

* * * *Effective April 16, 1981*

Dubuque, IA—Dubuque Muni, NDB Rwy 31, Amdt. 7

* * * *Effective March 19, 1981*

Basking Ridge, NJ—Somerset Hills, NDB—A, Amdt. 5

Philipsburg, PA—Mid-State, NDB Rwy 16, Amdt. 3

* * * *Effective March 5, 1981*

Brinkley, AR—Frank Federer Memorial, NDB Rwy 20, Amdt. 2

Hope, AR—Hope Municipal, NDB Rwy 16, Original

Redding, CA—Redding Muni, NDB Rwy 34, Amdt. 3

Denver, CO—Stapleton Intl, NDB Rwy 26L, Amdt. 35

Denver, CO—Stapleton Intl, NDB Rwy 26R, Amdt. 5

Onkaloosa, IA—Onkaloosa Muni, NDB Rwy 22, Amdt. 1

Plymouth, MA—Plymouth Muni, NDB Rwy 6, Amdt. 3

Jackson, MS—Hawkins Field, NDB Rwy 16, Amdt. 1

Teterboro, NJ—Teterboro, NDB Rwy 6, Amdt. 15

Socorro, NM—Socorro Muni, NDB Rwy 15, Original

Oklahoma City, OK—Will Rogers World, NDB Rwy 17L, Amdt. 1

Oklahoma City, OK—Will Rogers World, NDB Rwy 17R, Amdt. 20

Oklahoma City, OK—Will Rogers World, NDB Rwy 35R, Amdt. 2

Ponca City, OK—Ponca City Muni, NDB Rwy 17, Amdt. 1

Dumas, TX—Dumas Muni, NDB Rwy 1, Original

* * * *Effective February 19, 1981*

Globe, AZ—Globe-San Carlos Regional Air Facility, NDB—A, Original

Los Angeles, CA—Los Angeles Intl, NDB Rwy 24L/R, Amdt. 11

Eastland, TX—Eastland Muni, NDB Rwy 35, Original

* * * *Effective January 8, 1981*

Statesville, NC—Statesville Muni, NDB Rwy 20, Amdt. 5

* * * *Effective December 31, 1980*

Austin, TX—Robert Mueller Muni, NDB Rwy 31L, Amdt. 30

4. By amending § 97.29 ILS-MLS SIAPs identified as follows:

* * * *Effective April 16, 1981*

Dubuque, IA—Dubuque Muni, ILS Rwy 31, Amdt. 9

* * * *Effective March 19, 1981*

Philipsburg, PA—Mid-State, ILS Rwy 16, Amdt. 3

Pittsburg, PA—Allegheny County, ILS Rwy 10, Amdt. 2

* * * *Effective March 5, 1981*

Redding, CA—Redding Muni, ILS Rwy 34, Amdt. 8

Denver, CO—Stapleton Intl, ILS/DME Rwy 8R, Amdt. 1

Teterboro, NJ—Teterboro, ILS Rwy 6, Amdt. 23

Albuquerque, NM—Albuquerque Intl, ILS Rwy 8, Amdt. 3

Oklahoma City, OK—Will Rogers World, ILS Rwy 17R, Amdt. 6

Oklahoma City, OK—Will Rogers World, ILS Rwy 35R, Amdt. 3

DuBois, PA—DuBois-Jefferson County, ILS Rwy 25, Amdt. 4

Franklin, PA—Chess-Lamberton, ILS Rwy 20, Amdt. 2

* * * *Effective February 19, 1981*

Los Angeles, CA—Los Angeles Intl, ILS Rwy 24L, Amdt. 13

Los Angeles, CA—Los Angeles Intl, ILS Rwy 24R, Amdt. 14

Los Angeles, CA—Los Angeles Intl, ILS Rwy 25L, Amdt. 14

Los Angeles, CA—Los Angeles Intl, ILS Rwy 25R, Amdt. 14

Newburgh, NY—Stewart, ILS Rwy 9, Amdt. 2

* * * *Effective January 8, 1981*

Tucson, AZ—Ryan Field, ILS/DME Rwy 6, Amdt. 1

* * * *Effective January 7, 1981*

Barrow, AK—Wiley Post-Will Rogers Memorial, ILS/DME Rwy 6, Amdt. 1

* * * *Effective December 31, 1980*

Austin, TX—Robert Mueller Muni, ILS Rwy 31L, Amdt. 29

Austin, TX—Robert Mueller Muni, ILS Rwy 13R, Amdt. 6

* * * *Effective October 21, 1980*

Fort Collins/Loveland/ CO—Fort Collins-Loveland Muni, ILS Rwy 33, Amdt. 2

5. By amending § 97.31 RADAR SIAPs identified as follows:

* * * *Effective March 5, 1981*

Grand Rapids, MI—Kent County Intl, RADAR-1, Amdt. 6

Reno, NV—Cannon Intl, RADAR-1, Amdt. 2, cancelled

Albuquerque, NM—Albuquerque Intl, RADAR-1, Amdt. 20

* * * *Effective December 31, 1980*

Austin, TX—Robert Mueller Muni, RADAR-1, Amdt. 13

6. By amending § 97.33 RNAV SIAPs identified as follows:

* * * *Effective April 16, 1981*

Dubuque, IA—Dubuque Muni, RNAV Rwy 36, Amdt. 3

* * * *Effective March 5, 1981*

Jackson, MS—Hawkins Field, RNAV Rwy 16, Amdt. 3

* * * *Effective January 8, 1981*

Statesville, NC—Statesville Muni, RNAV Rwy 2, Amdt. 3

(Secs. 307, 313(a), 601, and 1110, Federal Aviation Act of 1958 (49 U.S.C. 1348, 1354(a),

1421, and 1510); sec. 6(c), Department of Transportation Act (49 U.S.C. 1655(c)); and 14 CFR 11.49(b)(3)).

Note.—The FAA has determined that this document involves a regulation which is not significant under Executive Order 12044, as implemented by DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979). Since this regulatory action involves an established body of technical requirements for which frequent and routine amendments are necessary to keep them operationally current and promote safe flight operations, the anticipated impact is so minimal that this action does not warrant preparation of a regulatory evaluation.

Issued in Washington, D.C. on January 16, 1981.

John S. Kern,

Chief, Aircraft Programs Division.

Note.—The incorporation by reference in the preceding document was approved by the Director of the Federal Register on December 31, 1980.

[FR Doc. 81-2553 Filed 1-28-81; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Part 936

The Point Reyes-Farallon Islands National Marine Sanctuary

Correction

In FR Doc 81-2483 appearing on page 7936 in the issue of Monday, January 26, 1981, make the following correction.

On page 7939, second column, the amendatory language reading "Accordingly, Part 936 is *proposed* as follows:" should have read "Accordingly, Part 936 is *added* as follows:"

BILLING CODE 1505-01-M

DEPARTMENT OF THE TREASURY

Customs Service

19 CFR Parts 4 and 103

[T.D. 81-19]

Vessel Manifest Filing Procedure and Disclosure Requirements

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: Pub. L. 96-275, an Act to protect the confidentiality of Shippers' Export Declarations, and to standardize export data submission and disclosure requirements, made changes in laws enforced by Customs. This document

amends the Customs Regulations to establish new procedures needed to reflect those changes.

Specifically, the amended regulations will (1) require that copies of bills of lading or equivalent commercial documents relating to all cargo encompassed by the outward manifest be attached to that manifest (now an alternative procedure), (2) modify the procedure whereby a shipper may request confidential treatment for certain information, (3) expand the information contained in an outward manifest subject to public disclosure, (4) allow the Secretary of the Treasury to withhold information from manifests on a shipment-by-shipment basis if disclosure "is likely to pose a threat of personal injury or property damage," and (5) provide a biennial renewal period for a shipper's certification claiming (application for) confidential treatment.

EFFECTIVE DATES: Amendment to § 4.63, Customs Regulations (19 CFR 4.63), January 29, 1981; amendment to § 103.11, Customs Regulations (19 CFR 103.11), March 30, 1981.

FOR FURTHER INFORMATION CONTACT: Disclosure aspect: Doris Robinson, Regulations and Information Division (566-8881); manifest filing procedure aspect: Jerry Laderberg, Carriers, Drawback and Bonds Division (566-5706), or Pete D'Heur, Cargo Processing Division (566-5354).

SUPPLEMENTARY INFORMATION:

Background

Pub. L. 96-275, an Act "to protect the confidentiality of Shippers' Export Declarations, and to standardize export data submission and disclosure requirements," was approved on June 17, 1980. Section 2 of the Act amends 46 U.S.C. 93 to require amendments to the Customs Regulations to implement new procedures established by the statute. Section 4(b) of the Act made the amendment to 46 U.S.C. 93 effective 45 days after enactment of the statute, i.e., August 1, 1980.

The outward manifest consists of several documents, but is primarily a cargo declaration that is presented to Customs when a vessel departs the United States ("clears") for a foreign destination. Section 4.63, Customs Regulations, now provides for the filing with Customs of a Cargo Declaration, Customs Form ("CF") 1302, which is a composite of the information contained in bills of lading and other commercial documents. Alternatively, Customs permits the filing of a Cargo Declaration, Outward With Commercial Forms, CF 1302-A, to which all necessary bills of

lading and other commercial documents must be attached. The result of this amendment is to make the current alternative procedure of filing a CF 1302-A with attachments mandatory, and eliminate the use of the CF 1302 (without attachments) as part of outward manifests. The CF 1302 may continue to be used if bills of lading or equivalent commercial documents relating to all cargo are attached to that form.

Section 103.11, Customs Regulations, presently provides for disclosure to the public and the press of certain information contained in vessel manifests and summary statistical reports, as well as the suspension of disclosure upon written application of a shipper, consignee, or importer. That section has been amended in accord with the requirements of the statute to (1) expand the information contained in an outward manifest which is subject to public disclosure to include the address of the shipper and the port of exit, (2) allow the Secretary of the Treasury to withhold information from outward manifests on a shipment-by-shipment basis if disclosure "is likely to pose a threat of personal injury or property damage," and (3) provide a biennial renewal period for a shipper's certification claiming confidential treatment of the shipper's name and address contained in the outward manifest.

In addition, § 103.11 has been amended to describe the new "certification" a shipper must file with Customs to be granted confidential treatment of his/her name and address.

The Act makes available for public disclosure the name and address of the shipper unless a biennial certification claiming confidential treatment is received by Customs. For shippers claiming confidentiality after August 1, 1980, their certifications will be valid for two years from the date of the submission to Customs of the certification. A shipper who, before August 1, 1980, had applied for and obtained Customs approval of a claim for confidential treatment of the shipper's name, must submit to Customs a new "certification" claiming confidentiality of the shipper's name and address if desired, following the procedure described in amended § 103.11. However, claims of confidentiality made by a shipper and approved by Customs prior to August 1, 1980, will continue in effect until March 30, 1981. (Treasury Decision) amending the Customs Regulations to implement the new law. In either case, the burden

of certification renewal rests with the shipper.

In this regard, Customs published a General Notice in the *Federal Register* on August 20, 1980 (45 FR 55559), advising exporters and others of the new procedure required by the Act.

Customs does not intend to verify either the certification itself or whether confidentiality should be granted in a given case. Therefore, lacking information to arouse suspicion of falsehood, Customs will accept routinely any certification at face value.

Applicability of Executive Order 12044

These amendments are not considered to be significant under the criteria contained in the Treasury Directive published in the *Federal Register* on November 8, 1978 (43 FR 52150), implementing E.O. 12044, "Improving Government Regulations." They were the subject of Work Plan 80-8, approved by the Treasury Department on October 9, 1980.

Inapplicability of Public Notice and Delayed Effective Date Provisions

The legislative process leading to the enactment of Pub. L. 96-275 already has afforded a measure of public participation. In addition, (1) a telex describing the changes in outward manifest procedures was transmitted to Customs field offices (and made available to the public by those offices), (2) the text of the law was published as T.D. 80-184 in the *Customs Bulletin* of July 23, 1980, to provide wider dissemination of the statutory changes, and (3) a General Notice advising the exporting community of the changes in procedure regarding disclosure of information was published in the *Federal Register* on August 20, 1980 (45 FR 55559).

Because the subject matter of this amendment merely implements specific statutory requirements, pursuant to 5 U.S.C. 553(b)(3), notice and public procedure thereon are found to be unnecessary, and, in respect to the amendment to § 4.63, Customs Regulations, relating to manifest filing procedures, a delayed effective date is not required pursuant to 5 U.S.C. 553(d)(3).

Drafting Information

The principal author of this document was Todd J. Schneider, Regulations and Information Division, Office of Regulations and Rulings. However, personnel from other Customs offices participated in its development.

Amendments to the Regulations

Parts 4 and 103, Customs Regulations (19 CFR Parts 4, 103), are amended as set forth below.

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

Section 4.63 is revised to read as follows:

§ 4.63 Outward cargo declaration; shippers' export declarations.

(a) No vessel shall be cleared directly for a foreign port, or for a foreign port by way of another domestic port or other domestic ports (see section 4.87(b)), unless there has been filed with the district director at the port from which clearance is being obtained (1) a Cargo Declaration, Customs Form 1302, or a Cargo Declaration Outward With Commercial Forms, Customs Form 1302-A, either form with copies of bills of lading or equivalent commercial forms relating to all cargo encompassed by the manifest attached thereto (i.e., "with attachments"), together with a properly executed Master's Oath on Entry of Vessel in Foreign Trade, Customs Form 1300, and such export declarations as are required by pertinent regulations of the Bureau of the Census, Department of Commerce, or (2) an incomplete Cargo Declaration as provided for in § 4.75.

(b) Except as hereafter stated, the number of the export declaration covering each shipment for which an authenticated export declaration is required shall be shown on the Cargo Declaration, Customs Form 1302 (with attachments) or 1302-A, in the marginal column headed "B/L No." If an export declaration is not required for a shipment, a notation shall be made on the Cargo Declaration describing the basis for the exemption with a reference to the number of the section in the Census Regulations (see §§ 30.39 and 30.50-30.57, Title 15, Code of Federal Regulations) where the particular exemption is provided. Where shipments are exempt on the basis of value and destination, the appearance of the value and destination on a bill of lading or other commercial form is acceptable as evidence of the exemption and reference to the applicable section in the Census Regulations is not required.

(c) The list of cargo may be shown on bills of lading, cargo lists, or other commercial forms: *Provided*, That:

(1) The Cargo Declaration, Customs Form 1302 (with attachments) or 1302-A, is completely executed except for particulars as to cargo;

(2) The commercial forms are securely attached to the Cargo Declaration in

such manner as to constitute one document;

(3) The commercial forms are incorporated by a suitable reference on the face of the Cargo Declaration such as "Cargo as per attached commercial forms;" and

(4) There is shown on the face of each such commercial form the information required by the Cargo Declaration for the cargo covered by that form.

(d) For each shipment to be exported under an entry or withdrawal for exportation or for transportation and exportation, the Cargo Declaration, Customs Form 1302 (with attachments) or 1302-A, or commercial document attached to the Cargo Declaration and made a part thereof in accordance with paragraph (c) of this section shall clearly show for such shipment the number, date, and class of such Customs entry or withdrawal (i.e., T. & E., Wd. T. & E., I. E., Wd. Ex., or Wd. T., as applicable) and the name of the port where the entry or withdrawal was filed if other than the port where the merchandise is laden for exportation.

(e) Customs officers shall accept a Cargo Declaration, Customs Form 1302 (with attachments) or 1302-A, covering containerized or palletized cargo which indicates by the use of appropriate words of qualification (see § 4.7a(c)(3)) that the declaration has been prepared on the basis of information furnished by the shipper.

(R.S. 251, as amended, 4197, as amended, 4199, as amended, 4200, as amended, sec. 624, 46 Stat. 759 (19 U.S.C. 66, 1624; 46 U.S.C. 91, 92, 93), and Pub. L. 96-275, June 17, 1980.)

PART 103—AVAILABILITY OF INFORMATION

Section 103.11 is revised to read as follows:

§ 103.11 Information on vessel manifests and summary statistical reports.

(a) *Disclosure to members of the press.* Although the following classes of information are exempt from the requirement of disclosure under the provisions of § 103.10, accredited representatives of the press, including newspapers, commercial magazines, trade journals, and similar publications may be permitted to examine vessel manifests and summary statistical reports of imports and exports and to copy therefrom for publication information and data not of a confidential nature, subject to the following rules:

(1) Of the information and data appearing on outward manifests, only the name and address of the shipper, general character of the cargo, number of packages and gross weight, name of

vessel or carrier, port of exit, port of destination, and country of destination may be copied and published. However, if the Secretary of the Treasury makes an affirmative finding on a shipment-by-shipment basis that disclosure of the above information is likely to pose a threat of personal injury or property damage, that information shall not be disclosed to the public.

(2) Commercial or financial information, such as the names of the consignees, and marks and numbers shall not be copied from outward manifests or any other papers.

(3) Of the information shown on inward manifests, only the name of the consignee, the general character of the commodity, the quantity (or value), name of vessel, and the country of dispatch shall be copied and published. When an inward manifest shows both quantity and value of the commodity, either may be copied and published, but not both in any instance.

(b) *Review of data.* All copies and notations from inward or outward manifests shall be submitted for examination by a Customs office designated for that purpose.

(c) *Disclosure to the public.* Members of the public shall be permitted to obtain information from, but not examine, vessel manifests, subject to the rules set forth in paragraphs (a) and (b) of this section. However, importers and exporters or their duly authorized brokers, attorneys, or agents may be permitted to examine manifests with respect to any consignment of goods in which they have a proper and legal interest as principal or agent, but shall not be permitted to make any general examination of manifests or make any copies or notations from them except with reference to the particular importation or exportation in which they have a proper and legal interest.

(d) *Suspension of disclosure.* (1) Inward manifest. Except as provided in § 103.14, upon written application of a consignee or importer, access to the name of such consignee or importer, on an inward manifest will thereafter be refused.

(2) Outward manifest. If a shipper wishes to request confidential treatment by Customs of the shipper's name and address contained in an outward manifest, the following procedure shall be followed:

(i) A shipper, or authorized employee or official of the shipper, must submit a certification claiming confidential treatment of the shipper's name and address. The certification shall include the shipper's Internal Revenue Service Employer Number, if available.

(ii) There is no prescribed format for a certification.

(iii) The certification must be submitted to the Regional Commissioner for the Region in which the port of exportation is located.

(iv) Each certification will be valid for a period of two (2) years from the date of its submission to Customs.

(3) If any individual shall abuse the privilege granted him of examining inward and outward manifests or shall make any improper use of any information or data obtained from such manifests or other papers filed in the customhouse, both he and the party or publication which he represents shall thereafter be denied access to such papers.

(R.S. 251, as amended, sec. 624, 46 Stat. 759, sec. 501, 65 Stat. 290, as amended (5 U.S.C. 522, 19 U.S.C. 66, 1624))

William T. Archey,

Acting Commissioner of Customs.

Approved: January 14, 1981.

Richard J. Davis,

Assistant Secretary of the Treasury.

[FR Doc. 81-3404 Filed 1-28-81; 8:45 am]

BILLING CODE 4810-22-M

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

23 CFR Part 765

Archeological and Paleontological Salvage; Recision of Regulation

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Recision of regulation.

SUMMARY: This document rescinds the regulation on archeological and paleontological salvage because it is obsolete.

EFFECTIVE DATE: February 27, 1981.

FOR FURTHER INFORMATION CONTACT:

Arthur M. Love, Office of Environmental Policy, 202-426-9173; or Irwin L. Schroeder, Office of the Chief Counsel, 202-426-0791, Federal Highway Administration, 400 Seventh Street, SW., Washington, D.C. 20590. Office hours are from 7:45 a.m. to 4:15 p.m., ET, Monday through Friday.

SUPPLEMENTARY INFORMATION: The Federal Highway Administration (FHWA) has long been interested in the impact its programs may have on archeological and paleontological (A & P) sites. Section 305 of Title 23, United States Code, which was added by the Federal-Aid Highway Act of 1956, gave the FHWA an early start among Federal

agencies in seeking ways to give adequate consideration to our Nation's cultural heritage.

Section 305 formally gave the FHWA authority to use Federal funds to salvage archeological or paleontological sites impacted by a highway project. A directive was developed to implement this permissive program. That directive is now codified in Part 765 of Title 23, Code of Federal Regulations (23 CFR 765), and contained in Volume 7, Chapter 7, Section 4 of the Federal-Aid Highway Program Manual (FHPM 7-7-4).

The FHWA is rescinding its present regulation because it has become obsolete. The companion FHWA directive (FHPM 7-7-4) is also being cancelled. This action recognizes the subsequent development of a national policy concerning the protection of historic and archeological sites, the obsolete language contained in the subject regulation and, additionally, the agency's concern to eliminate unnecessary, duplicative regulations. Recision of this regulation does not reflect a deemphasis or lessening of the agency's concern for identifying, evaluating, and considering archeological and paleontological resources in the highway development process. The cost of approved A & P data recovery will continue to be eligible for Federal-aid participation.

The FHWA's early highway salvage activities preceded the passage of Federal legislation dealing with historic and archeological protection. Over the years, these activities have evolved into a program which systematically deals with A & P concerns based upon broader Federal legislation. A national policy to protect historic and archeological (cultural) resources has been implemented by specific procedures developed by the President's Advisory Council on Historic Preservation (ACHP). Those procedures are contained in 36 CFR Part 800 and are applicable to the FHWA, as well as all Federal programs. The ACHP's procedures are more comprehensive in scope than the FHWA's procedures and reflect the evolution of a national policy dealing with A & P resources.

Archeological resource consideration is an integral and mandatory part of the Federal-aid highway development process. Retention of 23 CFR Part 765 solely to implement 23 U.S.C. 305 would unnecessarily duplicate other applicable regulations (36 CFR Part 800) without additional benefit to the resources for which protection is sought. In following 36 CFR Part 800, the FHWA not only

gives protection to A & P activities, but also reduces paperwork and simplifies interagency decision procedures consistent with the national policy stated in 23 U.S.C. 101(e).

As previously mentioned, the expenditure of Federal-aid highway funds will continue to be authorized for participation in the cost of approved archeological and paleontological data recovery operations under the authority of 23 U.S.C. 305. Such participation remains conditioned upon the policy that excavated objects and information are to be used for public purposes without private gain to any individual or organization.

PART 765 (REMOVED)

Accordingly, the Federal Highway Administration hereby removes 23 CFR Part 765, "Archeological and Paleontological Salvage."

Note.—The Federal Highway Administration has determined that this document is not significant according to the criteria established by the Department of Transportation pursuant to Executive Order 12044.

Due to the fact that the recision of 23 CFR Part 765 does not change FHWA policy or procedures, the FHWA has determined that publication of this amendment for notice and comment could not reasonably be anticipated to result in the receipt of useful information. The anticipated economic impact of this amendment is so minimal as not to require preparation of a full regulatory evaluation.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Research, Planning, and Construction. The provisions of OMB Circular No. A-95 regarding State and local clearinghouse review of Federal and federally assisted programs and projects apply to this program.)

(23 U.S.C. 101(e), 305, 315; 49 CFR 1.48(b))

Issued on: January 19, 1981.

John S. Hassell, Jr.,

Federal Highway Administrator.

[FR Doc. 81-2943 Filed 1-28-81; 8:45 am]

BILLING CODE 4910-22-M

DEPARTMENT OF JUSTICE

28 CFR Part 51

Procedures for the Administration of Section 5 of the Voting Rights Act of 1965; Revision of Procedures; Correction

AGENCY: Department of Justice.

ACTION: Final rule; correction.

SUMMARY: The Attorney General published as a final rule, effective January 5, 1981, a revision of 28 CFR, Part 51, (Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as amended) (FR Doc. 81-125, appearing at 46 FR 870 January 5, 1981). That rule requires correction and is corrected as shown below.

EFFECTIVE DATE: January 5, 1981.

FOR FURTHER INFORMATION CONTACT:

David H. Hunter, Attorney, Voting Section, Civil Rights Division, Department of Justice, Washington, D.C. 20530, (202) 724-7189.

1. The rule is assigned Attorney General Order No. 921a-80.

2. In the Table of Contents, the headings for §§ 51.27 and 51.28 (both appearing at 46 FR 873, first column) should be changed to correspond to the headings as set forth in the text of the rule.

3. (a) The heading to § 51.45 (appearing at 46 FR 873, first column and 878, third column) should read: "§ 51.45 Reconsideration of objection at the instance of the Attorney General"

(b) In § 51.45(a) (appearing at 46 FR 878, third column), in the fifth line "insistance" should read "instance."

4. In § 51.14(a) (appearing at 46 FR 875, first column), in the third line "permists" should read "permits" and in the sixth line "instutue" should read "institute."

5. In numbered clause (6) of paragraph (c) of § 51.26 (appearing at 46 FR 876, second column), the phrase "for which election returns a furnished" should read "for which election returns are furnished."

6. In § 51.39(d), the third line (appearing at 46 FR 878, second column) should read "prohibited purpose or effect, an" or rather than "prohibited purpose or effect, and."

7. In the Appendix, in the list of North Carolina counties in which the preclearance requirement of Section 5 of the Voting Rights Act applies (appearing at 46 FR 880, first column) "Craven County" should read "Craven County."

Stephen J. Wilkinson,

Department of Justice, Federal Register Liaison Officer (Alternate).

[FR Doc. 81-3457 Filed 1-28-81; 8:45 am]

BILLING CODE 4410-01-M

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 41

[DOD Directive 1332.14]¹

Enlisted Administrative Separations

AGENCY: Office of the Secretary of Defense.

ACTION: Final rule.

SUMMARY: This rule updates the policies, standards and procedures that govern administrative separations of enlisted members from the Armed Forces; reaffirms Department of Defense policy that homosexuality is incompatible with military service; and clarifies the procedures to be used in processing enlisted members for separation.

EFFECTIVE DATE: January 16, 1981.

FOR FURTHER INFORMATION CONTACT: LTC R. Baker, USA, Military Personnel Policy, Office of the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics), Washington, D.C. 20301, telephone 202-697-9283.

SUPPLEMENTARY INFORMATION: In FR Doc. 66-596 appearing in the *Federal Register* (31 FR 705) on January 19, 1966, the Office of the Secretary of Defense published Part 41. Other revisions to Part 41 were published:

FR Doc.	Volume and page No.	Date
66-1764	31 FR 2887	Feb. 16, 1966.
68-11151	33 FR 13009	Sept. 14, 1968.
69-5970	34 FR 7909	May 20, 1969.
71-17117	36 FR 22287	Nov. 24, 1971.

In FR Doc. 76-6104, appearing in the *Federal Register* (41 FR 9088) on March 3, 1976, the Office of the Secretary of Defense again revised and published Part 41 that included 1 change effective January 6, 1976. Effective January 1, 1977, this document was revised and two changes were issued. Accordingly, this revised Part 41 is reissued in its entirety and incorporates Changes 1 (January 31, 1977) and 2 (January 16, 1981). Change 2 authorizes separation for a homosexual act, including attempt or solicitation of such an act; admission of homosexuality; and homosexual marriage.

Mandatory Separation. Separation is mandatory unless the servicemember shows that he or she is not a homosexual and meets other standards for retention set forth in this Part. The right to a hearing before a board is

provided in all homosexual cases, and homosexuals will no longer be processed for separation by reason of unsuitability or misconduct.

Types of Discharge from Military Service. Change 2 provides that they will be processed under a new provision entitled "Homosexuality," and may receive an Honorable or General, Under Honorable Conditions discharge based on their overall service record. A Discharge Under Other Than Honorable Conditions may be issued under the following circumstances: the act was committed by use of force, coercion or intimidation, with a person under 16 years of age; with a subordinate in circumstances that violate customary military superior-subordinate relationships; openly in public; for compensation; or in another location subject to military control under aggravating circumstances that have an adverse impact on discipline, good order, or morale comparable to the impact of such activity aboard a vessel or aircraft.

As stated above, this version of DoD Directive 1332.14 (Part 41 of this title) was issued on December 29, 1976, and became effective January 1, 1977. On June 19, 1979, the Department of Defense published for comment by July 19, 1979, a proposed revision of DoD Directive 1332.14 (44 FR 35248). The comment period was extended to August 14, 1979 (44 FR 46296). The proposed rule was not adopted and the rulemaking was terminated.

A new project to revise DoD Directive 1332.14 was initiated in October 1980. When a draft is completed, it will be published in the *Federal Register* for comment. Such publication is not required by law, but will be undertaken voluntarily by the Department of Defense.

During the pendency of this revision, various court decisions raised questions about the procedures contained in DoD Directive 1332.14 with respect to separation of servicemembers on the basis of homosexuality. Because of the overriding importance of providing the Military Departments with clear guidance on this issue, it was determined that revision of those procedures pertaining to homosexuality should be promulgated without waiting for publication of the complete revision of the Directive. In addition, this matter involves a military function of the United States and a personnel function of the Department of Defense. In view of the foregoing, publication for comment would be impracticable, unnecessary, and contrary to the public interest.

Members of the public interested in this rule will have a formal opportunity

¹ Copies may be obtained, if needed, from the U.S. Naval Publications and Forms Center, 5801 Tabor Avenue, Philadelphia, PA 19120. Attention: Code 301.

to submit their views when the complete revision of DoD Directive 1332.14 is published in the *Federal Register* at a later time.

Accordingly, 32 CFR Chapter I, is amended by revising Part 41, reading as follows:

PART 41—ENLISTED ADMINISTRATIVE SEPARATION

Sec.

- 41.1 Reissuance and purpose.
- 41.2 Applicability and scope.
- 41.3 Policy.
- 41.4 Administrative discharge board.
- 41.5 Responsibilities.
- 41.6 Definitions.
- 41.7 Reasons for separation.
- 41.8 Retention or separation.
- 41.9 Characterization of service.
- 41.10 Restriction on certain administrative discharges.
- 41.11 Procedures for discharge.
- 41.12 Suspension of execution of approved discharge.
- 41.13 Homosexuality.

Authority: Title 10, U.S.C. 1162, 1163, 1169, 1170, 1172, and 1173.

§ 41.1 Reissuance and purpose.

This Part is reissued to update the policies, standards and procedures which govern the administrative separation of enlisted persons from the Armed Forces.

§ 41.2 Applicability and scope.

The provisions of this Part apply to the Regular and Reserve components of the Army, Navy, Air Force, Marine Corps and, by agreement with the Secretary of Transportation, to the Coast Guard. When the term "Military Departments" is used, it also includes the U.S. Coast Guard for the purposes of this Part.

§ 41.3 Policy.

(a) The Armed Forces have the right and the duty to separate from the Service, with an appropriate characterization of service, those members who clearly demonstrate they are unqualified for retention. At the same time, such members have rights which shall be protected.

(b) This Part further provides for separation under certain circumstances or conditions to meet the needs of the Services and members.

(c) Standards and procedures for these policies are prescribed in §§ 41.7 through 41.13 of this Part.

§ 41.4 Administrative discharge board.

(a) *Composition.* An administrative discharge board shall be comprised of at least three experienced commissioned officers at least one of whom shall be serving in the grade of major/lieutenant commander or higher, and may include

a nonvoting recorder. The following additional requirements apply:

(1) If the respondent is an enlisted member of a Reserve component or holds an appointment as a Reserve commissioned or warrant officer, the membership shall include a majority of Reserve officers, if reasonably available. Where a Reserve majority is not available, the board shall include at least one Reserve component officer. Voting members shall be senior to the respondent's Reserve grade.

(2) If the respondent is an enlisted woman, the board shall, upon the written request of the respondent, include a female officer as a voting member, if such officer is reasonably available. In the event of nonavailability, the reason shall be stated in the record of proceedings.

(3) If the respondent is a member of a minority group, the board shall, upon the written request of the respondent, include as a voting member an officer who is also a minority group member, if such officer is reasonably available. When requested, the appointed board member should normally be of the same minority group as the respondent; however, nonavailability of an officer of the same minority group shall not preclude convening the board. In the event of nonavailability, the reason shall be stated in the record of proceedings.

(b) *Procedures.* The board functions as an administrative rather than a judicial body. Strict rules of evidence need not be observed. However, the president may impose reasonable restrictions as to relevancy, competency and materiality of matters considered. When the board meets in closed sessions, only voting members shall be present. The proceedings of the board shall be maintained as prescribed by the Secretary of the Military Department concerned but, as a minimum, shall contain a verbatim record of the findings and recommendations. The board shall recommend one of the following:

- (1) Retention.
- (2) Discharge for a specified reason and the appropriate discharge certificate, according to the provisions of this Part and the applicable Service regulations.

The recommendations of the board in a case involving separation by reason of homosexuality shall be made in accordance with § 41.13 of this Part.

(c) *Rights of the Respondent.* Subject to the requirements prescribed herein, a respondent who has not waived a hearing before an administrative discharge board and whose case is presented to such a board has the following rights:

(1) The respondent may appear in person, with or without counsel, or if absent, be represented by counsel at all open proceedings of an administrative discharge board. The respondent may be represented by either military counsel appointed by the convening authority, or by military counsel of his/her own choice, provided the counsel requested is reasonably available, as determined under regulations of the Secretary concerned but not by both. In either case, the respondent may employ civilian counsel at his/her own expense.

(2) The respondent may challenge any voting member of the board for cause only.

(3) The respondent may request the appearance before the board of any witness whose testimony he/she believes to be pertinent to his/her case. The respondent will specify in his/her request the type of information the witness can provide. The board will invite the witness to attend if it considers that the witness is reasonably available and that his/her testimony can add materially to the case. If a witness on active duty declines the invitation, the board may refer the matter to the convening authority for a decision or orders. Witnesses not on active duty must appear voluntarily and at no expense to the Government, except as authorized in implementing regulations of the Military Department concerned.

(4) The respondent may, at any time before the board convenes or during the proceedings, submit any answer, deposition, sworn or unsworn statement, affidavit, certificate or stipulation. This includes, but is not limited to, depositions of witnesses not deemed to be reasonably available or witnesses unwilling to appear voluntarily.

(5) The respondent may or may not submit to examination by the board. The provisions of Article 31, 10 U.S.C. 831, apply.

(6) The respondent and his/her counsel may question any witness who appears before the board.

(7) Failure of the respondent to invoke any of these rights, after he/she has been apprised of same, cannot be considered as a bar to the board proceedings, findings and recommendations.

(d) *Actions by Discharge Authority.* Upon receipt of the record of board proceedings, the discharge authority may take one of the following actions:

(1) Approve the board's recommendations and direct their execution.

(2) Approve the board's recommendations for discharge but change the characterization of service to a more favorable one. The discharge

authority shall not downgrade the characterization of service.

(3) Approve the board's recommendation for discharge but change its basis when the record indicates such action would be appropriate, except that he/she shall not designate misconduct as the basis when the board has recommended discharge for unsuitability.

(4) Approve the discharge but suspend its execution for a specified period of probation.

(5) Disapprove the recommendation for discharge and retain the member in the Service.

(6) May recommend separation to the Secretary concerned, pursuant to § 41.7(b)(14), in the event of a board recommendation for retention, if he/she believes that separation is warranted by the circumstances of the particular case.

(7) Set aside the findings and recommendations and refer the case to a new board if he/she finds legal prejudice to the substantial rights of the respondent. No member of the new board shall have served on a prior board which considered the same matter. The record of the proceedings of the earlier board, minus the findings, recommendations and prejudicial matter, may be furnished the successor board. The discharge authority shall not approve findings or recommendations less favorable to the respondent than those rendered by the previous board.

The action of the discharge authority in a case involving discharge by reason of homosexuality shall be taken in accordance with § 41.13.

§ 41.5 Responsibilities.

Each of the Armed Forces shall:

(a) Prescribe appropriate internal procedures for periodic explanation to members of the types of discharge certificates, the basis for their issuance and the possible effects of various certificates upon reenlistment, civilian employment, veterans' benefits and related matters. As a minimum, such explanation shall take place each time the Articles of the Uniform Code of Military Justice are explained, pursuant to 10 U.S.C. 937. (Failure on the part of the member to receive or to understand such explanation, however, shall in no event be considered a defense in an administrative discharge proceeding, or a bar thereto.)

(b) Assure that the purpose and scope of the Discharge Review Board and the Board for Correction of Military/Naval Records, established pursuant to 10 U.S.C. 1552 and 1553, is explained during the separation processing of any member discharged under other than honorable conditions.

§ 41.6 Definitions.

(a) *Member*. An enlisted man or woman of the Armed Forces.

(b) *Discharge*. Complete severance from all military status.

(c) *Release from Active Duty*. Termination of active duty status and transfer or reversion to a Reserve component not on active duty.

(d) *Separation*. A general term which includes discharge and release from active duty.

(e) *Administrative Separation*. Discharge or release from active duty upon expiration of enlistment or required period of service, or before, in the manner prescribed herein or by law, but specifically excluding separation by sentence of general or special court-martial.

(f) *Military Record*. Comprises a member's behavior while in military service, including general comportment and performance of duty.

(g) *Prior Enlistment or Period of Service*. Service in any component of the Armed Forces which culminated in the issuance of a discharge certificate or certificate of service.

(h) *Administrative Discharge Board*. Appointed to render findings based on facts pertaining, or believed to pertain, to a case and to recommend retention in the Service, or discharge with reason for discharge and type of separation or discharge certificate to be furnished.

(i) *Discharge Authority*. As established herein and implemented by regulations issued by an Armed Force, and official authorized to take final action with respect to specified types of separation.

(j) *Respondent*. A member of the Armed Forces who has been notified that action has been initiated to discharge him/her under a specified Service regulation.

(k) *Counsel*. A lawyer, within the meaning of Article 27(b)(1) of the Uniform Code of Military Justice, unless appropriate authority certifies in the permanent record the non-availability of a lawyer so qualified and sets forth the qualifications of the substituted nonlawyer counsel.

(l) *Characterization of Service for Administrative Separations*. A determination reflecting a member's military behavior and performance of duty during a specific period of service. The three characterizations are (1) honorable, (2) under honorable conditions, (3) under other than honorable conditions.

(m) *Minority Group*. A segment of the population that possesses common traits that are transmissible by descent or common characteristics and a cultural heritage significantly different from that

of the general population. Such groups include, but are not limited to Negroes, American Indians, Mexican Americans, Puerto Ricans, Eskimos, Aleuts, Asian Americans and Spanish-Surnamed Americans.

§ 41.7 Reasons for separation.

(a) *Expiration of Enlistment or Fulfillment of Service Obligation*. An honorable separation (honorable discharge) or separation under honorable conditions (general discharge) as warranted by the member's military record.

(b) *Convenience of the Government*. An honorable separation (honorable discharge) or separation under honorable conditions (general discharge) as warranted by the member's military record, for the following reasons:

(1) General demobilization, reduction in authorized strength or an order applicable to all members of a class of personnel specified in the order.

(2) Acceptance of a commission or appointment or acceptance into a program leading to a commission or appointment in any branch of the Armed Forces, for active duty only.

(3) Immediate enlistment or reenlistment.

(4) Erroneous induction or enlistment.

(5) Separation of members serving in unspecified enlistments.

(6) Early separation of personnel under various authorized programs and circumstances.

(7) Voluntary separation of women for pregnancy or childbirth.

(8) Inability to perform prescribed duties, repetitive absenteeism or nonavailability for worldwide assignment as a result of parenthood.

(9) Conscientious objection.

(10) Sole surviving son/daughter and certain family members.

(11) Condition, not a physical disability, which interferes with performance of duty.

(12) Elimination of marginal performers:

(i) Elimination of marginal or nonproductive performers by reason of the member's:

(A) Failure to attain or maintain required job skill proficiency, either by associated inaptitude or nonapplication.

(B) Presence creating an administrative burden to the command due to minor military or disciplinary infractions.

(C) Performance has been noncontributory to unit readiness and mission accomplishment as specifically evidenced by below average efficiency ratings or specific demonstrated

incapacity to meet effectiveness standards.

(ii) Application of this provision is limited to members meeting the following criteria:

(A) The members considered must be in their first enlistment, and are otherwise eligible until completion of 36 months of active service, whichever is greater.

(B) The member must be medically qualified for separation.

(C) The member must have completed any disciplinary punishment.

(D) The member must not be about to stand trial for violation of the Uniform Code of Military Justice. Any such charges must have been dismissed, the individual acquitted, or after conviction, appellate review of the case completed prior to separation.

(E) The member separated under these provisions must be assigned to: (1) recruit training; (2) initial skill training immediately following recruit training; or (3) an organizational unit for an appropriate period of evaluation, as determined by the Secretary of the Military Department concerned, but not less than 60 days.

(iii) These discharges must be approved by specified discharge authority.

(iv) As a minimum, the Military Services should establish procedures wherein rebuttal by an individual being discharged will be considered by the discharge authority.

(v) Members in recruit training or initial skill training immediately following recruit training, who are separated for this reason, will be separated with an honorable separation (honorable discharge).

(13) For such other reasons as may be prescribed by the Secretary of the Military Department concerned.

(14) Notwithstanding the specific provisions of this or any other Part, or any proceedings, decisions or action in accord with this or any other Directive, the Secretary concerned may direct the separation of any member, prior to the expiration of term of service, after determining it to be in the best interest of that Department.

(c) *Dependency or Hardship.* An honorable separation (honorable discharge) or separation under honorable conditions (general discharge) as warranted by the member's military record.

(1) Separation may be directed when genuine dependency or undue hardship exists, and

(i) The hardship or dependency is not of a temporary nature;

(ii) Conditions have arisen or have been aggravated to an excessive degree

since entry into the Service and the member has made every reasonable effort to remedy situation;

(iii) The separation will eliminate or materially alleviate the condition; and

(iv) There are no means of alleviation readily available other than the separation.

(2) Undue hardship does not necessarily exist solely because of altered present or expected income or because the individual is separated from his family or must suffer the inconvenience normally incident to military service.

(d) *Minority.* Release by voidance of contract or separation with an honorable or a general discharge, as warranted by the member's military record.

(1) Release or separation may be directed after determination that:

(i) There is evidence satisfactory to the discharge authority that the member is under 18 years of age; and

(ii) The member enlisted without the written consent of his/her parent or guardian, if he/she has a parent or guardian entitled to his/her custody and control.

(2) Upon application by the parents or guardian of a regular enlisted member of an Armed Force to the discharge authority within 90 days after the member's enlistment, the member shall be discharged for his/her own convenience, with the pay and form of discharge certificate for which his/her service entitles him/her, if paragraphs (d)(1) (i) and (ii), of this section, are satisfied.

(e) *Disability.* An honorable discharge or a general discharge, as warranted by the member's military record, when the member has been determined to be physically unfit to perform the duties of his/her office, rank, grade or rating, and is not entitled to retirement under the provisions of 10 U.S.C., Chapter 61.

(f) *Personal Abuse of Drugs Other Than Alcoholic Beverages.* Discharge with an honorable discharge, when based on evidence developed as a direct or indirect result of a urinalysis test administered for identification of drug abusers, or by a member's volunteering for treatment for a drug problem under the Drug Identification and Treatment Program administered by his/her particular Armed Force, and:

(1) Member's record indicates lack of potential for continued military service; or

(2) Long-term rehabilitation is determined necessary and member is transferred to a Veterans' Administration or civilian medical facility for rehabilitation; or

(3) Member has failed, through inability or refusal, to participate in, cooperate in, or complete a drug abuse treatment and rehabilitation program.

Note.—It is essential to assure compliance with both the letter and spirit of the rule of law announced in *United States v. Ruiz* (23 USCMA 181, 48 CMR 797 (1974)). Extreme care should be exercised to assure that a member identified for separation under this provision is not separated with less than an honorable discharge, based on some separate and distinct reason for discharge, unless it can be clearly demonstrated that evidence of drug use obtained through the identification process described herein was not directly or indirectly utilized in establishing such separate and distinct reason. It may be desirable for Field Commanders to consult with legal personnel concerning implementation of this note.

(g) *Unsuitability.* Separation with an honorable or a general discharge, as warranted by the member's military record, when it has been determined that an individual is unsuitable for further military service because of:

(1) *Personality Disorder:* As determined by medical authority and described in the Diagnostic and Statistical Manual (DSM-11) of Mental Disorders,² American Psychiatric Association; which interferes with member's ability to adequately perform duties. Exception: Combat exhaustion and other acute situational maladjustments.

(2) *Alcohol Abuse.* Failure, through inability or refusal to participate in, cooperate in, or complete an alcohol abuse treatment and rehabilitation program.

(3) *Unsanitary habits.*

(4) *Financial irresponsibility.*

(5) *Apathy, defective attitudes,* inability to expend effort constructively. As a significant observable defect elsewhere not readily describable.

(6) *Inaptitude.*

(h) *Security.* Separation, with the character of discharge, and under conditions and procedures stipulated by the Secretary of Defense, as set forth in Part 156 of this title and similar Directives applicable to the Coast Guard, when retention is clearly inconsistent with the interest of national security.

(i) *Misconduct.* Separation under other than honorable conditions, unless the particular circumstances in a given case warrant a general or an honorable discharge, when it has been determined that an individual is unqualified for

² Section on mental disorders, International Classification of Diseases and Injuries—8, Diagnostic and Statistical Manual (DSM-11) of Mental Disorders, 2nd Edition, Committee on Nomenclature & Statistics, American Psychiatric Association, Washington, D.C., 1968.

further military service because the member's military record in the current enlistment of period of obligated service evidences one or more of the following patterns of conduct, acts or conditions:

- (1) Frequent involvement of a discreditable nature with civil or military authorities.
- (2) An established pattern for shirking.
- (3) An established pattern showing dishonorable failure to pay just debts.
- (4) An established pattern showing dishonorable failure to contribute adequate support to dependents or failure to comply with orders, decrees or judgments of a civil court concerning support of dependents.
- (5) Sexual perversion, including but not limited to (i) lewd and lascivious acts, (ii) sodomy, (iii) indecent exposure, (iv) indecent acts with or assault upon a child, or (v) other indecent acts or offenses. Policies and procedures concerning homosexual acts are set forth in § 41.13.
- (6) Drug abuse, which is the illegal, wrongful, or improper use, possession, sale, transfer or introduction on a military installation of any narcotic substance, intoxicating inhaled substance, marijuana, or controlled substance, as established by 21 U.S.C. 812, when supported by evidence not attributed to a urinalysis administered for identification of drug abusers or to a member's volunteering for treatment under the Drug Identification and Treatment Program administered by his/her particular Armed Force.
- (7) Conviction by civil authorities (foreign or domestic), or action taken which is tantamount to a finding of guilty, of an offense for which the maximum penalty under the Uniform Code of Military Justice is death or confinement for one year or more; or which involves moral turpitude; or where the offender is adjudged a juvenile delinquent, wayward minor, or youthful offender, or is placed on probation, or punished in any way, as the result of an offense involving moral turpitude. If the offense is not listed in the Manual for Courts-Martial, 1969 (Rev.), Table of Maximum Punishments, or is not closely related to an offense listed therein, the maximum punishments authorized by U.S. Code or the District of Columbia Code, whichever is lesser, applies.
- (8) Procurement of a fraudulent enlistment, induction or period of active service through any deliberate material misrepresentation, omission or concealment which, if known at the time, might have resulted in rejection. The enlistment of a minor with false representation as to age without proper

consent will not, in itself, be considered as fraudulent enlistment.

(9) Prolonged unauthorized absence, continuous for one year or more.

(j) *Resignation or Request for Discharge for the Good of the Service.* Separation under other than honorable conditions is authorized, subject to procedures and safeguards specified elsewhere in this Part upon resignation or request for discharge, where conduct has rendered a member triable by courts-martial for an offense which is listed in Section A. of the Table of Maximum Punishments, paragraph 127c, Manual for Courts-Martial, 1969 (Rev.), as being punishable by a punitive discharge (the provisions of the Table of Maximum Punishments, Section B., paragraph 127c, Manual for Courts-Martial, 1969 (Rev.), are not applicable to requests for discharge pursuant to this paragraph).

(k) *Homosexuality.* Separation, with the character of discharge, and under conditions and procedures set forth in § 41.13.

§ 41.8 Retention or separation.

In determining whether a member should retain current military status or be administratively separated, the member's entire military record may be evaluated.

(a) Include (1) records of nonjudicial punishment imposed during a prior enlistment or period of service, (2) all records of conviction by court-martial, and (3) any other factors which are material and relevant.

(b) Commanding Officers, investigating officers, administrative discharge boards, and other Agencies charged with making such determinations, shall consider records of nonjudicial punishment imposed during a prior enlistment or period of service only if such records of punishments would have, under the particular circumstances of the case, a direct and strong probative value in determining whether retention or administrative separation is appropriate.

(c) Cases in which the circumstances may warrant use of such records shall ordinarily be limited to those involving patterns of conduct which become manifest only over an extended period of time.

(d) When a record of nonjudicial punishment imposed during a current enlistment or period of service is considered, isolated incidents and events which are remote in time or have no probative value in determining whether retention or administrative separation should be effected, shall have minimal influence on the determination.

§ 41.9 Characterization of service.

(a) *Guidelines.* When separated under the provisions of this Part a member shall be provided a certificate reflecting the character of his/her service for the period concerned.

(1) *Honorable.* Predicated upon proper military behavior and proficient performance of duty with due consideration for the member's age, length of service, grade and general aptitude. A member will not necessarily be denied an honorable characterization solely by reason of a specific number of convictions by courts-martial or actions under Article 15 of the Uniform Code of Military Justice (10 U.S.C. 815) during his/her current enlistment or period of obligated service. An Honorable Discharge certificate (DD Form 256) shall be provided upon discharge.

(2) *Under Honorable Conditions.* Appropriate when a member's military record is not sufficiently meritorious to warrant an honorable characterization, as prescribed by the regulations of the Service concerned. A General Discharge certificate (DD Form 257) shall be provided upon discharge.

(3) *Under Other Than Honorable Conditions.* Appropriate when a member is separated for (i) misconduct, security, or a homosexual act in accordance with § 41.13(d)(1), when based on the approval of a recommendation of an administrative discharge board or waiver of the right to board action, or (ii) resignation or request for discharge for the good of the Service. A Discharge Under Other Than Honorable Conditions certificate (DD Form 794) shall be provided upon discharge.

Note.—Use of DD Form 258 is discontinued effective January 1, 1977, at which time, use of existing DD Forms 794 is prescribed.

(b) Special Consideration

(1) In any case in which a Discharge Under Other Than Honorable Conditions certificate is authorized under this Part, a member may receive a more favorable characterization if, during his/her current enlistment or period of obligated service, or any voluntary or involuntary extension thereof, or period of prior service, he/she has been awarded a personal decoration as defined by his/her Service, or if warranted by the particular circumstances of a specific case.

(2) Except as indicated below, the characterization of service of the current enlistment or period of service will be determined solely by the member's military record during that enlistment or period of service, plus any extensions thereof prescribed by law or by the

Armed Forces concerned, or effected with the consent of the member. The following shall not be considered:

(i) Prior service activities, including but not limited to records of conviction by courts-martial, records of non-judicial punishment, records of absence without leave, or commission of other offenses for which punishment was not imposed.

(ii) Preservice activities, excepting misrepresentations, including omission of facts which, if known, would have precluded, postponed or otherwise affected the member's eligibility for enlistment or induction.

§ 41.10 Restriction on certain administrative discharges.

(a) Administrative discharge action under the provisions of paragraphs (g)(2), (4), (5), and (6), and (i)(1) of § 41.7, will not normally be initiated until a member has been counseled concerning his/her deficiencies and afforded a reasonable opportunity to overcome them.

(b) No member shall be separated under other than honorable conditions unless he/she is afforded the right to present his/her case before an administrative discharge board, with the advice and assistance of counsel, and unless such discharge is supported by approved board findings and an approved board recommendation for such a discharge. As exceptions, a discharge under other than honorable conditions may be issued without board action if the member (1) is beyond military control by reason of prolonged unauthorized absence, or (2) resigns or requests discharge for the good of the Service, or (3) waives his/her right to board action.

(c) The discharge authority may approve the service characterization recommended by an administrative discharge board, or a characterization more favorable, but shall not approve a characterization of service less favorable than that recommended.

(d) When an administrative discharge board recommends retention, and the discharge authority believes that separation is warranted, by the circumstances of a particular case, this authority may recommend separation to the Secretary concerned, pursuant to paragraph § 41.7(b)(14). If separation is approved, an Honorable or a General Discharge certificate, as directed by the Secretary concerned, will be issued.

(e) Notwithstanding a member's written acknowledgement that he/she will be issued a Discharge Under Other Than Honorable Conditions certificate, under the provisions of § 41.7(j), "Resignation or Request for Discharge

for the Good of the Service," the discharge authority may direct issuance of either an Honorable or General Discharge certificate, if warranted.

(f) A member subject to discharge because of conviction by civil court may be processed for discharge although he/she has filed an appeal or stated his/her intention to do so. However, it will be the general policy to withhold the execution of the approved discharge, pending outcome of the appeal. If the execution of the discharge is considered appropriate without waiting for final action on the appeal, the member may be discharged with the appropriate type of discharge certificate, upon the direction of the Secretary concerned.

(g) No member shall be administratively discharged with a discharge under other than honorable conditions, if the grounds for such discharge action are based wholly or in part upon acts or omissions for which the member has been previously tried by court-martial resulting in acquittal or action having the effect thereof, except when such acquittal or equivalent disposition is based on a legal technicality not going to the merits.

(h) No member shall be subjected to administrative discharge board action based upon conduct which has previously been the subject of administrative discharge board proceedings, when the evidence before the subsequent board would be the same as the evidence before the previous board, except as provided in § 41.4(d)(7) of this Part, and in those cases where the favorable findings of the previous board are determined to have been obtained by fraud or collusion.

§ 41.11 Procedures for discharge.

The following procedures will be adhered to in effecting administrative discharges:

(a) *Consultation with Counsel.* Members being processed for involuntary separation under honorable conditions (general discharge) or under other than honorable conditions, shall be provided the opportunity to consult with a judge advocate or law specialist at the outset of the procedure for separation.

(b) *Honorable Discharge.* A separation with an honorable discharge may be effected by the member's commanding officer or higher authority when the member is eligible for or subject to discharge and it has been determined that the member merits an honorable discharge under prescribed Service standards.

(c) *Under Honorable Conditions (General Discharge).* A separation

under honorable conditions may be effected by the commanding officer or higher authority when the member is eligible for or is subject to discharge and it has been determined, under prescribed Service standards that such discharge is warranted. When a General Discharge certificate is issued for one of the reasons listed in § 41.7(a) through (e), the specific basis therefor shall be included in the member's permanent personnel records.

(d) *Discharge for Unsuitability.* An honorable discharge or a discharge under honorable conditions, based on the standards prescribed in § 41.7(g), may be issued by the commander exercising special court-martial jurisdiction or higher authority.

(1) A member with less than eight years of total active and/or reserve military service shall be notified in writing of the proposed discharge action and shall be afforded an opportunity to make a statement in his/her own behalf or decline the opportunity in writing. This correspondence shall be filed in the member's permanent personnel records.

(2) A member with eight or more years of total active and/or reserve military service shall be discharged by reason of unsuitability only in accordance with the safeguards and procedures specified in (e)(1) and (2) of this section.

(e) *Under Other Than Honorable Conditions.* A discharge under other than honorable conditions shall be directed by a commander exercising general court-martial jurisdiction or by higher authority. This authority may be delegated to a general or flag officer in command who has a judge advocate or law specialist on his/her staff for cases arising in that command. Every action taken pursuant to such a delegation shall state the authority therefor. A Discharge Under Other Than Honorable Conditions certificate shall be issued in accordance with the provisions of this Directive which include the following procedures and safeguards:

(1) A member who is under military control shall be notified in writing of the basis for the proposed discharge action and advised that he/she has the following rights:

- (i) To present his/her case before an administrative discharge board.
- (ii) To be represented by counsel.
- (iii) To waive the above rights in writing. The member shall be given an opportunity to consult with counsel, prior to waiving his/her rights.

(2) If a member waives his/her rights, the discharge authority may disapprove the waiver and refer the case to an administrative discharge board, or direct retention on active duty, or direct discharge by reason of misconduct or

security. If discharge is directed, the type of certificate will be specified.

(3) A member unable to appear in person before an administrative discharge board, by reason of confinement by civil authorities, shall be advised (by registered mail or certified mail, return receipt requested) of the proposed discharge action, the type of discharge certificate that may be issued, and the fact that action has been suspended to give him/her the opportunity to exercise the following rights:

(i) To have his/her case considered by an administrative discharge board.

(ii) To request appointment of a military counsel to represent him/her and in his/her absence present his/her case before an administrative discharge board.

(iii) To submit statements in his/her own behalf.

(iv) To waive the foregoing rights, either in writing or by failing to reply to the letter of notification within a prescribed time limit.

(4) A member of a Reserve component not on active duty shall be advised (by registered mail or certified mail, return receipt requested and received, indicating delivery) of the proposed discharge action, the type of discharge certificate that may be issued, and the fact that action has been suspended to give him/her the opportunity to exercise the following rights:

(i) To have his/her case considered by an administrative discharge board.

(ii) To request appointment of a military counsel to represent him/her and in his/her absence present his/her case before an administrative discharge board.

(iii) To submit statements in his/her own behalf.

(iv) To waive the foregoing rights, either in writing or by failing to reply to the letter of notification within a prescribed time limit.

(5) A member beyond military control by reason of unauthorized absence:

(i) May be discharged under other than honorable conditions *in absentia* under either of the following circumstances:

(A) When the prosecution of the member is apparently barred by statute of limitations, 10 U.S.C. 843. In those cases, a Discharge Under Other Than Honorable Conditions certificate may be issued at any time after it is determined that prosecution is so barred, provided that upon consideration of available extenuating, mitigating and aggravating factors in each case, the discharge authority determines that the best interest of the Armed Forces will be served by issuance of such discharge.

(B) When the discharge authority determines, in accordance with regulations of the Department concerned, that issuance of a Discharge Under Other Than Honorable Conditions certificate will serve the national interests.

(ii) Shall be notified of the imminent discharge action and the effective date thereof by registered mail or certified mail, return receipt requested, forwarded to the record address of the member, or next of kin, as appropriate.

(iii) Shall be subject to the separation limitations of 10 U.S.C. 1163, if he/she is a member of a Reserve component.

(6) A member who submits a resignation or requests discharge for the good of the Service may be issued a Discharge Under Other Than Honorable Conditions certificate without board action, provided he/she has been afforded the opportunity to consult counsel and certifies in writing that he/she understands (i) he/she will receive a discharge under other than honorable conditions, and (ii) the adverse nature of such a characterization and the possible consequences thereof.

(f) **Conditional Waiver.** Use of a conditional waiver, as described below, is authorized at the discretion of the Military Departments. A "conditional waiver" is a statement initiated by a member waiving those rights associated with administrative discharge board proceedings, contingent upon receiving a characterization of military service higher than the least characterization authorized for issuance for the specific reason of separation in the member's situation. If such a statement of waiver is accepted, the particular circumstances of the member's military service warranting the higher characterization will be specifically identified by the member's commanding officer, or higher authority, in the discharge correspondence to be filed in the member's military personnel record.

§ 41.12 Suspension of execution of approved discharge.

The discharge authority or higher authority may, prior to the expiration of the member's enlistment or period of obligated service, suspend execution of an approved discharge for a specified period if the circumstances in a case indicate a reasonable prospect for rehabilitation. During the period of suspension the member shall be afforded an opportunity to demonstrate that he/she is capable of behaving properly for an extended period under varying conditions and that he/she can perform assigned duties efficiently.

(a) Upon satisfactory completion of the probationary period, execution of

the approved discharge will be cancelled automatically.

(b) Additional misconduct on the part of the member during the probationary period of actions which constitute substandard performance of duty or demonstrate characteristics of unsuitability may establish the basis for one of the following actions.

(1) Punitive or new administrative action may be initiated, notwithstanding the suspension of execution of the approved discharge.

(2) Suspension of the approved discharge may be vacated, and the approved discharge executed, to include discharge *in absentia* when the member has been beyond the military control for 15 or more days.

(c) Suspension of a discharge is not authorized in a case where there is an approved finding that one or more of the circumstances authorizing separation by reason of homosexuality under § 41.13(c) has occurred.

§ 41.13 Homosexuality.

(a) **Policy.** Homosexuality is incompatible with military service. The presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission. The presence of such members adversely affects the ability of the armed forces to maintain discipline, good order, and morale; to foster mutual trust and confidence among servicemembers; to insure the integrity of the system of rank and command; to facilitate assignment and worldwide deployment of servicemembers who frequently must live and work under close conditions affording minimal privacy; to recruit and retain members of the armed forces; to maintain the public acceptability of military service; and to prevent breaches of security.

(b) **Definitions.** As used in this section:

(1) Homosexual means a person, regardless of sex, who engages in, desires to engage in, or intends to engage in homosexual acts.

(2) Bisexual means a person who engages in, desires to engage in, or intends to engage in homosexual and heterosexual acts.

(3) A homosexual act means bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires.

(c) **Basis.** The basis for separation may include preservice, prior service, or current service conduct or statements. A member shall be separated under this

section if, but only if, one or more of the following approved findings is made:

(1) The member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are approved further findings that:

(i) Such conduct is a departure from the member's usual and customary behavior;

(ii) Such conduct under all the circumstances is unlikely to recur;

(iii) Such conduct was not accomplished by use of force, coercion, or intimidation by the member during a period of military service;

(iv) Under the particular circumstances of the case, the member's continued presence in the Service is consistent with the interest of the Service in proper discipline, good order, and morale; and

(v) The member does not desire to engage in or intend to engage in homosexual acts.

(2) The member has stated that he or she is a homosexual or bisexual unless there is a further finding that the member is not a homosexual or bisexual.

(3) The member has married or attempted to marry a person known to be of the same biological sex (as evidenced by the external anatomy of the persons involved) unless there are further findings that the member is not a homosexual or bisexual and that the purpose of the marriage or attempt was the avoidance or termination of military service.

(d) *Characterization.*

(1) A Discharge Under Other Than Honorable Conditions may be issued in accordance with the guidance on Misconduct found in § 41.7(i) if there is a finding that during the current term of service the member attempted, solicited, or committed a homosexual act:

(i) By using force, coercion, or intimidation;

(ii) With a person under 16 years of age;

(iii) With a subordinate in circumstances that violate customary military superior-subordinate relationships;

(iv) Openly in public view;

(v) For compensation;

(vi) Aboard a military vessel or aircraft; or

(vii) In another location subject to military control under aggravating circumstances noted in the finding that have an adverse impact on discipline, good order, or morale comparable to the impact of such activity aboard a vessel or aircraft.

(2) In all other cases, the character of discharge of a member separated under

this provision shall reflect the character of the member's service in accordance with § 41.9.

(e) *Procedures.*

(1) Separation processing shall be initiated if there is probable cause to believe separation is warranted under paragraph (c) of this section.

(2) Counseling and rehabilitation requirements are not applicable.

(3) The procedural requirements of § 41.11(e) shall be used as applicable.

(4) A member being considered for separation under this provision shall have the right to request an Administrative Discharge Board (§ 41.4 of this Part), subject to the following provisions:

(i) The Board shall follow the procedures authorized under § 41.4(b) of this Part, except:

(A) If the Board finds that one or more of the circumstances authorizing separation under paragraph (c) of this section is supported by the evidence, the Board shall recommend separation unless the Board finds that retention is warranted under the limited circumstances described in that paragraph.

(B) If the Board does not find that there is sufficient evidence that one or more of the circumstances authorizing separation under paragraph (c) above has occurred, the Board shall recommend retention unless the case involves another basis for separation of which the member has been duly notified.

(ii) The Discharge Authority shall be exercised by a general court-martial convening authority or higher authority in any case which a Discharge Under Other Than Honorable Conditions is authorized. In all other cases, the Discharge Authority shall be exercised in a Special Court-Martial convening authority or higher authority. The Discharge Authority shall dispose of the case according to the following provisions:

(A) If the Board recommends retention, the Discharge Authority shall:

(1) Approve the finding and direct retention; or

(2) Forward the case to the Secretary concerned with a recommendation that the Secretary separate the member under the Secretary's Authority (§ 41.7(b)(14)).

(B) If the Board recommends separation, the Discharge Authority shall:

(1) Approve the finding and direct separation; or

(2) Disapprove the finding on the basis that

(i) There is insufficient evidence to support the finding; or

(ii) Retention is warranted under the limited circumstances described in paragraph (c) of this section.

(C) If there has been a waiver of Board proceedings, the Discharge Authority shall dispose of the case in accordance with the following provisions:

(1) If the Discharge Authority determines that there is not sufficient evidence to support separation under paragraph (c) of this section, the Discharge Authority shall direct retention unless there is another basis for separation of which the member has been duly notified.

(2) If the Discharge Authority determines that one or more of the circumstances authorizing separation under paragraph (c) of this section has occurred, the member shall be separated unless retention is warranted under the limited circumstances described in paragraph (c) of this section.

(5) The burden of proving that retention is warranted under the limited circumstances described in paragraph (c) of this section rests with the member except in cases where the member's conduct was solely the result of a desire to avoid or terminate military service.

(6) Findings regarding the existence of the limited circumstances warranting a member's retention under paragraph (c) of this section required only if:

(i) The member clearly and specifically raises such limited circumstances; or

(ii) The Board or Discharge Authority relies upon such circumstances to justify the member's retention.

(7) Nothing in these procedures:

(i) Limits the authority of the Secretary concerned to take appropriate action in a case to ensure that there has been compliance with the provisions of this section;

(ii) Precludes retention of a member for a limited period of time in the interests of national security as authorized by the Secretary concerned;

(iii) Authorizes a member to seek Secretarial review unless authorized in procedures promulgated by the Secretary concerned;

(iv) Precludes separation in appropriate circumstances for another reason set forth in § 41.7;

(v) Precludes trial by court-martial in appropriate cases.

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January 28, 1981.

[FR Doc. 81-3445 Filed 1-28-81; 8:45 am]

BILLING CODE 3810-70-M