

OFFICE OF THE  
JUDGE ADVOCATE GENERAL



CANADA

CABINET DU  
JUGE AVOCAT GÉNÉRAL

MEMORANDUM

NOTE

1605-19-36 (DJAG/L)

20 Sep 89

DPLS

PROPOSED CFAO 19-36

Ref: CFAO 19-36 draft of 6 Sep 89

1. The Ref has been reviewed in detail within this Division for form and legality. I realize that there may be a number of constraints placed upon your directorate as to the format this CFAO should take, but feel it necessary to make a number of observations with respect to the draft that was forwarded for review.

2. I would first observe that the title "Policy and Procedure-Inappropriate Sexual Conduct and Behaviour" appears to be unnecessarily lengthy. The Concise Oxford Dictionary defines "behaviour", in part, as

"Department, manners; way of conducting oneself (be on one's good or best -, take care to behave well when being observed or tested); moral conduct, treatment shown to or towards others;..."

and "conduct" in part, as

"1. ... 2. Manner of conducting (business etc.); (Art) mode of treatment; behaviour (esp. in its moral aspect); ..."

In other words, "conduct" is defined in part as behaviour and "behaviour" is defined in part as conduct. I would therefore suggest that the simple and straightforward title of the CFAO could be "Policy and Procedure - Inappropriate Sexual Conduct." If, for reasons not known to me, you have received direction that both "conduct" and "behaviour" are to be used, then I would observe that the title in Ref uses both words as does paragraph 1. However, paragraph 3 of Ref only uses "inappropriate sexual conduct", with this phrase appearing before the definition of "inappropriate sexual conduct and behaviour", which is first used in paragraph 4.

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3. Paragraph 3 of Ref indicates that it is subject to three other paragraphs. The effect of those three other paragraphs on paragraph (3) is the same as if the following qualification were placed in paragraph (3) rather than the "subject to" reference:

"unless the person's enrolment, or the member's retention, is authorized in accordance with the procedures set out in this order."

I would suggest that the substitution of the above quoted qualification (as contained in the revised draft attached to this memo) makes the paragraph more understandable to the reader.

4. In subparagraph 7(c) of Ref the expression "the extent to which" seems to be illogical as the Committee would seem to only be required to determine whether the evidence referred to either

- a. an isolated incident or
- b. more than one such incident.

I would therefore suggest that a better expression would be "whether or not". This same comment would be made for sub-subparagraph 10(b)(3) and subparagraph 14(c) in Ref (being sub-subparagraph 10(b)(3) and subparagraph 13(c) in the attached draft).

5. Paragraph 8 of Ref uses the words "suspect" and "deem". I would suggest that the more appropriate words are "believe" and "considers" respectively. The same change from "deemed" to "considered" is recommended for subparagraph 10(a).

6. Paragraphs 13, 14 and 15 of Ref seem to be a little out of chronological sequence insofar as the subject matter is concerned, since it would seem that the Committee should be looking at the circumstances mentioned in paragraph 14 of Ref before making the recommendation to ADM(Per) that is now contained in paragraph 13. You will therefore note that the draft I have provided you with reverses the order of these two paragraphs and makes consequential changes to paragraph 15. I trust that these changes improve readability and deal with the matter in the logical sequence that I believe will be followed.

7. Paragraph 14 of Ref indicates that "the Committee concludes that release of the member may not be warranted", whereas I would suggest that the Committee would be concluding that the release

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of the member is not warranted, even though I realize that this conclusion results in a recommendation to ADM(Per) who may agree or disagree with the conclusion.

8. Paragraph 15 is a little confusing in its present form since it refers back to the two preceding paragraphs. It is hoped that the suggested amended wording in the attached draft will remove some of the possible source of confusion.

9. Paragraph 16 represents my major source of concern with the entire CFAO. I realize that it may have been the intent of the drafter to "bury" the homosexual nature of the inappropriate sexual conduct within the CFAO rather than to highlight it. However, the placement of such an expansion of a definition in the body of CFAO, rather than placing the full definition in the definition section at the beginning of the CFAO, does not comply with either CF or other government drafting standards as I know them. Rather than continuing with the "two-part" definition contained in paragraphs 5 and 16 of Ref, I would suggest that both portions of the definition could be included in subparagraph 5(a) as follows:

"5. For the purposes of this order:

a. "inappropriate sexual conduct" means any act, offer

or request of a sexual nature that

(i) constitutes a criminal offence under the

Criminal Code or the Code of Service Discipline,

or

(ii) involves persons of the same sex and does not

constitute an offence under the Criminal Codes

or the Code of Service Discipline;"...

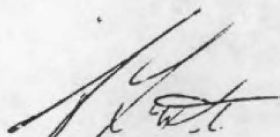
A definition as suggested above would permit the elimination of paragraph 16 entirely and would clarify "upfront" the applicability of the order. Since CFAO's constitute direction to members of the Canadian Forces, I would suggest that the present format of burying the specific goal of this CFAO is counter-productive and possibly renders the direction less comprehensible and evident. If the direction is intended to survive as a

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reasonable limit, I might suggest that a Court reviewing Ref might be less than impressed with the manner in which the definition is now handled in a two-part, possibly ambiguous, format rather than as a straight forward definition of a policy direction as is the norm for other CFAOs.

11. I trust the above comments and the attached draft may be of use. If you have any observations on the above or if I can be of further assistance, please let me know.



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