

PC DG CHARTER.

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MEMORANDUM

1745-42-7 (DG Secur)

4 Mar 92

Distribution List

PROPOSED CFAO 19-36
OBSERVATIONS/COMMENTS

Ref: Proposed CFAO 19-36 25 Oct 91

1. Although military police are likely to be a major player in the investigative process in support of the proposed CFAO there was no opportunity to input/comment on the reference prior to submission of the document for CDS approval. Notwithstanding, comments/observations are forwarded for consideration.

- a. Para 2. A-SJ-100-004 AG 000 Military Police Procedures, Chapter 48, should be included in the references as Military Police Unusual Incident reporting procedures will apply in many instances.
- b. Para 4. Because of the broad definition of sexual misconduct outlined in para 3, criminal action as well as disciplinary and administrative actions will apply in many instances. In fact, sexual assault levels 1, 2 and 3, which constitute a criminal offence under Section 70 NDA and must be handled as a criminal matter through civil courts in Canada, will be included under this definition. Therefore line 3 of para 4 should read "A CF member who engages in sexual misconduct is liable to criminal or disciplinary and administrative action." As a matter of interest the scope of criminal code and service offences which by definition could be considered sexual misconduct is shown at Annex A.
- c. Para 5. Recent court decisions have consistently ruled against CF for taking administrative action based on military police investigations which were conducted for the purpose of investigating

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criminal and or service offences. The common position is that "the individuals did not have their day in court." While not stated, there is the underlying belief that, while there was insufficient evidence to support the formal laying of charges and trial, the CF acted instead by taking administrative action which, in most instances, has greater repercussions for the individual than criminal or disciplinary action would have involved. The Security Intelligence Review Committee has repeatedly made this charge and the Chairman has been consistent before such committees as the Standing Committee of the House of Commons on Justice and Solicitor General in heaping criticism upon the Department and CF for such action. The position, of course, is that such action is contrary to the Charter of Rights and Freedoms. This situation could be avoided if a board of inquiry or summary investigation were convened to address administrative aspects of an incident when no criminal or disciplinary action is taken. While para 5 infers the options for investigation available to a CO, it does not in my view, provide firm direction to avoid the difficulties we have been encountering in the appeal process. It is therefore recommended that an additional statement be incorporated into the para to the effect that "If there has been no criminal or disciplinary conviction as a result of charges arising from a police investigation, a board of inquiry or summary investigation to investigate and make recommendation with regard to the administrative aspects of the incident, shall be convened."

- d. Para 7. By the scope of the definition there will be both criminal and disciplinary disposition of charges. Therefore this paragraph should be restated along the lines that: "on completion of the investigation required in para 5, if the matter is not being placed before a civil court for disposition of criminal charges, the CO shall take such disciplinary action, if any as is considered appropriate."
- e. Para 11. First Sentence add after order, "regardless of whether or not an MPUIR has been submitted."

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- f. Para 12. Military police investigation reports, because of the nature of information contained in them, are handled on the technical military police staff net and made available to CO and commanders at each level within the chain of command. Accordingly, the last sentence should be reworded along the lines, "This report, and all subsequent reports, required by this order (except for military police investigation reports which are handled independently and made available at each level within the chain of command) shall be forwarded through the chain of command."
- g. Para 14. In line with the above, the opening sentence should read "The report made pursuant to para 12 shall make reference to any civil police or military police investigation report and include:"
- h. Para 17. Special Career Review Board (SCRB) is an acronym already existing within the Department. SCRB as presently existing refers to the Security Clearance Review Board. As the proceedings of the latter are subject to review by the Security Intelligence Review Committee, an institution of Parliament, and Federal Appeal Courts, a second organization by the same acronym will in my opinion create confusion within the Department and outside within Government and the federal court system.
- i. Para 17. As a result of a recommendation contained in the Marin Report - Internal Review of the SIU, a statement must be included in Security Clearance Review Board (SCRB) proceedings to the effect that the "principles of fundamental justice have been respected during all phases of the screening process." This statement is in regard to section 7 of the Charter which states that:

"Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

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It is recommended that para 17 be amended to make a representative of DPLS a permanent member of the SCRB and that that representative be required to express a legal opinion with regard to section 7 of the Charter for each case under review.

- j. Para 20. Given my line of thought expressed above, I have reservations about the provisions of this para. I have no recommendation to make but I doubt, except in very unusual circumstances, whether the actions proposed would stand up under Section 7 Charter scrutiny.

2. After being in the "hot seat" of criticism for the past two years I believe every effort must be made to accommodate Charter conditions in our approach to personnel policies and proceedings. Military police and security policies, procedures and training are currently undergoing constant review and revision with a view to ensuring compliance with Charter conditions. Some of the "lessons learned" are reflected in my review of the proposed CFAO.


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Action

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OFFENCES WHICH HAVE SEXUAL MISCONDUCT CONNOTATIONS

CRIMINAL CODE OFFENCES

Sect: 17 Compulsion by Threats (Sex Asslts)
151 Sexual Interference
152 Invitation to Sexual Touching
153 Sexual Exploitation
154 Incest
159 Anal Intercourse
160 Bestiality
163 Corrupting Morals
167 Immoral Theatrical Performance
168 Mailing Obscene Matter
170 Parent or Guardian Procuring Sexual Activity
171 Householder Permitting Sexual Activity
172 Corrupting Children
173 Indecent Acts
174 Nudity
175 Indecent Exhibition
210 Keeping Common Bawdy-House
211 Transporting to a Bawdy-House
212 Procuring (Juvenile Prostitution)
213 Offences in Relation to Prostitution
230 Murder in Commission of Offences (Sex Asslts)
271 Sexual Assault (Level One)
272 Sexual Assault (Level Two)
with a weapon, threats to a third party or
Causing bodily harm
273 Aggravated Sexual Assault (Level Three)

NDA OFFENCES

Sect: 92 Scandalous Conduct by Officers
93 Cruel and Disgraceful Conduct
95 Abuse of Inferiors
128 Conspiracy (to commit a crime)
129 Conduct to the Prejudice of Good Order and Discipline
130 Offences against other Canadian Law
131 Offences against Foreign Law
137 Attempt to Commit Offence

ANNEX A
TO 1745-42-7 (D6 Secur)
DATED 4 MAR 92

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