UNITED STATES CIVIL SERVICE COMMISSION

WASHINGTON, D.C. 20415

IN REPLY PLEASE RE

YOUR REFERENCE

February 25, 1966

The Mattachine Society
of Washington
P.O. Box 1032
Washington, D. C. 20013

Gentlemen:

Pursuant to your request of August 15, 1965, Commission representatives met with representatives of the Society on September 8, 1965, to enable the Society to present its views regarding the Government policy on the suitability for Federal employment, of persons who are shown to have engaged in homosexual acts.

The Society was extended 30 days to submit a written memorandum in support of the positions set forth at these discussions to ensure that full consideration could be given to its contentions and supporting data by the Commissioners. On December 13, 1965, the Society filed five documents,* which, along with the substance of the September discussions, have been considered by the Commissioners.

The core of the Society's position and its recommendations is that private, consensual, out-of-working hours homosexual conduct on the part of adults, cease to be a bar to Federal employment. In the alternative it is asked that the Commission activate continuing discussions with representatives of the Society to take a "progressive, idealistic, humane, forward-looking, courageous role" to elicit the holding of objective hearings leading to the adoption of the Society's recommendation.

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* "DISCRIMINATION AGAINST THE EMPLOYMENT OF HOMOSEXUALS", dated February 28, 1963, by the Society, "RESOLUTION OF NATIONAL CAPITOL AREA CIVIL LIBERTIES UNION ON FEDERAL EMPLOYMENT OF HOMOSEXUALS", dated August 7, 1964, "A BRIEF OF INJUSTICES" by the Council on Religion and the Homosexual, Inc., San Francisco, California, June 1965, "WHY ARE HOMOSEXUALS PICKETING THE U. S. CIVIL SERVICE COMMISSION", June 26, 1965, by the Society, and "FEDERAL EMPLOYMENT OF HOMOSEXUAL AMERICAN CITIZENS", November 15, 1965, by the Society.

The Commission's policy for determining suitability is stated as follows:

> "Persons about whom there is evidence that they have engaged in or solicited others to engage in homosexual or sexually perverted acts with them, without evidence of rehabilitation, are not suitable for Federal employment. In acting on such cases the Commission will consider arrest records, court records, or records of conviction for some form of homosexual conduct or sexual perversion; or medical evidence, admissions, or other credible information that the individual has engaged in or solicited others to engage in such acts with him. Evidence showing that a person has homosexual tendencies, standing alone, is insufficient to support a rating of unsuitability on the ground of immoral conduct."

We have carefully weighed the contentions and recommendations of the Society, and perceive a fundamental misconception by the Society of our policy stemming from a basic cleavage in the perspective by which this subject is viewed. We do not subscribe to the view, which indeed is the rock upon which the Mattachine Society is founded, that "homosexual" is a proper metonym for an individual. Rather we consider the term "homosexual" to be properly used as an adjective to describe the nature of overt sexual relations or conduct. Consistent with this usage pertinent considerations encompass the types of deviate sexual behavior engaged in, whether isolated, intermittent, or continuing acts, the age of the particular participants, the extent of promiscuity, the aggressive or passive character of the individual's participation, the recency of the incidents, the presence of physical, mental, emotional, or nervous causes, the influence of drugs, alcohol or other contributing factors, the public or private character of the acts, the incidence of arrests, convictions, or of public offense, nuisance or breach of the peace related to the acts, the notoriety, if any, of the participants, the extent or effect of rehabilitative efforts, if any, and the admitted acceptance of, or preference for homosexual relations. Suitability determinations also comprehend the total impact of the applicant upon the job. Pertinent considerations here are the revulsion of other employees by homosexual conduct and the consequent disruption of service efficiency, the apprehension caused other employees of homosexual advances, solicitations or assaults, the unavoidable subjection of the sexual deviate to erotic stimulation through on-the-job use of common toilet, shower, and living facilities, the offense to members of the public who are required to deal with a known or admitted sexual deviate to transact Government business, the hazard that the prestige and authority of a Government position will be used to foster homosexual activity, particularly among the youth, and the use of Government funds and authority in furtherance of conduct offensive both to the mores and the law of our society.

In the light of these pervading requirements it is upon overt conduct that the Commission's policy operates, not upon spurious classification of individuals. The Society apparently represents an effort by certain individuals to classify themselves as "homosexuals" and thence on the basis of asserted discrimination to seek, with the help of others, either complete social acceptance of aberrant sexual conduct or advance absolvement of any consequences for homosexual acts which come to the attention of the public authority. Homosexual conduct, including that between consenting adults in private, is a crime in every jurisdiction, except under specified conditions, in Illinois. Such conduct is also considered immoral under the prevailing mores of our society.

We are not unaware of the numerous studies, reports and recommendations pertaining to the criminal aspects of aberrant sexual conduct and the unequal and anomalous impact of the criminal laws and their enforcement upon individuals, who for whatever cause, engage in homosexual conduct.* It is significant to note, however, that the renowned Wolfenden Report, which recommended that consensual homosexual conduct, in private between persons over 21 years of age, be excluded as an offense under the criminal law of England, nevertheless recognized that such conduct may be a valid ground for exclusion from certain forms of employment. id p. 22. Whether the criminal laws represent an appropriate societal response to such conduct is a matter properly addressed to the state legislatures and the Congress. It is beyond the province of this Commission.

We reject categorically the assertion that the Commission pries into the private sex life of those seeking Federal employment, or that it discriminates in ferreting out homosexual conduct. The standard against criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct is uniformly applied and suitability investigations underlying its observance are objectively pursued. We know of no means, consistent with American notions of privacy and fairness, and limitations on governmental authority, which could ascertain the nature of individual private sexual behavior between consenting adults. As long as it remains truly private, that is, it remains undisclosed to all but the participants, it is not the subject of an inquiry. Where, however, due to arrest records, or public disclosure or notoriety, an applicant's sexual behavior, be it heterosexual or homosexual, becomes a matter of public knowledge, an inquiry may be warranted. Criminal or licentious heterosexual conduct may equally be disqualifying, and like homosexual conduct, may become the subject of legitimate concern in a suitability investigation. In all instances the individual is apprised of the matter being investigated and afforded an opportunity to rebut, explain, supplement or verify the information.

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*e.g. SEX OFFENDERS, Gebhard, Gagnon, Pomeroy, Institute of Sex Research (1965); SEXUAL BEHAVIOR AND THE LAW, Samuel G. Kling, Random House (1965); HOMOSEXUALITY AND CITIZENSHIP IN FLORIDA, Legislative Investigation Committee Report (1964); THE AMERICAN LAW INSTITUTE, MODEL PENAL CODE, Proposed Official Draft (1962); PRIVATE CONSENSUAL HOMOSEXUAL BEHAVIOR: THE CRIME AND ITS ENFORCEMENT, Yale Law Journal, 623 (March 1961); REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION BY THE SECRETARY OF STATE FOR THE HOME DEPARTMENT AND THE SECRETARY OF SCOTLAND (WOLFENDEN REPORT) (1957); A PSYCHIATRIC EVALUATION OF LAWS OF HOMOSEXUALITY, 29 Temple Law Quarterly, 273 (Spring 1956) and SEXUAL DEVIATION RESEARCH, Calif. Legislature, Judiciary Committee, Subcommittee on Sex Research (1952).

To be sure if an individual applicant were to publicly proclaim that he engages in homosexual conduct, that he prefers such relationships, that he is not sick, or emotionally disturbed, and that he simply has different sexual preferences, as some members of the Mattachine Society openly avow, the Commission would be required to find such an individual unsuitable for Federal employment. The same would be true of an avowed adulterer, or one who engages in incest, illegal fornication, prostitution, or other sexual acts which are criminal and offensive to our mores and our general sense of propriety. The self-revelation by announcement of such private sexual behavior and preferences is itself public conduct which the Commission must consider in assaying an individual's suitability for Federal employment.

Hence it is apparent that the Commission's policy must be judged by its impact in the individual case in the light of all the circumstances, including the individual's overt conduct. Before any determination is reached the matter is carefully reviewed by a panel of three high level, mature, experienced employees, and all factors thoroughly considered. The fairness of this result, in the light of the investigative evidence including the applicant's statements, is subject to administrative review and may also be judicially reviewed. Hence there are safeguards against error and injustice.

We can neither, consistent with our obligations under the law, absolve individuals of the consequences of their conduct, nor do we propose by attribution of sexual preferences based on such conduct, to create an insidious classification of individuals. We see no third sex, no oppressed minority or secret society, but only individuals; and we judge their suitability for Federal employment in the light of their overt conduct. We must attribute to overt acts whether homosexual or heterosexual, the character ascribed by the laws and mores of our society. Our authority and our duty permit no other course.

By direction of the Commission:

Sincerely yours,

John W. Macy, Jr.

John W. Macy, Jr.
Chairman