

25 Oct 91

SEXUAL MISCONDUCT

CFAO 19-36

PURPOSE

1. This order prescribes the Canadian Forces (CF) career policy and procedures applicable to cases of sexual misconduct.

RELATED ORDERS

2. This order should be read in conjunction with:
 - a. QR&O 19.61 (Certificate of Conviction);
 - b. CFAO 4-13 (Unusual Incidents);
 - c. CFAO 19-38 (Personal Relationships);
 - d. CFAO 19-39 (Personal Harassment);
 - e. CFAO 34-25 (Psychoneurotic and Personality Disorders - Medical Examination and Disposal); and
 - f. CFAO 114-3 (Conduct of Officers & WOs - Notification to NDHQ).

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DEFINITIONS

3. In this order, "sexual misconduct" means
- a. an act which has a sexual purpose or is of a sexual or indecent nature and which constitutes an offence under the Criminal Code or the Code of Service Discipline; or
 - b. an act of sexual harassment contrary to CFAO 19-39.

POLICY

4. It is CF policy that sexual misconduct is unacceptable and will not be tolerated. A CF member who engages in sexual misconduct is liable to disciplinary and administrative action, including release if appropriate. An applicant for enrolment who has engaged in sexual misconduct may be refused enrolment.

INVESTIGATION

5. Where an allegation is made that a CF member has engaged in sexual misconduct, the commanding officer (CO) shall ensure that an investigation is conducted into the allegation as

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soon as practicable. The type of investigation will depend on the nature of the alleged sexual misconduct. Where the allegation concerns a possible offence under the Criminal Code, the matter should be referred to the Military Police for a determination of which police force, military or civilian, should conduct the investigation. Where the allegation concerns a possible offence contrary to the Code of Service Discipline, the investigation may consist of an informal investigation, a summary investigation, a board of inquiry or a military police investigation, as appropriate under the circumstances. Where the allegation is one of sexual harassment, the investigation shall be conducted in accordance with CFAO 19-39. If a police investigation is conducted, nothing precludes the conduct of an informal investigation, a summary investigation, or a board of inquiry to resolve issues not covered by the police investigation. If there is doubt as to whether an investigation is required, or the most suitable type of investigation, the advice of the unit legal advisor should be sought.

6. Where in the course of an investigation it appears that the subject of the investigation may suffer from a medical or psychiatric disorder, the military authority responsible for conducting the investigation or for liaising with the civilian investigative authority shall inform the CO. A CO who receives such a report shall consult with a medical officer on the need for an examination pursuant to CFAO 34-25.

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DISCIPLINARY ACTION

7. On completion of the investigation required in paragraph 5, the CO shall take such disciplinary action, if any, as is considered appropriate.

ADMINISTRATIVE ACTION

8. Administrative action in some cases of sexual misconduct may be handled at the unit level. In cases of sexual harassment where no charge has been or will be laid under the Code of Service Discipline, the matter shall be dealt with at the unit level pursuant to CFAO 19-39 except where disciplinary or administrative action has previously been taken against the member for sexual harassment. If previous disciplinary or administrative action has been taken for sexual harassment, the matter is to be referred to NDHQ in accordance with the orders for reporting contained in this CFAO. This is to be done regardless of the apparent seriousness of the most recent alleged harassment or whether the harassment was of the same nature or involved the same victim as the previous harassment. When sexual activities take place in circumstances where they are contrary to the Code of Service Discipline, they constitute sexual misconduct even if they are otherwise lawful. For example, sexual activity between consenting adults may take place in a location where such

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actions are prohibited by CF orders. Cases of this nature shall be handled at the unit level unless the CO considers them to be sufficiently serious to warrant reporting to NDHQ in accordance with this order.

9. In cases not handled at the unit level under paragraph 8, the CO shall consider the results of the investigation and all other relevant factors. Where the CO is satisfied that the member has engaged in sexual misconduct, the CO shall:

- a. decide whether to recommend to NDHQ that the member be retained in or released from the CF; and
- b. if the decision is to recommend release, prepare and deliver a Notice of Intent to Recommend Release in accordance with QR&O 15.21 or 15.36, as appropriate.

10. In those cases not handled at the unit level under paragraph 8, the CO shall not place the member on Counselling and Probation or Report of Shortcomings, give the member a reproof or take any other administrative action that might interfere with

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the proper determination of the question of release until the decision with respect to release or retention has been made by NDHQ. This does not prevent the member from being suspended from duty under QR&O 19.75 where appropriate.

REPORTING

11. An allegation of sexual misconduct by a member may qualify as an unusual incident for the purposes of CFAO 4-13 and may require special reporting under that order. In addition, where proceedings under the Code of Service Discipline have been commenced against an officer, CWO, MWO or WO, there is a special reporting requirement contained in CFAO 114-3.

12. In those cases not handled at the unit level under paragraph 8, the CO shall report the alleged sexual misconduct to NDHQ/Director General Personnel Careers Officers (DGPCO) or Director General Personnel Careers Other Ranks (DGPCOR), as appropriate. This report, and all subsequent reports required by this order (except for 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.

13. In order to treat any victim of sexual misconduct and the accused member fairly, it is essential that the reports under

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paragraph 12 be handled expeditiously. Therefore, all levels in the chain of command are to treat these reports as priority matters for onward transmission in the shortest possible time.

14. The report made pursuant to paragraph 12 shall include:

- a. all available investigation reports, other than police reports, relating to the allegation of sexual misconduct;
- b. where applicable, a statement identifying any relevant police reports;
- c. a summary prepared by a medical authority of the findings of a report prepared under paragraph 6, if any;
- d. a recommendation as to whether the member should be retained in or released from the CF with any information supporting that recommendation and any additional recommendations;
- e. where applicable, a copy of the Notice of Intent to Recommend Release;
- f. where a Notice of Intent to Recommend Release has been given, a copy of the information and representations, if any, provided by the member

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with respect to the alleged sexual misconduct or the recommendation for release; and

- g. a statement as to whether a charge has been, or is likely to be, laid under the Criminal Code or Code of Service Discipline with respect to the sexual misconduct.

15. On completion of any disciplinary action the CO shall forward a report to NDHQ/DGPCO or DGPCOR, as appropriate, containing:

- a. the charge report or charge sheet;
- b. a summary of the evidence presented;
- c. the finding with respect to the charge or charges;
- d. the sentence imposed, if any; and
- e. the member's conduct sheet.

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16. On the completion of any proceedings under the Criminal Code the CO shall forward a report to NDHQ/DGPCO or DGPCOR, as appropriate, containing the results of the civil court proceedings, including any certificate of conviction.

NDHQ REVIEW

17. A special Career Review Board (CRB) shall be established at NDHQ to review cases of sexual misconduct. Representatives of DGPCO and DGPCOR shall be included in the membership of this board.

18. Upon receiving a report under paragraph 12, the CRB shall determine whether there is sufficient information upon which to base a recommendation. The CRB shall obtain any further information that may be required prior to considering its recommendation.

19. In deciding whether the recommendation should be for retention or release, the CRB shall consider the following factors:

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- a. the nature of the sexual misconduct;
- b. where there is a victim, the impact of the sexual misconduct on the victim if such information is available;
- c. the service record of the member;
- d. the summary of evidence and findings of any service tribunal;
- e. any certificate of conviction or other available information relating to a civilian trial;
- f. the recommendation of the CO;
- g. the information and representations provided by the member, if any; and
- h. such other factors as the CRB may determine to be relevant.

20. Where the CRB is satisfied that it has sufficient information upon which to make a recommendation, it may determine its recommendation and take further action in accordance with

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this order, whether or not action under the Criminal Code or Code of Service Discipline has been concluded. The propriety of the CRB proceeding in circumstances where such action has not been completed will be a matter for the board to determine based on the circumstances of the particular case.

21. Where the CRB determines that the recommendation is to retain the member without the need for further representations by the member, that recommendation shall be forwarded to the approving authority for a decision. Unless otherwise directed, the approving authority for officers is DGPCO and for non-commissioned members is DGPCOR. Such a recommendation will normally only occur at this stage where the CRB is not satisfied that the available information establishes that the member has engaged in sexual misconduct. If the approving authority concurs with the recommendation, the officer commanding the command and the CO shall be informed of the decision and of the administrative conditions applicable to the retention, if any.

22. Where the approving authority does not concur with a recommendation for retention under paragraph 21, that authority shall:

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- a. if the CO has recommended the member's release and the member has not objected to that recommendation, initiate action to have the member released; and
- b. in any other case, refer the matter to the CRB for action in accordance with paragraphs 23 to 27.

23. Where the CRB determines that it may recommend release of the member, it shall provide the member with all the available information upon which it will be basing its decision, subject to lawful exemptions, and inform the member that he may make any desired representations through the CO within 14 days of the receipt of the CRB's information.

24. The CRB may extend the 14 day time limit for response where it is informed by the CO that the member is unable to meet the time limit for a valid reason such as duty requirements or illness.

25. On receipt of the information and representations of the member provided pursuant to paragraph 23, or on being informed by the CO that the member has not provided any further information or representations within the time limit, the CRB shall determine its recommendation based upon all the information before it.

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26. If the CRB is satisfied that the evidence establishes that the member has engaged in sexual misconduct, the CRB will normally recommend the release of the member to the approving authority. Where the CRB decides to recommend retention despite finding that the member has engaged in sexual misconduct, it shall provide reasons why release would not be appropriate as well as recommendations as to what other administrative action should be taken.

27. The CO and the member shall be informed, through the chain of command, of the decision by the approving authority, the reasons for that decision, and any further action to be taken.

APPLICANTS FOR ENROLMENT OR RE-ENROLMENT

28. Where during the recruiting procedure information is received that an applicant for enrolment or re-enrolment has engaged in sexual misconduct, the enrolling authority shall not normally enrol the applicant. In cases where the enrolling authority considers that this general policy should not be applied, the enrolling authority shall refer the matter to NDHQ/Director General Recruiting, Education and Training for direction.

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