

## **C. Discrimination Based On Sexual Orientation**

### **1. Introduction**

On June 8, 2015, the DoD added sexual orientation to the Diversity and Inclusion Management, Military Equal Opportunity (MEO), Civilian Equal Opportunity, and the DoD Civil Rights Programs (*Department of Defense Directive 1020.02E, Diversity Management and Equal Opportunity in the DoD*). The policy adds sexual orientation to protected class status, along with race, color, national origin, religion, and gender. Collectively, these programs promote equal opportunity, diversity and inclusion management, and they are designed to prevent unlawful discrimination and harassment throughout the military.

### **2. Program Overview**

Following the repeal of the Don't Ask Don't Tell (DADT) (*United States v. Windsor*, 570 U.S. \_\_\_\_ (2013) (Docket No. 12-307), the DoD established a policy to provide military service members avenues in which to resolve complaints of discrimination based on sexual orientation. At the time, sexual orientation was not considered a part of a military organization's EO Program. Complaints were filed through service member command channels, and through the Inspector General (IG) system. DoDD 1020.02E currently directs organizational chains-of-command to be used as the "primary and preferred channel" in order to identify and correct discriminatory practices, process and resolve complaints of discrimination or harassment, and to ensure that MEO matters are taken seriously and acted on as necessary. The new policy also transferred complaints resolution responsibility from the IG to the MEO.

DoDD 1020.02E also provides protections for Department of Defense civilian employees by prohibiting unlawful employment discrimination based on race, sex (pregnancy, gender identity, and sexual orientation when based on sex stereotyping), color, national origin, age, religion, disability, and genetic information. The policy also protects DoD civilians from reprisal for participation in previous EEO activity. While not enforced by Equal Employment Opportunity Commission regulations, discrimination in employment based on other factors (i.e. status as a parent) may be addressed through other separate complaint and resolution systems.

### **3. Statistical Data**

Prior to the above referenced change, the VTNG, in 2014, established a reporting procedure in a Memorandum, SUBJECT: Joint Policy Memorandum (NGVT-SJA) 2014-05 – Reporting Requirements for Complaints of Discrimination Based Upon Sexual Orientation. As a result of the new DoD policy, this policy memorandum was rescinded. Current DoDD 1020.02E guidance directs avenues of redress for discrimination complaints through the service member's chain of command, or their local Equal Opportunity Office. Complaints against Colonels (promotable) and Senior Officials through the Department of the Army Inspector General Investigations Division, or the Office of the Inspector General of the Air Force.

A review under both policies reveal that there were no formal or informal reports of discrimination based upon sexual orientation during this reporting period.

#### **4. Accomplishments**

There have been several major Sexual Orientation-related milestones within the last calendar year.

- a) The United States Supreme Court held on June 26, 2015, that the fundamental right to marry is guaranteed to same-sex couples under both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution (*Obergefell v. Hodges*, 576 U.S. \_\_\_\_ (2015) (Docket No. 14-556). The overturning of same-sex marriage bans provides Military service members and DA civilian same-sex spouses the accessibility to hundreds of marriage benefits.
- b) On 13 July 2015 Defense Secretary Ash Carter issued two directives, allowing transgender men and women to serve in the United States military. First, Secretary Carter ordered the creation of a Pentagon working group in order to “study over the next six months the policy and readiness implications of welcoming transgender persons to serve openly.” Second, Secretary Carter stated that all decisions to dismiss troops with gender dysphoria would be handled by the Pentagon's acting Under Secretary of Defense for Personnel and Readiness.<sup>1</sup> In recent months, all of the uniformed services have moved the aforementioned decision to their highest levels. In March of this year, the U.S. Army issued an All Army Activities directive protecting transgender Soldiers from being dismissed by mid-level officers, transferring the responsibility to its top civilian for personnel matters.
- c) The VTNG Equal Employment Manager continues to oversee discrimination complaints based on gender identity. Gender identity equality continues to be an agency priority, and the organization has amended its EO policy to include gender identity.
- d) The VTNG did not conduct any Sexual Orientation or Gender-Identity training in 2015, as the Department of the Army, Department of the Air Force, and the National Guard Bureau have not yet established service branch-centric guidance or training. However, the VTNG Equal Employment Manager did provide EO related training to VTNG EEO Counselors based on current DoDD 1020.02E policy. In addition, the legal office made wide spread distribution of the new policy to members of the VTNG as well as to all judge advocates.
- e) The VTNG maintains an ad hoc committee currently comprised of the organizations Staff Judge Advocate, Sexual Assault Response Coordinator, Equal Employment Manager, and the Inspector General in order to address various concerns related to this report, including discrimination based on sexual orientation. This committee will continue to develop policies, practices, and procedures to identify, train, report, and investigate any misconduct.