

DoD Policy on Homosexual Conduct

**OFFICE OF THE STAFF JUDGE ADVOCATE
FORT JACKSON, SOUTH CAROLINA**

DoD Policy on Homosexual Conduct

Session Purpose

To apprise leaders of the current DoD policy on homosexual conduct.

DoD Policy on Homosexual Conduct

At the conclusion of the session, you will be able to:

- state the basic points of DoD Policy;
- define sexual orientation;
- define homosexual conduct;
- state the Commander's responsibilities;
- describe the characteristics of credible information; and
- list staff resources who can provide assistance.

DoD Policy on Homosexual Conduct

The suitability of persons to serve in the Armed Forces is based on their conduct and their ability to meet required standards of duty performance and discipline.

Homosexual conduct is grounds for barring entry into the Armed Forces and for separation from the Armed Forces.

Sexual Orientation is NOT a bar to enlistment or to continued service.

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Definitions are the key to understanding.

Sexual Orientation:

- is a personal/private matter; and
- is defined as “an abstract sexual preference for persons of a particular sex as distinct from a propensity or intent to engage in sexual acts.”

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Propensity - A propensity to engage in homosexual acts indicates a likelihood that a person engages in or will engage in homosexual acts.

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.

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What constitutes Homosexual Conduct:

- **statement;**
- **act; or**
- **marriage between the same sex.**

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Statement:

- can be conveyed through language or behavior;
- indicates a propensity or intent to engage in homosexual acts; and
- is rebuttable.

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ACTS - any bodily contact:

- actively undertaken or passively permitted, between persons of the same sex for the purpose of satisfying sexual desires; *and*
- that a reasonable person would understand to demonstrate a propensity or intent to engage in an act described above.

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What behaviors are NOT homosexual acts as defined by the DoD Policy? Associational Behavior.
Examples of associational behavior include:

- associating with known homosexuals;
- marching in a gay rights rally in civilian clothes;
- possessing or reading homosexual publications;
and
- going to a gay bar, etc.

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Summary of DoD Policy

- Sexual Orientation is a private/personal matter.
- Conduct determines suitability for service.
- Homosexual Conduct (**S A M**) is justification for administrative separation.

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DoD Policy on Homosexual Conduct affects:

- accessions;
- separations;
- criminal investigations;
- security investigations; and
- military training.

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Accessions

- Individuals will NOT be asked to reveal whether they are heterosexual, homosexual, or bisexual.
- Sexual orientation ALONE is NOT a bar to entry into service.
- All applicants will be informed of the policy concerning homosexual conduct.

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Separation

- Suitability for service is based on CONDUCT.
- DoD directs three bases for separation: **S A M.**
- Discharge for engaging in homosexual conduct will normally be characterized as “Honorable” or “Under Honorable Conditions.”

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Administrative discharge “Under Other than Honorable Conditions” or court-martial MAY be appropriate if the soldier attempted, solicited, or committed a homosexual act:

- by using force;
- with a person under 16 years of age;
- with a subordinate;
- openly in public view;
- for compensation;
- aboard a military vessel or aircraft; or
- in a location under military control.

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Criminal Investigations

- No Defense criminal investigative or other DoD law enforcement organization will conduct investigations solely to determine a soldier's sexual orientation.
- Such organizations normally will NOT initiate criminal investigations into adult, private, consensual sexual misconduct where such misconduct is the ONLY offense involved.

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Criminal Investigations (Continued)

- In the absence of aggravating circumstances, allegations of sexual misconduct will be referred to the soldier's Commander.
- If the Commander is uncertain about any aspects of investigating alleged homosexual conduct, he/she should seek advice from the local SJA.

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Personnel Security

- No investigations or inquiries solely to determine a soldier's sexual orientation.
- No questions about sexual orientation on Personnel Security Questionnaires.
- Only sexual CONDUCT may be questioned during investigations.
- No information about homosexual orientation or conduct obtained during security clearance investigations will be used for a separation proceeding.

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Military Training

- Soldiers to be informed of laws and regulations governing sexual conduct, including policies on homosexual conduct.
- New training plan for DoD policy on homosexual conduct designed for commanders and personnel involved in recruiting, accession processing, criminal investigations, and administrative separations.

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Commander's Responsibilities

- Ensure soldiers are briefed on DoD policy on homosexual conduct.
- Ensure refresher and optional individual training in military justice (AR 27-10, paragraph 19-2f).

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How should a Commander respond to allegations of homosexual conduct?

- Determine if alleged CONDUCT fits DoD definition of homosexual conduct.
- Verify that information about alleged homosexual CONDUCT is credible.
- Initiate informal fact-finding inquiry ONLY if CREDIBLE information exists.

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What is “Credible Information?”

- Comes from a reliable person.
- Is an observation of conduct.
- Would lead a reasonable person to believe the soldier making the described statement or committing the described act intended to convey the fact that he/she engages in or has a propensity to engage in homosexual conduct.

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What resources are available to the Commander who is dealing with an allegation of homosexual conduct?

- Local SJA.
- Local law enforcement or criminal investigative organization.

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How should a Commander carry out an inquiry?

- Confine all inquiries to alleged homosexual conduct (NOT orientation).
- Verify that information obtained is credible.
- Seek legal advice as needed.

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What should a commander do if, during the course of the inquiry, he/she discovers possible homosexual conduct?

- Contact law enforcement or appropriate Defense criminal investigative organization.

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What should a Commander do if the inquiry fails to verify that a soldier engaged in homosexual conduct?

- Terminate the inquiry.

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What should a commander do if the inquiry verifies that a soldier did engage in act(s) of homosexual conduct?

- Seek legal advice on initiating administrative separation proceedings or UCMJ action.

Substantial Investigation

- Substantial Investigation: an investigation that **extends beyond** questioning the member, individuals suggested by the member for the interview, and the member's immediate chain of command.
- To initiate a substantial investigation of:
- **Noncredible statement:**
 - DA approval.
 - Consult with JA.
- **Conduct:**
 - Consult with JA.
- JA must consult with MACOM JA.
- Exception – criminal misconduct.

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Threats/Harassment of Soldiers

- Prompt investigation is required.
- Soldiers found to have made threats or engaged in harassment must be held “fully accountable.”
- Investigators should not solicit allegations concerning sexual orientation or homosexual conduct of the victim.

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Commander's Responsibilities

- Understand the DOD homosexual conduct policy and ensure that your soldiers understand and receive training on the DOD homosexual conduct policy.
- Establish a climate free of harassment.
 - No direct (threats, etc.) or indirect (jody calls, jokes, etc.) harassment.
 - No tolerance of harassment by unit or chain of command.

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Summary of Presentation

- Basic points of DoD policy on homosexual conduct.
- Definitions of terms.
- Responsibilities of commander.
- Sources of assistance available.