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DEPARTMENT OF NATIONAL DEFENCE



MINISTÈRE DE LA DÉFENSE NATIONALE

OFFICE OF THE
JUDGE ADVOCATE GENERAL

CANADA

CABINET DU
JUGE AVOCAT GÉNÉRAL

JA ONT: 1170-1

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16 August 1988

Commander
Canadian Forces Training
System Headquarters
Canadian Forces Base Trenton
Astra, Ontario
K0K 1B0Attention: DCOS Adm**APPLICATION FOR REDRESS OF GRIEVANCE**Reference: 5225-6 TD 8204

1. The following points constitute my comments, as requested, in respect of the proposed treatment of Pte Reed's grievance.
2. The facts of [REDACTED]'s case involve her release from the Canadian Forces under item 5c at the expiry of her terms of service. Although apparently otherwise qualified for re-engagement, [REDACTED] was released as a direct result of her homosexuality and in accordance with an NDHQ direction. This result was obtained notwithstanding the interim policy that releases of homosexuals under CFAO 19-20 are not to be effected over the objections of an identified homosexual member. This interim policy is a result of a ministerial direction and was specifically applied in [REDACTED]'s case in February of this year.
3. The above facts represent extreme inconsistency. CF authorities are in essence doing what the MND has directed be held in abeyance pending further policy direction i.e. releasing homosexuals. Reliance upon an argument that failure to re-engage for homosexuality is substantially different than release during current terms of service is, in my view, a very weak position which would be embarrassing if exposed to public scrutiny. However, it is the position that I am given to understand authorities at NDHQ will, in part, rely upon if a challenge is raised at that level. Moreover, and notwithstanding the MND's direction, the general CF policy in respect of the non-employment of homosexuals has not been ruled by competent authority to be

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illegal and while the enforcement of that policy in some circumstances and not in others is clearly inconsistent, such inconsistency does not change the legal character of the practice.

4. Following from the above analysis I would concur that the draft response to the grievor prepared for BGen Brown's signature is substantially an accurate reflection of the CF position. However, from a purely technical perspective I must point out that the term "contract" in line 4 of paragraph 3 is not an appropriate usage in that it has a meaning at law which has never been ascribed to the type of military service in question. The word contract could be replaced by the phrase "terms of service". I would also observe that there is only one table to article 15.01 of Queen's Regulations and Orders. Accordingly, "tables" in the last line of paragraph 3 should be in the singular. From a more substantive perspective I note that [redacted]'s release resulted from an ADM(Per) direction and, accordingly, redress is not within the power of the Commander, TSHQ. Given this fact and presuming that BGen Brown is not satisfied with the justice of the complaint I would point out the requirements of paragraph 7b(2) of CFAO 19-32 to the effect that the grievor's wishes in respect of forwarding the grievance to higher authorities must be solicited. ✓

5. Subject to the above observations it would, in my view, be appropriate to execute the prepared response if BGen Brown is convinced that release in this instance (or failure to re-engage) is fair. That is, as indicated above, the general CF policy in respect of homosexuality and the selective enforcement of that policy is not illegal and the policy has apparently been correctly applied in this case. However, despite the legality of the policy and any particular views held in respect of allowing homosexuals to serve in the CF, an essential question in the grievance context is whether the present policy of selective enforcement has resulted in just and fair treatment in the case at hand. In posing this question I note that some identified homosexuals could, under the interim policy, be allowed to serve indefinitely. It seems to me that the presence of some homosexuals weakens arguments in support of the general policy and may make the present approach look bloody minded or at least less than honourable. ✓

6. Given the complexity of this question it would be my recommendation that comment as to "just treatment" be avoided by modifying the last two sentences of paragraph 4 to base lack of support on the correct application of the policy. Having taken this tack it would also, in my view, be appropriate to communicate to ADM(Per), under separate cover and without direct reference to the Reed case, concerns with respect to the approach of selective enforcement of policy and the consequent increased need for a general policy decision in respect of the issue of homosexuals.

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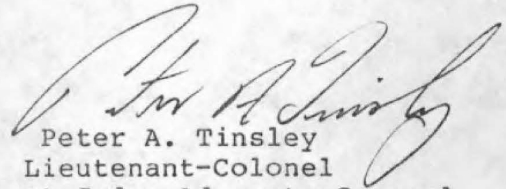
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7. I trust that my comments will be of assistance to you. I am, of course, available to consult further on this matter should it be required.



Peter A. Tinsley
Lieutenant-Colonel
Assistant Judge Advocate General

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