, the case would have been investigated in accordance with
7 MILPERSMAN 1910-148 in effect at the time (enclosure 2) and JAGINST 5800.7 (JAGMAN).
8 Standard procedure would entail a Preliminary Inquiry Officer being assigned to conduct a
9 preliminary investigation. Upon completion of the investigation, the Commanding Officer
10 would then determine how to proceed in the matter.

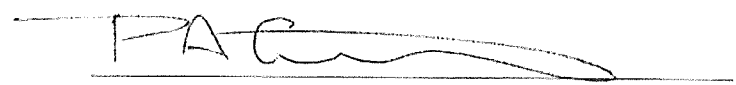
11 5. Due to CT13 Knight's impending End of Active Obligated Service (EAOS) date
12 quickly approaching and his intent to separate at EAOS, after seeking legal advice from
13 Commander, Navy Region Southeast's Staff Judge Advocate Office, our immediate superiors in
14 our chain of command, the Commanding Officer decided that administrative separation
15 proceedings under MILPERSMAN 1910-148 would not be pursued. Instead, CT13 Knight
16 would be discharged at the end of his enlistment contract pursuant to MILPERSMAN 1910-104
17 (enclosure 3). His Certificate of Discharge from Active Duty (DD214) therefore, properly
18 reflects his release at the conclusion of his active duty service obligation.

19 6. Had the Commanding Officer decided to pursue administrative separation proceedings
20 in accordance with MILPERSMAN 1910-148, standard procedure would have been to forward
21 an administrative request to Navy Personnel Command (NPC) and, if approved, CT13 Knight
22 would have been properly notified of his right to a separation hearing to contest possible
23 separation. If he elected to contest, the Commanding Officer would have convened an

1 administrative separation board to determine if CTI3 Knight did or possessed a propensity to
2 engage in homosexual acts, and if so, recommend separation from the Navy and his possible
3 discharge characterization. However, since the Commanding Officer elected not to process CTI3
4 Knight pursuant to MILPERSMAN 1910-148, but instead allowed him to be released from
5 active duty at the end of his service contract, no such administrative separation actions took
6 place.

7 Under 28 U.S.C. §1746 and penalty of perjury, I declare that the foregoing is true and correct to
8 the best of my knowledge and belief.

9 Executed this 18th day of August 2011, at HQ US European Command, Stuttgart, Germany.

10
11 

12 CDR Pat Count, USN
13 IO Plans Chief, EPOC IOSD (J39)
14 HQ US European Command
15 Stuttgart, Germany
16



DEPARTMENT OF THE NAVY

Naval Security Group Activity
Fort Gordon, Georgia 30905-5810



20 Feb 05

From: Command Master Chief, Naval Security Group Activity, Fort Gordon

To: PERS 832

Via: Commander Officer, Naval Security Group Activity, Fort Gordon

Subj: MEMORANDUM FOR THE RECORD ICO CTI3 JASON D. KNIGHT, USN,
[REDACTED]

1. The purpose of this memorandum is to document a conversation between CTI3 Knight and myself that occurred on or about 02 February 2005.
2. PO3 Knight made an appointment to come see me to discuss a personal issue. When he arrived we came into my office at GCHQ. I had him sit and close the door behind him. He then stated that he had tried to send the Executive Officer (XO) and I an email about his personal issue using the command website email links, but the email to me was getting rejected and he did not hear from the XO. After some discussion I found out he had been sending it to the wrong email address for me and to the old XO. He then told me that he was gay. He stated that he had talked to a lawyer about whether he should come out with it and was advised not to, but felt it was the right thing to do. In his statement to me, he commented that he has been trying to come to grips with a lifestyle that he has suspected for some time. He stated he wanted to be free to express his lifestyle. I provide him with general information about the Navys' policy. I also provided him with my correct email address and asked him to resend the email to me. That email is available if required.
3. Point of Contact is CMDCM(SW) Adrian D. Williams at COMM: 706-791-9672 or DSN: 780-9672.

A.D. WILLIAMS

MILPERSMAN 1910-148

SEPARATION BY REASON OF HOMOSEXUAL CONDUCT

Responsible Office	NAVPERSCOM (PERS-4832)	Phone:	DSN	882-4432
			COM	(901) 874-4432
			FAX	882-2624

References	(a) CNO WASHINGTON DC 281833Z OCT 99 (NAVADMIN 291/99) (b) CNO WASHINGTON DC 010300Z MAR 94 (NAVADMIN 033/94) (c) Uniform Code of Military Justice (UCMJ), Article 31(b) (d) Manual for Courts-Martial (MCM) United States (e) CNO WASHINGTON DC 131430Z APR 00 (NAVADMIN 094/00) (f) BUPERSINST 1900.8A
-------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

1. **Policy**. Separation processing is mandatory if the commanding officer (CO) believes, based on **credible information**, the servicemember has committed **homosexual conduct** as defined in MILPERSMAN 1900-010.

2. **Separation Authority**. Commander, Navy Personnel Command (COMNAVPERSCOM) serves as separation authority for **all** cases involving homosexual conduct.

3. **Separation Basis**

a. Homosexual conduct exists if a servicemember has

(1) engaged in a homosexual act;

(2) married or attempted to marry a person of the same biological sex; or

(3) stated that he/she is a homosexual or bisexual, or made other statements indicating a propensity or intent to engage in homosexual acts.

b. Sexual orientation (e.g., heterosexual, homosexual, and bisexual) is considered a personal and private matter, and is

not a bar to continued service unless manifested by homosexual conduct as defined in MILPERSMAN 1900-010.

c. Processing is not required if member committed homosexual conduct to avoid or terminate military service, and separation is not in the best interest of Navy.

4. Fact-Finding Inquiries

a. If the CO questions the credibility of evidence of homosexual conduct, a fact-finding investigation may be necessary. **An investigation is not mandatory and only a CO can authorize it.** Sole purpose of an investigation is to uncover further information to assist the CO in determining whether the alleged homosexual conduct actually occurred.

b. As explained in reference (a), before a CO authorizes an investigation concerning alleged homosexual conduct, the command's judge advocate should consult with the senior judge advocate assigned to the general court-martial convening authority or higher authority. COs without assigned judge advocates should consult directly with a senior judge advocate in their chain of command, or seek assistance in securing such advice from Navy Trial Service Offices or Navy Personnel Command (NAVPERSCOM). **Consultation should occur prior to initiation of any investigation.**

c. COs may personally conduct the inquiry or appoint an investigating officer.

d. As explained in reference (b), members shall not be asked nor required to reveal their sexual orientation; however, when credible information indicates homosexual conduct, members may be asked if they engaged in such conduct. **Prior to any questioning, members suspected of homosexual conduct should be advised of the Department of Defense (DOD) policy on homosexual conduct and apprised of their rights per reference (c), if applicable.**

e. If a CO has credible evidence of possible criminal conduct, the procedures outlined in reference (d) and other Secretary of the Navy (SECNAV) regulations/directives must be followed.

f. Where a servicemember has stated that he/she is a homosexual or bisexual and does not contest separation, little

or no investigation should be necessary. A commander who suspects that a servicemember has made such a statement for purpose of seeking separation from Naval Service in order to avoid a service obligation, and who believes the member is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts, may initiate a more substantial investigation **only when authorized by SECNAV (Assistant Secretary of the Navy, Manpower and Reserve Affairs (ASN(M&RA)))**.

g. A **request for authorization** may be forwarded to NAVPERSCOM, Enlisted Performance and Separations Section (PERS-4832) for coordination with SECNAV (ASN(M&RA)). Request will provide facts surrounding disclosure, an explanation of why further inquiry is appropriate, and an assessment of any potential disadvantage of an extended inquiry.

h. **The following is a definition of "substantial inquiry"**: As explained in reference (e), a substantial inquiry to determine whether a statement was made for the purpose of seeking separation from the military service in order to avoid a service obligation 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.

5. **Credible Information**. This table provides some examples of when credible information exists or does not exist to support initiating fact-finding inquiries:

Credible information...	WHEN...
does not exist	<ul style="list-style-type: none"> • the only information is the opinion of others that a member is homosexual; • information is based on rumor, suspicion, or capricious claims concerning a member's sexual orientation; or • the only known information is associational activity such as frequenting homosexual bars, possessing/reading homosexual publications, associating with known homosexuals, or marching in a homosexual rights rally in civilian clothes. (Such activity, in and of itself, does not provide evidence of homosexual conduct.)

Credible information...	WHEN...
does exist	<ul style="list-style-type: none"> • member states they are homosexual/bisexual, or married to a member of the same sex, or have engaged in homosexual acts; • a reliable person has observed or heard a member engaging in homosexual acts; • a reliable person states they heard, observed, or discovered a member make a spoken/written statement that a reasonable person would believe was intended to convey the fact they engage in, attempt to engage in, or have a propensity to engage in homosexual acts; or • a reliable person states they have observed behavior that amounts to a non-verbal statement by a member they are homosexual or bisexual (i.e., behavior that a reasonable person would believe was intended to convey the member engages in, attempts to engage in, or has the propensity to engage in homosexual acts).

6. **Processing Procedures.** Administrative Board Procedure (MILPERSMAN 1910-404) must be used. Least favorable characterization for cases based on homosexual acts and/or marriage must state Under Other Than Honorable (OTH). For cases where sole basis for processing is an admission by the servicemember that he/she is a homosexual or bisexual, least favorable characterization may be General (Under Honorable Conditions) (GEN).

7. **Verbatim Processing Reasons.** Reason for processing cited on member's notice of an Administrative Board Procedure must state the member is being processed for:

<p>"HOMOSEXUAL CONDUCT AS EVIDENCED BY: (one or more of the following phrases in its entirety)</p> <p>a. member's statement that he/she is a homosexual or bisexual, or words to that effect, which creates a rebuttable presumption that he/she engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts; and/or</p> <p>b. member engaging in, attempting to engage in, or soliciting another to engage in a homosexual act(s); and/or</p> <p>c. member's marriage or attempted marriage to a person known to be of the same biological sex."</p>

8. **Mandatory Separation.** Use this table to determine when separation is mandatory.

A member must be...	WHEN there is an approved finding the...	UNLESS there are further approved findings that...	THEN the administrative board may recommend...
separated	member made a statement that he/she is a homosexual or bisexual, or words to that effect	the member has demonstrated that he/she does not engage in, or have a propensity to engage in, homosexual act(s). (See Notes 1 and 2.)	retention
	member committed homosexual act(s)	<ul style="list-style-type: none"> • such acts are a departure from the member's usual behavior; and • such acts are unlikely to recur; and • such acts were not accomplished by use of force, coercion, or intimidation; and • under the particular circumstances of the case, the member's continued presence in Navy is consistent with Navy's interest in good order and discipline, and morale; and • the member does not have a propensity to engage in homosexual acts. (See Note 1) 	retention using the homosexual conduct board findings/recommendations sheet per MILPERSMAN 1910-516.
	member married or attempted to marry a person known to be of the same biological sex	(See Note 1.)	
retained	board does not find sufficient evidence that homosexual conduct exists (See Note 1.)	the case involves another basis for separation (e.g., misconduct, etc.) which member was notified of and a basis for separation is recommended.	separation for the other basis

NOTES:

1. The member bears the burden of proving by a preponderance of the evidence that retention is warranted.
2. In determining whether a member has successfully rebutted the homosexual acts presumption, the following (not all inclusive) may be considered:
 - a. Whether the member has engaged in homosexual acts.
 - b. Member's credibility.
 - c. Nature and circumstances of member's statement.
 - d. Testimony from others regarding member's past conduct, character and credibility.

9. **Characterization of Separation**

a. Use this table to determine characterization of service.

WHEN...	THEN separation type...
<p>during the current term of service, the member attempted, solicited, or committed a homosexual act with aggravating circumstances as follows:</p> <ul style="list-style-type: none"> • by using force, coercion, or intimidation; • with a person under age 16; • with a subordinate in circumstances that violate customary naval superior-subordinate relationships; • openly in public view; • for compensation; • aboard a naval vessel or aircraft; or • in another location subject to naval control, under aggravating circumstances that adversely impact good order and discipline; or morale-comparable to the impact created by such activity aboard a vessel or aircraft 	<p>can be OTH per MILPERSMAN 1910-300</p>
<p>processing by reason of statement (see Note) or homosexual acts or marriage do not meet criteria for OTH consideration cited above</p>	<p>may be GEN or Honorable (HON) per MILPERSMAN 1910-300</p>

NOTE: Characterization of service is based on service record in cases of homosexual conduct with no evidence (including admissions) of aggravating circumstances.

b. If the member has less than 180 days of service, an Entry Level Separation may be appropriate. See MILPERSMAN 1910-308.

c. MILPERSMAN 1910-300 provides additional characterization guidance.

10. **Separation Program Designator (SPD)**. Per reference (f), the following SPD codes are to be used:

SPD CODES	EXPLANATION
GRA-Homosexual Conduct (Acts) GRB-Homosexual Conduct (Statement) GRC-Homosexual Conduct (Marriage or Attempted Marriage)	Involuntary discharge, approved recommendation of a board. (Use when administrative board was held.)
HRA-Homosexual Conduct (Acts) HRB-Homosexual Conduct (Statement) HRC-Homosexual Conduct (Marriage or Attempted Marriage)	Involuntary discharge in lieu of further processing or convening of a board. (Use when administrative board was waived.)

MILPERSMAN 1910-104

SEPARATION BY REASON OF EXPIRATION OF ACTIVE OBLIGATED SERVICE (EAOS)

Responsible Office	NAVPERSCOM (PERS-832)	Phone:	DSN	882-4431
			COM	(901) 874-4431
			FAX	882-2754

NAVPERSCOM CUSTOMER SERVICE CENTER	Phone: Toll Free	1-866-U ASK NPC
------------------------------------	------------------	-----------------

References	(a) BUPERSINST 1610.10 (b) BUPERSINST 1900.8A
-------------------	--------------------------------------------------

1. **Separation Authority (SA)**. Commanding officer (CO).
2. **Policy**. A member may be separated upon expiration of enlistment or fulfillment of service obligation. Separation up to 30 days prior to the member's expiration of active obligated service (EAOS) is authorized if
 - a. the member is serving outside the continental United States (CONUS); or
 - b. the member is a resident of a state, territory, or possession outside CONUS and is serving outside the member's state, territory, or possession of residence.
3. **Characterization of Separation**. Honorable, unless a General is warranted on the basis of the Enlisted Performance Evaluation System; reference (a) refers. A member is eligible for a characterization of service as General (Under Honorable Conditions), if during the current enlistment, the member's final evaluation average is 2.49 or below. (This average is determined by averaging the individual trait averages of all evaluations during the current enlistment.)

4. Separation Program Designator (SPD). Per reference (b), the following SPD codes are to be used:

SPD CODE	EXPLANATION
JBK	Involuntary discharge, no board entitlement.
KBK	Voluntary discharge allowed by established directives.
LBK	Involuntary release or transfer to another service component.
MBK	Voluntary release or transfer to another service component.