

VI A New Millennium – a New Era

Subject Heading: Personnel management of homosexual soldiers [...] Homosexuality does not constitute a reason for restriction regarding assignment or status, nor therefore does it require special consideration as a criterion in eligibility.¹

Despite great expectations for the two parties and especially new Defense Minister Rudolf Scharping, the change in government to a Green and SPD-led coalition in 1998 did not initially bring about any improvements in the collective lot of gays and lesbians. Late that year the Gay Federation in Germany (SVD) congratulated Scharping on his new appointment, tying its well wishes to hopes for a “prompt change in current personnel policy regarding sexual identity.”² German gays and lesbians hoped in particular for effective measures against continued discrimination, including (and especially) in the Bundeswehr.³ Scharping, however, stuck to the hardline position of before. Parliamentary State Secretary Walter Kolbow (also of the SPD) wrote back for the minister that it was “neither legally nor factually objectionable to avoid assigning homosexually oriented soldiers, be they gay or lesbian, as troop leaders or instructors as soon as their tendency is known.”⁴ While Kolbow drew on arguments that his institution had been advancing for decades, his answer did contain a novelty: For the first time, the secretary’s response included mention of lesbian soldiers, making it clear that the same restrictions would apply for them. Both the Social Democrats and the Greens were known to set great stock on granting women equal rights in their communications, a principle that now meant restrictions against gay soldiers would hold equally for women. Otherwise, all the old arguments stood present and accounted for: Even if “growing tolerance [could be] registered” in society, “a general level of tolerance could not be assumed [among soldiers] in principle, especially among conscripts.” Instead, the working premise should be that “one part of young conscript-bound soldiers themselves or their families would have no understanding for...employing homosexually-inclined superiors.” Knowledge of a superior’s homosexuality in the line of duty could “shake” his authority, which was, however, “indispensable” for operational

1 BMVg, PSZ III 1, 3 July 2000.

2 BArch, BW 2/38358: Gay Federation in Germany, State Chapter Berlin/Brandenburg, to Rudolf Scharping, 25 November 1998.

3 BArch, BW 2/38357: Gay Federation in Germany, Speaker Manfred Bruns to Rudolf Scharping, 4 December 1998.

4 BArch, BW 2/38358: BMVg, Parliamentary State Secretary Walter Kolbow to SVD, 26 February 1999, in what follows as well.

readiness. In brief, even with an SPD minister at the helm no change in course came down from Hardthöhe – except for the mention of lesbian soldiers.

The soldiers working at BASS made little secret of their disappointment in Scharping and the Red–Green coalition government. In an open letter to the minister, they wrote that the change in government and Scharping's post had "lit a spark of hope in many gay soldiers."⁵ In July 1998 Scharping himself had still been saying after all that the SPD would actively implement "policies to dismantle discrimination and hardship for lesbians and gays." Instead, the letter continued, the BMVg was fighting "tooth and nail against gays receiving equal treatment in the Bundeswehr." The soldiers also went public with their complaints, as with a first sergeant fighting for acceptance into career service cited in *Focus* in August 1999. For the soldiers, Scharping had been the "greatest disappointment [...] Before the vote he announced he would do away with every form of discrimination against homosexuals in the event they won. Yet he barely had set foot in office when his tail went between his legs. His ministry wo not tolerate any more gays in career service. Scharping is an electoral fraud."

1. The European Dimension: The 1999 ECHR Verdict against the British Armed Forces

In fall 1999 more ominous news arrived for the BMVg and its minister, this time from Strasbourg. Like a dark cloud, a weeks-old decision at the European Court of Human Rights (ECHR) hung over the ministry – would the politicians, officials and officers simply be able to ignore it, or would lightning strike on Hardthöhe as well? Three years before, in 1996, the ECHR (incorrectly listed in BMVg papers at the time as the European Court of Justice, or ECJ) had taken up a series of complaints filed by British soldiers.⁶ Now, in September 1999, the Strasbourg judges issued their verdict: The dishonorable discharge given in 1994 to four members of the British armed forces based on their homosexual orientation stood in violation of the European Convention on Human Rights, as did the "extraordinarily invasive" interrogation of their sexual lives prior to dismissal. In the view of the court,

5 All quotes from *Focus*, "Schwule in die Bundeswehr."

6 The court's ability to accept and rule on the petitions was a direct consequence of the European Convention on Human Rights' reform taking effect the previous year. Supplementary protocol 11 strengthened the convention's protective mechanism and marked the birth of the ECHR in its present form. From now on, individual complaints could be filed directly at Strasbourg, which in turn had sole jurisdiction over them. The reform led to a marked increase in petitions in the coming years.

the British armed forces' methods constituted an unjustifiable intrusion into the private sphere, as was protected by Article 8 of the Convention.⁷

The London government's argument relied on a report from the Homosexuality Policy Assessment Team (HPAT), which had foreseen issues for fighting power and operational readiness "in animosity on the part of heterosexuals." For its part, the court had doubts as to the validity of HPAT's findings; the authors were not outside experts but employees working at the Ministry of Defense and within the armed forces, nor had their survey of soldiers been anonymous but included names, and contained leading questions. Even working under the assumption that the survey results were accurate, the negative attitudes that had been registered among heterosexual soldiers toward homosexuals would not justify the harsh restrictions any more than "similarly negative attitudes toward people of another race, ethnicity or skin color."⁸ London had also failed to present a convincing account of the damage it feared would be inflicted on troop morale and fighting power. To the Strasbourg court, this meant there existed "no weighty or convincing grounds" that might have justified the soldiers' dismissal. Accordingly, the intrusion into the soldiers' private lives over the course of their dismissal and interrogation was incompatible with Article 8 of the Convention.⁹ The judges did not rule in favor of the plaintiffs' reinstatement into service, but they did find the discrimination grounds for financial compensation. The British government accepted the verdict and suspended current dismissal proceedings against homosexual soldiers pending further review of the ruling.¹⁰

The German Ministry of Defense pored over the Strasbourg decision with a magnifying glass; the day after the ruling State Secretary Peter Wichert promptly ordered his legal staff to draw up possible consequences for personnel leadership in the Bundeswehr. The legal department had an initial assessment ready two days later that sounded the all-clear for the BMVg's stance:

8. Overall environmental effects on interested circles notwithstanding, the decision does not demand any change in the going practices of the Bundeswehr [...]

7 ECHR ruling from 27 September 1999. See also BArch, BW 1/502107, no pagination: BMVg, R I 1 to State Secretary Wichert, 30 September 1999. For a contemporary legal assessment of the ruling see Schmidt-Radefeldt, "Streitkräfte und Homosexualität." *Bundeswehr aktuell*, a weekly newspaper put out by the BMVg also reported extensively on the ruling: *Bundeswehr aktuell*, 4 October 1999, 4.

8 ECHR ruling from 27 September 1999, compare to BArch, BW 1/502107: Report from Doctor of Law Armin Steinkamm, Bundeswehr University Munich, 25 January 2000, here 5–6, quote on 6.

9 Ibid.

10 BArch, BW 1/502107, no pagination: BMVg, R I 1 to State Secretary Wichert, 30 September 1999.

9. The issue of the disconcerting interrogations is irrelevant if only because Bundeswehr personnel leadership does not carry out similar sorts of inquisitions.
10. The ruling cannot be applied to the Bundeswehr anyway, since it does not make homo sexuality automatic and absolute grounds for dismissal, which is what the ruling hinges on. Moreover, the court only uses the argument of homosexuals' undue and prejudiced rejection by heterosexuals to justify its decision regarding the serious intrusion on the professional freedom of the persons concerned [...]
12. In light of the European Court of Justice's [sic] emphasis on finding the human rights violation to consist in the degree of interference in status law, First Lieutenant Stecher's prospects for success before the European Court of Justice, where he could appeal following a negative decision at the Federal Constitutional Court, should likely be assessed as low.
13. Court approval of Bundeswehr practices around accepting soldiers for career service, on the other hand, cannot be predicted as having the same prospects for success [...] To support these practices the court would ultimately have to follow the argumentation that it is not the established legal position of an existing employment relationship that is being interfered with, but rather the expansion and continuation of a legal relationship there is no basis to claim as one's own.¹¹

The jurists concluded their report to the secretary by recommending that current practices be kept in place. The personnel department's evaluation came several days later; its employees agreed that the German practice of not assigning known homosexuals to positions as troop leaders or instructors was unaffected by the Strasbourg ruling. They did, however, view the "practical exclusion [of homosexual soldiers] from the status of career soldiers" as being in far greater "jeopardy" than the jurists.

The ECJ [sic] has, however, also ruled as immaterial the principal argument used by the Bundeswehr in justifying its restrictive assignment practices [regarding homosexuals] as well as [their] practical exclusion from the status of career soldiers. [In the court's view] this is founded exclusively on prejudices within the heterosexual majority, and could be answered by appropriate regulations on conduct and discipline such as those the British Army used to counter racial prejudice and reservations toward women. Against this backdrop, in the event a concrete individual case were referred to the court, our practice of accepting soldiers for career service would be jeopardized at the very least.¹²

More than their counterparts in the legal department, the officials and jurists in the personnel department no longer thought it possible to bar homosexual soldiers generally from career service after the court ruling. One such case was already on its way through the courts after Lüneberg Administrative Court had ruled ini-

¹¹ Ibid. See chapter 7 for greater detail on the British armed forces.

¹² BArch, BW 1/502107, no pagination: BMVg, PSZ III 1 to department head at PSZ, 4 October 1999.

tially in favor of a first lieutenant; the case would be in Karlsruhe at the Federal Constitutional Court before too long, and potentially wind up in Strasbourg. If the internal conversation reveals anything, it is that the ECHR ruling brought significant worries to the BMVg. For some in the ministry, it gave even greater cause for concern than the upcoming decision in Karlsruhe on First Lieutenant Stecher's constitutional complaint regarding his removal as platoon commander.

The personnel department's paper mentioned another lawsuit filed by a gay officer that was pending at the administrative court in Berlin; First Lieutenant Schmid had filed the motion after he was transferred out of his post as platoon leader in a mechanized infantry battalion and had a firm offer of a military career withdrawn.¹³ While this third lawsuit was just beginning to make its way through the courts in late 1999, the personnel department was already warning that here too, "the legal path might be exhausted" all the way up to Karlsruhe and Strasbourg.

It was not only in offices at Hardthöhe that the potential implications of the Strasbourg ruling on the Bundeswehr were reverberating but in the opposing camp as well, among advocates for gay soldiers, where hope for change was growing. Meanwhile the advisory panel on leadership development and civic education within the Bundeswehr tasked Armin Steinkamm, a professor of public law at Bundeswehr University Munich, with preparing a legal report as to what the Strasbourg court's ruling might portend for the current suits. The ECHR had dealt exclusively with the question of terminating an already existing service contract, leaving aside for the present matters of reinstatement and promotions within existing contracts. The court's predecessor, the former European Commission on Human Rights, had consistently ruled that there was no legal entitlement to be hired or taken on as a public employee. The commission had similarly denied all legal claims to promotion or particular assignments in the armed forces based on the European Convention on Human Rights. The ECHR ruling, by contrast, had now made it clear that "national armed forces would not be allowed to exist in a 'legal vacuum'" but fell subject to "the same convention standards as any other sovereign authority." Strasbourg also did not concede any "expanded leeway for assessment due to reasons of national security policy where intimate areas of private life are concerned."¹⁴ The European court opinion took such a general tack that "the ECJ [could be expected] to perceive all forms of discrimination against homosexuals in public office that were justified by prejudice as irreconcilable with Article 8 [of the European Con-

¹³ BArch, BW 1/502107, no pagination: BMVg, PSZ III, 5 January 2000. See chapter 4 for a full account.

¹⁴ BArch, BW 1/502107: Report by Doctor of Law Armin Steinkamm, Bundeswehr University Munich, 25 January 2000, here 9–10.

vention on Human Rights].”¹⁵ This principle was in turn brought to bear in the suits the Bundeswehr soldiers had filed, based as they were on the plaintiffs’ exclusion from particular assignments. Steinkamm’s report echoed a sentiment coming from other corners that “the postulates of democratic European society such as pluralism and tolerance [must not be allowed to] stop ‘outside the barracks gate,’ but find special relevance, here of all places.”¹⁶

Steinkamm also set the Strasbourg decision within the context of Articles 3 and 33 (2) of Germany’s Basic Law, the relevant domestic conventions for the soldiers’ legal complaints regarding their rejection for career service and assignment restrictions. The latter statute states that “every German shall be equally eligible for any public office according to his aptitude, qualifications and professional achievement”; by Steinkamm’s reading, the Strasbourg decision made barring homosexual soldiers from career or fixed-term service *solely* on the basis of their homosexual disposition incompatible with the article.¹⁷ At the same time, not assigning or promoting homosexual soldiers as superiors or instructors solely on the basis of their homosexual disposition violated Article 3 of the Basic Law. The law professor closed out his report by appealing to “the Bundeswehr’s interests in adopting appropriate measures, to avert legal developments in a timely fashion that ran contrary to the European community’s efforts at fighting discrimination.”¹⁸

Christina Schenk and the PDS faction had already submitted a minor inquiry on “Gays and the Bundeswehr” in October 1999, asking among other things whether the justifications given for the ECHR ruling against the British armed forces did not also apply to the Bundeswehr, and whether the federal government would revise its position toward homosexuals in the Bundeswehr in light of the verdict. The inquiry also wanted to know whether the government would withdraw the legal steps it had already taken against the decision from Lüneberg Administrative Court in favor of the staff sergeant, and take the plaintiff back as a troop instructor.¹⁹ The defense ministry’s answer, as might be expected for most opposition inquiries, was brief: The ruling against the British armed forces was not transferable “without further ado,” since the Bundeswehr did not tie homosexuality to “any automatic

¹⁵ Ibid., 20.

¹⁶ Ibid., 11.

¹⁷ Ibid., 11.

¹⁸ Ibid., 21.

¹⁹ BArch, BW 2/38358: Deputy Christina Schenk and the PDS Faction, Minor inquiry to the federal government, 1 October 1999 (emended by hand to 5 October 1999), Bundestag printed material 14/1750.

and absolute grounds for dismissal.” This made it pointless for the BMVg to answer any of the following questions.²⁰

Even if the BMVg did not see it that way, at least outwardly, the ECHR ruling took on a highly-charged aspect when a Bundeswehr officer filed suit at the Federal Constitutional Court – would he end up in Strasbourg as well?

2. The Legal Dimension: A First Lieutenant’s Complaint and Questions from Karlsruhe for the BMVg

I hereby file a constitutional complaint against [...] the decision of the Federal Ministry of Defense [...] for violating the general right to personality (Art. 1 (1) in conjunction with 2 (1) of the Basic Law), the principle of equality before the law (Art. 3 of the Basic Law) and the right to equal access to public office according to aptitude, qualification and professional achievements (Art. 33 of the Basic Law).

I submit the following motions:

- 1.) The decisions named are repealed.
- 2.) [...] The Federal Ministry of Defense is obligated to reassign the plaintiff to his former service post as platoon head in Squadron 3 of the air force base battalion.²¹

In a rationale the lieutenant’s lawyer characterized as a “constitutional appraisal,” she explained that the BMVg was relying on the “valid legal position” by which “an officer who admits his homosexuality will not be assigned a position in which he is directly responsible for leading, educating or instructing subordinate soldiers.” Yet what exactly did “[admitting] his homosexuality” mean in this instance? “Would the plaintiff have had to dispute his homosexuality, contrary to the truth, and lie to his commander and squadron chief to be able to continue to serve as an instructor?”²²

When the Federal Administrative Court referred to the fact that “homosexually inclined men were still broadly rejected by heterosexual men, potentially resulting in an unacceptable loss of authority,” this was “a mere supposition in ‘a vacuum’.” The court deserved to be “fundamentally reproached for not concerning itself in the slightest with the concrete situation within the ranks.”²³ In the lieutenant’s case “everyone involved, subordinates and superiors alike, had spoken out in favor of

²⁰ BArch, BW 2/38358: BMVg, Parliamentary State Secretary Walter Kolbow, 14 December 1999.

²¹ BArch, BW 1/502107, sheets 65–118: Constitutional appeal by First Lieutenant Stecher from 23 December 1998, here sheets 65–66.

²² Ibid., sheet 74.

²³ Ibid., 77–78.

[his] staying on [...] in his post as a platoon leader.”²⁴ Personnel measures such as those taken “would be absolutely unthinkable in any other public post today.” The Bundeswehr laid claim to an “exceptional position [...] that appears more and more questionable in an age of increasing social acceptance of homosexuality.”²⁵

Looking back, it is remarkable that Lieutenant Stecher’s appeal was the first to reach Karlsruhe. Every suit preceding it had ended at the latest before the Supreme Administrative Court. It remains anyhow a matter of speculation whether, and in any event highly unlikely that, constitutional judges would have ruled in favor of a gay soldier filing suit in the 1970s or 1980s. Societal values change over time, and courts require an even longer time to render this shift into rulings. A defeat at constitutional court in Karlsruhe in 1980 or 1990 would likely have done a disservice to the cause of homosexual soldiers; by 1999 the signs pointing toward a successful constitutional appeal were much more favorable. First, however, the lieutenant would have to cope with rejection: On 31 August 1999 the constitutional court (BVerfG) rejected an express appeal from the lieutenant’s lawyer to return her client to his former post. There was no pressing need to act since the plaintiff had been given leave from service for a longer period to complete specialized training.²⁶

In October 1999, the court ordered the federal government to draft a position paper concerning the main proceedings by 28 January 2000. The court president, Jutta Limbach, gave the government a general opportunity to comment, but also asked specifically after the “underlying factual basis of the contested decision by the Federal Ministry of Defense for assessing a possible disruption to service operations,” and how the government would view the “constitutional objections raised against the backdrop of the Federal Constitutional Court’s ruling history.” The court was also interested in how other NATO members dealt with the matter: “Are homosexually disposed soldiers entrusted with direct supervision, education and training of subordinates in allied NATO forces?”²⁷

In a draft response composed on State Secretary Wichert’s letterhead, Legal Section II 2 opened by stressing that it held “the established legal tradition at the Federal Constitutional Court [...] to be correct.” The same could not be said for the plaintiff’s claim in the case at hand, namely that he had been transferred to a posi-

²⁴ Ibid., 75.

²⁵ Ibid., 79.

²⁶ BVerfG, 17 August 1999, 2 BvR 2276/98.

²⁷ BArch, BW 1/502107, no pagination: Bundesverfassungsgericht, Az 2 BvR 2276/98, from 6 October 1999.

tion on squadron staff that was ill-suited to his qualifications and expertise. On the contrary, he had been “handed a position that entailed responsibility.”²⁸

The legal section proposed by way of response to the court’s first question that “determining a lack in fitness in the plaintiff for his former position [had not been] based on disruptions caused to service operations, issues with acceptance [n]or specific incidents that otherwise called his fitness into question.” Rather, the decision had been based on the “*abstract danger* to his authority as a military leader and troop instructor coming from the revelation of his same-sex tendency in the meantime.”²⁹

To account for this anticipated loss in authority, the jurists cited the same lack of social acceptance they had trotted out continuously before administrative courts since the 1970s, even repeating it word for word: “There is moreover much to suggest that even today, behavioral patterns that would not draw any attention among heterosexuals might lead to gossip, suspicion, and rejection [when coming] from homosexually inclined superiors, potentially leading to a considerable loss of authority for the superior and thus a disruption to service operations.”³⁰

As proof the legal section pointed to a survey of conscripted soldiers this study has previously discussed at several points, conducted by the Bundeswehr Institute of Social Sciences in 1992. A mere one in three of the recruits found homosexuality “acceptable,” while nearly one half considered it “negative” or “very negative.” (Another 20% chose the further alternative of “unacceptable.” It is worth noting here that the survey results showed a two-thirds majority rejecting homosexuality.)³¹ “Assertions about the increasing acceptance of homosexuality [on the other hand] must be examined.”³² In raising the specter of “abstract dangers,” the legal division introduced a new argument concerning deployment abroad. The lieutenant’s platoon had not been deployed yet, and “it is precisely the particular trials of endurance [...] a small fighting group [would experience] [...] abroad under meager living conditions” that the unit had not been forced to undergo to date. Specifically, the ministry cited “confined living quarters” and the “highly restricted range of possibilities to engage in sexual activity.” The section went farther still:

28 BArch, BW 1/502107, no pagination: BMVg, State Secretary, Draft response to the BVerfG, Az 2 BvR 2276/98, undated, drafted by R II 2, 21 December 1999. All quotes below from the same document. Original emphasis.

29 Ibid.

30 Ibid.

31 See chapter 4 for a full account of the study.

32 BArch, BW 1/502107, no pagination: BMVg, State Secretary, Draft response to the BVerfG, Az 2 BvR 2276/98, undated, drafted by R II 2, 21 December 1999. Quoted as well in what follows.

Even an accepted and well-respected superior can wind up in borderline situations where the formal principle of the chain of command on its own cannot provide a sufficient basis for him to prevail over his subordinates [...] Particularly with a view to the exceptional strains of [foreign] deployment, a homosexual officer's given track record of assessment and achievement during peacetime operations on national territory loses its validity in refuting the problems of acceptance outlined above.³³

The regulations cited in response to the court president's second question about other NATO member states will be considered in closer detail in the following chapter. The third question, which contained Karlsruhe's request to assess the "constitutional objections raised against the backdrop of the Federal Constitutional Court's ruling history," prompted the BMVg jurists to reach deep into the desk drawer for previous administrative court verdicts, including one from 1975 analyzed closely above in chapter 4 – the case of Reserve Lieutenant Rainer Plein from Münster. It seems that in early 2000, the lawyers in Bonn could not actually think of much more than to underpin their argument than to draw and quote extensively from a twenty-five-year-old ruling.³⁴ They suggested the BMVg emphasize to the court the considerable discretion the military had in making assignments.

The federal government is of the opinion that acceptance of homosexual superiors in the armed forces has not yet reached a state as to preclude making *known* homosexuality the deciding factor in assignment decisions. On the one hand, a homosexual soldier has the option of living out his sexual orientation in private, outside of service. On the other, the armed forces' constitutional mandate and the existential danger to which soldiers are exposed if the military does not counteract disruptive factors are sufficient grounds to justify the requirement that soldiers accept certain restrictions on their official eligibility based on their personal sexual tendencies.³⁵

When the draft was circulated for approval, the otherwise routine procedure drew significant protest from some corners as a result of differences between sections and departments. The back and forth reveals that by early 2000, the BMVg's restrictive stance was no longer shared by every official and officer at the ministry. Section III 5 at the Personnel, Social Services and Central Affairs Department did not sign off on the draft without also suggesting to leave out the 1975 verdict entirely. In its

³³ Ibid.

³⁴ Ruling at North Rhine-Westphalia Superior Administrative Court on 4 September 1975, Az I 4 1108/74. Incidentally, the jurists in Bonn wrongly attributed the ruling to Rhineland-Palatinate Superior Administrative Court in Koblenz.

³⁵ BArch, BW 1/502107, no pagination: BMVg, State Secretary, Draft response to BVerfG, Az 2 BvR 2276/98, undated, drafted by R II 2 (original emphasis on "discovered").

place they proposed a more recent short-term SOWI study so as to “arrive at more sound argumentation.”³⁶ The staff at another legal section also thought their colleagues might like to revise their remarks on the 1975 verdict; the arguments that had been drawn from the case no longer reflected current case law. “References to older jurisprudence might sooner weaken the position of the federal government during proceedings.”³⁷ They also criticized the argument about the lieutenant’s potential rejection while on deployment as inapplicable, since his subunit had not yet been deployed.³⁸ Section PSZ III 6 meanwhile declined to cosign the draft, clearly articulating to the legal department as to why: Karlsruhe would find the draft responses “unconvincing.”³⁹ Drawing on the study from Britain’s Homosexuality Policy Assessment Team was “simply counterproductive.” The British had made out “animosity on the part of *heterosexuals*, as well as attacks against homosexuals – their harassment and molestation as well as their ostracization and being shunned” to be problematic for fighting power and operational readiness. If this argument were presented before the court, it would logically follow that “soldiers from outside Europe, for example, might just as well be seen as ‘disruptors’ with implications for the Bundeswehr’s operational readiness in the event that fellow soldiers did not accept them. ‘That cannot be true!’”⁴⁰

The personnel department also criticized the fact that the ministry’s own legal staff was still relying on a survey from 1992. Assuming a continued lack of acceptance would have to be “substantiated again by facts.” The letter from the common soldiers in the platoon led by the lieutenant spoke a different language than the survey. Nor did the section mince words about the draft response to Karlsruhe’s third question. “In light of the more than 3,000 female soldiers [in the military] at present, it was not tenable” to argue before the Federal Constitutional Court in the year 2000 that “other soldiers entered consideration as sexual partners for homosexuals, unlike for heterosexuals,” and that therefore the behavior of the former toward comrades or subordinates might be “influenced by sexual motives” – all while referring to a verdict from 1975 at Koblenz Superior Administrative Court.⁴¹

PSZ III 6 was not alone in its forceful criticism. Section III 1 at the Personnel, Social Services and Central Affairs Department shared “unreservedly” in the

³⁶ BArch, BW 1/502107, no pagination: BMVg, PSZ III 5 to R II 2, 18 January 2000. Also in BArch, BW 2/38358.

³⁷ BArch, BW 1/502107, no pagination: BMVg, R I 1, 18 January 2000. Also in BArch, BW 2/38358.

³⁸ Ibid.

³⁹ BArch, BW 1/502107, no pagination: BMVg, PSZ III 6 to R II 2, 11 January 2000 (emphasis in original). Also in BArch, BW 2/38358.

⁴⁰ Ibid.

⁴¹ Ibid.

concerns that had been voiced, although it did not withhold its signature. “Since, however, we manifestly do not have any other or better arguments at our disposal, we have no choice but to rely on the reasons you have chosen in the hopes that the Federal Constitutional Court will work them into its decision in our favor.”⁴²

Why, if hopes did not seem to run all that high in the personnel department, did it nevertheless sign on to the draft and thus endorse it? The answer comes in the first few sentences of the department’s response: “Personnel leadership must take its direction from the intentions of the public agencies as recently laid out in the new MFR draft proposal from Section Füs I 4 and maintain the current restrictive line,” a goal which the legal department, too, “ultimately served.”⁴³ The “public agencies” mentioned here were the military service branches, the army, air force and navy. MFR is the abbreviation for “Militärischer Führungsrat” or Military Command Council, in which the chiefs of the individual service branches and the chief of defense consult and reach internal agreement. The paper from the personnel division speaks to the pressure applied by military leadership on other departments in the BMVg, and likely political leadership, in order to maintain the stance, it had kept to date.

The draft response never reached Karlsruhe. BMVg sections were not the only ones that either refused to sign or reported serious concerns; both the Federal Ministry of the Interior and the Federal Ministry of Justice did the same.⁴⁴

Karlsruhe insisted on an answer. The draft response was circulated to the ministries of the Interior, Justice and Family for cosignature; all three declined, holding the defense ministry’s position to be “no longer appropriate to the times or constitution.” The Federal Ministry for Family Affairs, Senior Citizens and Women and Youth, led by Social Democrat Christine Bergmann, further viewed the draft as violating the coalition agreement between the SPD and the Greens. When the BMVg section responsible for the draft asked again, all three ministries stated that “there was no room for convergence [even] at a working level.”⁴⁵ The reply indicates that the ministries’ respective positions had been coordinated by political leadership at the institutions; the Justice Ministry’s negative response was later shown to have been decided in conjunction with the head of the ministry, Herta Däubler-Gmelin. Instead the “divergence of opinion” should be resolved at the “leadership level,” i.e.

42 BArch, BW 1/502107, no pagination: BMVg, PSZ III 1 to R II 2, 18 January 2000. Also in BArch, BW 2/38358.

43 Ibid.

44 BArch, BW 2/38358: BMVg, Füs I 4, speaking notes for the chief of defense at a council meeting on 24 January 2000.

45 BArch, BW 1/502107, no pagination: BMVg, R II 2 to State Secretary Wichert, 20 January 2000.

between ministers.⁴⁶ All this led the government to request an extension until the end of March 2000. The clock had begun to tick; the BMVg had two months' time to answer Karlsruhe – or change its stance. The hour for a political decision from Minister of Defense Rudolf Scharping had come.

3. The Political Dimension

First Lieutenant Stecher's transfer also took on political dimensions in 1999. The fight drew a line through the governing coalition and the SPD itself, escalating amid public clashes between Scharping and his fellow cabinet ministers and in some cases those within his own party.

In May of that year, Minister for Economic Cooperation and Development Heidemarie Wiecezorek-Zeul took up Stecher's cause with Scharping, asking the minister to explain his position on soldiers' sexual orientation and the case at hand.⁴⁷ Scharping thanked her for the "opportunity to correct a number of recent unfounded publications." "Most of the one-sided depictions in the media," Scharping wrote, "give the impression that the Bundeswehr is ignoring the repeal of homosexual behavior's criminality, and refusing to take account of societal developments. In truth, the Bundeswehr – more than many other armies – has continually been open to shifts in society."⁴⁸

Yet "a different assessment had shown itself" among troop leaders and instructors, "namely that despite greater tolerance within society, a general level of acceptance cannot be [accepted as] the working premise." This explained the risk a superior ran of losing the confidence of and authority over troops in the event he or she were found to have a homosexual "inclination." Tolerance could not be ruled by decree. The personnel desk drafting the minister's response went on to paraphrase extensively from the familiar litany of administrative court rulings, echoing their emphasis on the unacceptable risks to operational readiness. They further cited Stecher's recent promotion to first lieutenant as evidence that it did not attach "moral opprobrium" to a soldier leading a same-sex lifestyle. Rather, the ministry

⁴⁶ BArch, BW 2/38358: BMVg, FÜS I 4, Speaking notes for the chief of defense for a council meeting on 24 January 2000.

⁴⁷ BArch, BW 1/502107 and BW 2/38357: Federal minister for economic cooperation and development to the BMVg, 19 May 1999.

⁴⁸ BArch, BW 2/38357: BMVg, Minister, to Federal Development Minister Wiecezorek-Zeul, 24 June 1999, cited as well in the following. The draft response of the minister's letter by PSZ III 1 is available in BW 1/502107.

took its cues from “social reality and its implications for the mission of the armed forces.”⁴⁹

Yet the question of whether or not the Bundeswehr was attuned to “social reality” in 1999 was precisely what gave more and more people cause for serious doubt. The parliamentary state secretary at the justice ministry, Eckhart Pick (SPD), clearly thought this, refusing to sign on to a BMVg draft response to Deputy Christina Schenk (PDS). In doing so he referred explicitly to the coalition agreement, which stated that “Nobody [...] may [...] be discriminated against due to their sexual orientation as gay or lesbian.”⁵⁰

Federal Minister for the Environment Jürgen Trittin (Alliance 90/The Greens) also engaged on behalf of the forcibly transferred lieutenant.⁵¹ Tritten did not leave the matter at a letter to a fellow cabinet member but took sides publicly, issuing a passionate reminder to Scharping that the governing coalition had made it its business “to protect minorities and help bring about their equality and participation in society.”⁵² Trittin labelled Scharping’s contention that homosexual superiors were not sufficiently accepted in the Bundeswehr “out of touch,”⁵³ and he stressed that “simply giving into antigay sentiment and thus bolstering it” was clearly out of step with the Bundeswehr’s principle of leadership development and civic education.⁵⁴ Fellow Green Angelika Beer took Scharping’s ministry still more sharply to task, noting the coalition’s express agreement that nobody should suffer disadvantages based on their sexual orientation. She was “appalled that this sort of discrimination should now simply carry on, even drawing on alleged reservations among the population to do so.”⁵⁵ Beneath the headline “Red and Green Fight over Homosexual Soldiers,” the *Frankfurter Rundschau* quoted Scharping’s press spokesperson in June 1999 with the words “The Bundeswehr bases itself on laws, not coalition agreements.”⁵⁶

In Koblenz, the site of the largest Bundeswehr installation at the time, the *Rhein-Zeitung* ran a piece that announced a “Fight between Trittin and Scharping: Gay Officer Forcibly Transferred.”⁵⁷ Scharping himself was cited in the piece; the

49 Ibid.

50 BAArch, BW 2/38357: BMJ, Parliamentary State Secretary Eckhart Pick to the BMVg, Parliamentary State Secretary Brigitte Schulte, 15 June 1999.

51 Ibid., Federal Minister Deputy Jürgen Trittin to Defense Minister Scharping, 21 January 1999.

52 *Rhein-Zeitung*, “Streit zwischen Trittin und Scharping: Schwuler Offizier zwangsversetzt.”

53 *Frankfurter Rundschau*, “Rot und Grün streiten über homosexuelle Bundeswehrsoldaten.”

54 “Streit zwischen Trittin und Scharping: Schwuler Offizier zwangsversetzt.”

55 “Rot und Grün streiten über homosexuelle Bundeswehrsoldaten.”

56 Ibid.

57 “Streit zwischen Trittin und Scharping: Schwuler Offizier zwangsversetzt.” Cited as well in what follows.

only thing that occurred to him was to repeat the arguments that had seemingly been carved in stone since the 1970s. “Homosexuality raises considerable doubts regarding fitness [to become a superior], and prevents assignment to positions tied to leading, educating and instructing soldiers.” The Bundeswehr had “opened itself to societal change more than many other armies.” It would, however, be “missing the point of social realities to want to ascribe a leading role to the armed forces where serious conflicts with the values of many citizens loom.”

In its own piece entitled “Homosexual Soldiers: Sager criticizes Scharping,” *Die Welt* reported that Krista Sager, a Green party member and senator for equality in Hamburg had also come out against discrimination against homosexual soldiers.⁵⁸ Society’s acceptance of gays in the military, including those in positions of leadership, had grown considerably.

Yet it was not only from the Greens that Scharping found himself under increasing pressure throughout 1999 – members of his own party applied it too:

The SPD’s best critics still come from within the SPD itself. So it was that the chairman of Schuwsos [the LGBT wing of the SPD] for Lower Saxony, Achim Schipporeit, called on the chancellor to put his foot down [...] If he remained silent, he would be “partly to blame for violating the human dignity of gay soldiers.” In Schipporeit’s words, “How much longer will the Red–Green coalition let Scharping lead it around by the nose on the matter?”⁵⁹

In an interview for this study, the parliamentary state secretary for the BMVg at the time, Brigitte Schulte (SPD), recalled the increasing pressure coming from within and outside of the SPD: “There was an arrangement in the [Red–Green] coalition agreement to end discrimination against homosexuals across the board.” Schulte herself operated under the assumption that the subject had not been broached in the SPD faction, as “there would have been a fuss otherwise.”⁶⁰ There turned out to be a fuss within the SPD faction after all. The second parliamentary state secretary, Walter Kolbow, was forced to deal with the anger, “defending himself against a barrage of recriminations from the entire faction.”⁶¹

In a *FAZ* article from September 1999, a defense ministry spokesperson found himself repeating his ministry’s position yet again beneath the headline “Homosexuals are not allowed to instruct.” Homosexuality still was not “well received by society at large, and thus was not accepted by all the soldiers,” which meant a loss

⁵⁸ “‘Homosexuelle Soldaten’.”

⁵⁹ Rosa Rauschen, “Schwule bei der Bundeswehr.”

⁶⁰ Interview with retired Parliamentary State Secretary Brigitte Schulte, Wachtberg, 16 April 2019.

⁶¹ BArch, BW 2/38357: BMVg, Füs I 4, 11 November 1999, referring to a 9 November 1999 session of the SPD parliamentary faction’s working group on security policy.

in authority over troops had to be expected. That loss was unacceptable, however, “since the Bundeswehr’s defense mandate demands unconditional trust in superiors and unimpeded operational readiness.” Soldiers could not simply be told to accept homosexuality “by decree.”⁶²

In October 1999, gay and lesbian soldiers received renewed support from the FDP in the form of a motion introduced by the faction: “The German Bundestag calls on the federal government to guarantee that soldiers are not discriminated against based on their sexual orientation within the working operations of the Federal Ministry of Defense.”⁶³ When Minister Scharping and State Secretary Wichert explained that homosexuality “raised lasting doubts about soldiers’ suitability for the task of leadership as their authority might suffer” the Liberals countered that the armed forces had since allowed women to join the ranks:

It has long been self-evident that female and male superiors alike will have subordinates of the opposite sex. As such, the Federal Ministry of Defense’s call for homosexual and heterosexual superiors to receive different treatment can only be the result of the prejudice-riddled notion that homosexual superiors might sooner tend to give into the possibility of sexually motivated desires within the official line of duty than would be the case with the majority of superiors who are heterosexually inclined. Yet there is no set of experiences that would justify such an assumption. It may be accurate to say that revelation of a superior’s homosexuality may initially lead to inappropriate reactions that are the consequence of young soldiers’ being insufficiently educated. In that case, however, it falls to the superiors on site to provide young people with the right kind of information and help them learn how to deal with homosexuality. The Bundeswehr cannot shrink back in the presence of ready discrimination, much less confirm and strengthen it through conscious discrimination of its own. The German Bundestag fully commits itself to demanding a Bundeswehr free from discrimination. No member of the Bundeswehr may be discriminated against in any way on the basis of race, religion, sex, the national affiliation of his countrymen or sexual orientation. On the contrary, it is the task of the Bundeswehr to fight against prejudices that may exist among its members when necessary and take on an informative role.⁶⁴

The FDP motion was taken up by the full Bundestag in March 2000, where the matter was referred to the Defense Committee.⁶⁵ Scharping viewed the motion and

⁶² *Frankfurter Allgemeine Zeitung*, “Homosexueller darf nicht ausbilden.”

⁶³ German Bundestag, 14th legislative period, Document 14/1870. Motion by Deputies Hildebrecht Braun (Augsburg), Günter Nolting, Jörg van Essen, other deputies and the FDP faction: “Bekämpfung jeder Art von Diskriminierung in der Bundeswehr.”

⁶⁴ *Ibid.*

⁶⁵ German Bundestag, 14th legislative period, typed transcript of the 95 Session on 23 March 2000, plenary transcript 14/95, 8844–45.

its redirection to committee as “a good opportunity to speak calmly with each other about these issues, and not try to resolve them based on some form of agitation.”⁶⁶

Press reports also credited the SPD Minister of Defense with commissioning a study from the ultra-conservative group “Christians on the Offensive” and its associated “Institute for Youth and Society” in Reichelsheim that had sought to cast homosexuals as unfit to lead or instruct Bundeswehr troops. The alleged commission caused a significant stir in the press in January 2000; *taz* spoke of “dubious numbers from the 1950s,” with one article in the paper entitled “Scharping’s Bundeswehr Study: Gays are sick.”⁶⁷ The *Berliner Zeitung* meanwhile reported “Gays demand apology from Scharping,”⁶⁸ while Bundestag deputy Volker Beck (Alliance 90/The Greens) accused Scharping’s ministry of circulating “homophobic pamphlets.”⁶⁹ According to the *taz* report, the study still proceeded to understand homosexuality as an illness even though same-sex desire was no longer seen as requiring treatment. “Still, there was evidently no desire for close analysis at Rudolf Scharping’s ministry. Given such advice, it is small wonder that the Federal Ministry of Defense continues to look to prevent gays from entering the military,” the paper concluded.⁷⁰

What was the study under discussion? Had it in fact been commissioned by the BMVg, even directly by the minister himself? The truth proved to be quite different than what the headlines suggested. As it turned out, the “Institute for Youth and Society” in Reichelsheim had sent the report to the BMVg on its own initiative in September 1999, where it was shelved by the press and information staff. When an editor from *MAX* magazine sent in an inquiry to the BMVg about homosexual soldiers in late December 1999, an official on the press and information staff had responded briefly by fax, summarizing the ministry’s stated position and including the Reichelsheim study, expressly (as was later explained) to show how outside forces sought to influence the ministry. The last page of the letter however included a typed closing phrase from the official and her signature – directly beneath the Reichelsheim study. The editor at *MAX* used it in turn to present the otherwise obscure study as the BMVg’s own, securing a media sensation in the process.

⁶⁶ Ibid.

⁶⁷ Lange, “Scharpings Bundeswehr-Studie.”

⁶⁸ “Schwule fordern Entschuldigung von Scharping,” available as a copy in BArch, BW 1/582743.

⁶⁹ The BMVg press review likely falsely attributed the article “Defamation of homosexuals,” which was based on an AP news report, to the 28 January 2000 edition of the *Berliner Morgenpost* (a copy is available in BArch, BW 1/582743). *taz* further quoted Beck as saying it would be a “grave insult” if a study for the Ministry of Defense “vilified” the lifestyles of gay and lesbian citizens “as an illness and thus an illegitimate, less-worthy form of life.” Lange, “Scharpings Bundeswehr-Studie.”

⁷⁰ Ibid.

Inquires from *Spiegel* and other editorial boards followed shortly after *MAX* came out with its piece “Pink Army Faction.”⁷¹ The BMVg clarified the misunderstanding and was able to put out the fire, at least temporarily;⁷² a week later, the flame rekindled. On 26 January 2000 the tabloid *B.Z.* made its report, followed the next day by *taz* and other newspapers. The press and information staff now had its hands full trying to get the story under wraps. On 28 January *Berliner Morgenpost* reported “Homophobic study not from the Bundeswehr”⁷³; *taz* followed with a correction the day after.⁷⁴ Independently of the subject at hand, the incident demonstrates the importance of exercising particular care and caution in dealing with the press. In the hands of a media outlet with its own interests, a matter as simple as a wrongly placed signature can provide cause for scandal.

4. The Internal Military Dimension: “The Service Branches’ Position on Homosexuality Rock Solid”

Scharping had not wanted to take charge of any federal ministry in 1998, least of all defense.⁷⁵ Visibly a stranger to the task, the new minister had next to no experience with the Bundeswehr, relying instead on the state secretaries (especially on the seasoned Peter Wichert, who had been with the BMVg since 1989) and military leadership’s counsel. Scharping led the ministry and armed forces under the principle “the apparatus must be trusted in,” as one contemporary involved at ministry leadership level stressed. The interviewee, who wished to remain anonymous, recalled that similarly to Helmut Schmidt the new minister had first wanted to “tune into the Bundeswehr to find out what the hot topics were for soldiers, what was on their minds.”⁷⁶

In the course of speaking with soldiers the subject of homosexuality had not come up once.⁷⁷ Another eyewitness, a former officer on staff at the Center for Leadership Development and Civic Education in Koblenz, was still able to recall why. One of the roundtable discussions had been intended to address the question of minorities; the BMVg had not initially planned on it but the eyewitness had been

71 Baum, “Rosa Armee Fraktion.”

72 BArch, BW 2/38358: BMVg, Press/Information Staff, 21 January 2000.

73 “‘Schwulenfeindliche Studie’ nicht von der Bundeswehr.” A copy is available in BArch, BW 1/582743.

74 *taz*, “correction,” 29 January 2000. A copy is available in BArch, BW 1/582743.

75 Letter from retired Parliamentary State Secretary Brigitte Schulte to the author, 2 June 2019.

76 Interview by telephone (anonymized), 13 May 2019.

77 Ibid.

able to convince the minister of the need for an additional session on the topic. As planned, the conversation was meant to invite homosexual soldiers, but the BMVg struck it – and with it the topic in general – from the ministerial conversation. Thus in early 1999 Scharping met with Muslim, Jewish and Russian–German soldiers; a Sikh had even been in attendance. To the interviewee's mind, no decision-maker at the BMVg had wanted to raise the thorny issue of homosexual soldiers in the minister's presence. "And this when from a purely statistical perspective, homosexuals far and away made up the largest group of minorities in the armed forces with a normal distribution of five to ten percent of the population, much larger than Muslims, Jews, Russian–Germans and [as of 1999] women combined."⁷⁸

The eyewitness, who worked directly within Scharping's sphere, recalled the minister himself as having "no fears about broaching the subject, but not seeing any urgent need to act either."⁷⁹ The "topic had bobbed along" at the ministry, "landing from time to time on the [minister's] desk in the form of ongoing proceedings, especially legal complaints." While homosexual soldiers presented a "serious topic in certain circles," those circles were "tightly constricted."⁸⁰ In obvious contrast to the soldiers who were themselves affected, the public at large did not view homosexuality as a decisive topic for the Bundeswehr. SPD member Brigitte Schulte, who entered the ministry with Scharping as a parliamentary state secretary, recalled that

the case of First Lieutenant Stecher must have been presented to him [Scharping] by State Secretary Dr. Wichert and the general who was still leading the personnel department after [Scharping] took office in 1998–99. They sought to obtain the most agreeable answer from the new minister, who had to familiarize himself with the enormous set of responsibilities involved in defense in a fast-track procedure. That was unfair and ill-advised!⁸¹

When she realized that a lieutenant was going to be dismissed because he was homosexual, Schulte's immediate reaction had been that "It was simply impossible! The time for that is truly past."⁸² "That's how we've always done it," had been State Secretary Wichert's response. Personnel matters fell under his purview. Schulte recalled she had been "left completely speechless that this was still going on in the Bundeswehr in the year 1999. I would have thought that the liberal coalition had cleared up the matter. It was something we [SPD defense politicians] should have

⁷⁸ Interview with Reserve Lieutenant Colonel Joachim Meier of Karlsruhe, 16 July 2018.

⁷⁹ Interview by telephone (anonymized), 13 May 2019.

⁸⁰ *Ibid.*

⁸¹ Letter from retired Parliamentary State Secretary Brigitte Schulte to the author, 2 June 2019.

⁸² Interview with retired Parliamentary State Secretary Brigitte Schulte, Wachtberg, 16 April 2019.

done better at earlier on.”⁸³ And still, Scharping let more than a year slip by before he began to consider revising the ministry’s position.

Close colleagues of the minister recalled that homosexuality had not been the “dominating topic” at the BMVg, “not by a long shot.” Nor had Scharping viewed it as a key topic; it “was not part of the priorities on his agenda when he arrived at the ministry.” They explained Scharping’s hesitation in terms of his conviction that things usually had to ripen until they were ready for decision. From that perspective the ongoing suits had “been quite helpful,” putting the BMVg under pressure to decide specifically whether to “clear up the matter or let the suits continue.”⁸⁴ Peter Wichert recalled something very similar. Minister Scharping himself had been quiet on the subject, thinking “Why change the regulations when there’s nothing to regulate?” Scharping and he (Wichert) had both had pursued the maxim “Let it be!” and sought to keep the practice of “tacit acceptance.” Yet “tacit acceptance” was no longer enough for those who were directly impacted, and who by now had a strong lobby in politics and the media, allowing them to build up “tremendous social pressure.”⁸⁵

A good year after taking office Scharping made a first approach on the subject of homosexuality, reminding colleagues during a council meeting on 22 December 1999 that he had been tasked with “developing a position on the subject of homosexuality for the armed forces and briefing on it.”⁸⁶ (The council, whose meeting was archived internally, was composed of the institution’s top members – the minister [abbreviated to BM from *Bundesminister* in the archives], the state secretaries and the chief of defense.⁸⁷) The minister insisted on an update by January 2000; he did not consider new internal studies or surveys necessary.⁸⁸

Military leadership responded with a call for a new empirical study about soldiers’ attitudes toward homosexuality. Presumably this was a play for time; soldiers learn the combat style of delay during tactical training, when one’s own forces either are not sufficient for linear defense or the opponent is too powerful. Evidently, the generals in Hardthöhe were now employing a similar tactic to hold up the show of political will.

⁸³ Ibid.

⁸⁴ Interview by telephone (anonymized), 13 May 2019.

⁸⁵ Interview with retired State Secretary Peter Wichert, Bad Münstereifel, 10 April 2019.

⁸⁶ BArch, BW 2/38358: BMVg, deputy chief of defense, notes from 23 December 1999 concerning the 22 December 1999 council session.

⁸⁷ BArch, BW 2/21537, no pagination: BMVg leadership council, April 1983.

⁸⁸ BArch, BW 2/38358: BMVg, deputy chief of defense, notes from 23 December 1999 concerning the 22 December 1999 council session.

Whether or not such a study and new survey of soldiers should be commissioned had been a perennial source of debate between BMVg sections in the late 1990s. Advocates for change were the first to issue demands for a new survey; the last empirical study had been conducted in 1992 and they expected data from the Bundeswehr to reflect greater tolerance in light of the societal changes that had since occurred. The chiefs of the joint staff and the individual service branches, meanwhile, dismissed a new survey as unnecessary to date, loathe as they were for an uncomfortable topic to come to the fore. In 1999 the staff department head at Füs I postponed a decision about the study until the Federal Constitutional Court had decided on First Lieutenant Stecher's case.⁸⁹ By January 2000, the tables had turned: Now it was the generals who were fighting for a new study, while the faction seeking change within institutional leadership no longer viewed it as necessary.

On 6 January 2000 Füs I 4 invited representatives from a total of ten branches of the service staffs, the personnel department and the legal department to a coordinating session in advance of a Chief of Staff Council (MFR) meeting fixed for 19 January.⁹⁰ "Homosexuality in the Armed Forces" was listed as the third point on the agenda, with the stated goal of reaching a "common state of knowledge" regarding homosexuals in roles of authority and determining whether there was room for maneuver in the current position. To come straight to the point, the answer was there was none; the army, air force and navy all stonewalled: "The [service branches'] adherence to the current position does not allow for a change in stance on homosexuality within the armed forces at present."⁹¹ A personnel section had briefly summarized the possibilities in advance of the coordinating session "without prejudice to the outcome": Sharpening restrictions would give "cause for legal concern" and was "impossible to implement politically."⁹² Lifting current restrictions depended on the "public agencies," i.e. the armed forces changing their position. There was no leeway for "practicable interim solutions," which meant it would have to be clarified with service branch representatives at the meeting whether their leadership wanted to "maintain or lift the restrictions." The "favorable jurisprudence from the courts" to date did not place the ministry under any pressure to stick to its practices. The personnel section also warned that if the

⁸⁹ BArch, BW 1/502107, no pagination: BMVg, PSZ III 1, 5 January 2000.

⁹⁰ The Military Command Council "served to formulate overall military demands and objectives." Chaired by the chief of defense, the council was made up of the three chiefs of the services and the surgeon general, along with the deputy chief of defense.

⁹¹ BArch, BW 2/38358: BMVg, Füs I 4 to the chief of defense, 14 January 2000. Also available as a draft in BArch, BW 1/502107.

⁹² BArch, BW 1/502107, no pagination: BMVg, PSZ III 1, 5 January 2000. Also available in BArch, BW 2/38358.

Federal Constitutional Court ruled the assignment policy unconstitutional, it would make it untenable to continue rejecting homosexual soldiers for career service.⁹³

A further comment from Section Füs I 1 in February 2000 conveys the ministry's awareness of the problem with remarkable clarity: "The Bundeswehr cannot prove homosexual soldiers' lack of fitness for assignment as direct superiors in the troops either generally or in individual cases. Rather, the point of departure for the position is the assumption that a like superior would be rejected by their subordinates and considerable segments of the population."⁹⁴ This led the section to draw clear conclusions: "A supreme court ruling against the Bundeswehr would force it to abandon its previous position. A ruling against assignment decisions would also take down our position on [not] accepting soldiers for career service."⁹⁵

Füs I 4 made an effort to garner support among the other sections and departments involved in the discussion to draw the necessary consequences, but it was not able to convince them. The coordinating session opened in typical fashion for military decision-making, with a situational report. The BMVg's stance was well-known to all: "not an illness, not a breach of service," but restrictions on assignment and status. "The position regarding homosexual superiors is based on anticipated problems with acceptance and as a result authority, touching on operational readiness."⁹⁶ This position was politically disputed, coming under "tremendous" criticism from deputies within Alliance 90/The Greens and the SPD (as well as the SPD working group on security policy), backed by the approval of Parliamentary State Secretary Schulte. "The federal minister's task must be seen against this backdrop; he wants a tenable position, i.e. one that the Bundeswehr also accepts." Using the diction typical of a military situational assessment, Füs I 4 saw "three possibilities for acting: Maintain current position until forced to change if necessary by court ruling; abandon current position; maintain current position while at the same time pursuing an informational and educational campaign in the direction of greater tolerance."⁹⁷

All those present shared the opinion that the cases involving First Lieutenant Stecher, First Lieutenant Schmid and another staff sergeant would cause a "considerable stir in public"; all three soldiers were in good standing.⁹⁸ "Their 'unsuit-

⁹³ Ibid.

⁹⁴ BArch, BW 2/38358: BMVg, Füs I 4 to the chief of defense, 24 February 2000.

⁹⁵ Ibid., BMVg, Füs I 4 to the chief of defense, 17 February 2000. In draft form from 20 January with slightly different wording.

⁹⁶ BArch, BW 2/38358: BMVg, Füs I 4, introductory statement on 6 January 2000.

⁹⁷ Ibid.

⁹⁸ BArch, BW 2/38358: BMVg, Füs I 4 to the chief of defense, 14 January 2000, in what follows as well. Also available in draft form in BArch, BW 1/502107.

ability' for assignment to leadership roles arose exclusively from an expectation of their potential rejection by subordinates and assumed limitations on operational readiness, for which, however, there is no proof in the specific cases." Speaking behind closed doors, they openly assessed the BMVg's chances of prevailing over Lieutenant Stecher before the Federal Constitutional Court as "doubtful." A decision from the high court would "in any event force the previous position to be abandoned." Those gathered also showed open self-criticism in their assessment that, in Stecher's case, a ruling against the BMVg would also bring an end to its stance on (not) accepting homosexual soldiers for career service.

While there was consensus regarding the situation at hand, no single proposal for a way out of the anticipated dilemma followed. Füs I 4 sought for one in vain, proposing a shift in the restrictive position from general exclusion to case-by-case inspection. "Non-assignment or transfer would then only occur in 'conspicuous cases' under the same criteria as with heterosexual soldiers."⁹⁹ The section had already introduced individual case decisions as a path forward in September 1994, in a letter to a staff surgeon who later successfully petitioned for acceptance into career service. Yet in practice nothing changed; due consideration of the circumstances at hand had even been explicitly rejected as a policy. The same was seen in January 2000:

The other sections pointed out that this essentially meant abandoning the current position. The representatives from the service branches were not ready to do so. The branches operate under the assumption that significant segments of society, as well as soldiers in the Bundeswehr, would reject a personal encounter with homosexuality [...] They argue specifically that the mere presence of a risk/supposition of a restriction on assignment or cause for worry justifies the current stance.¹⁰⁰

The assessment bordered on resignation as it continued: "The lack of fitness that the service branches assume cannot be substantiated, either generally or in specific instances."¹⁰¹ Society's increased acceptance of homosexuals, cited by advocates for changing the regulations, was "doubted by those responsible for operational readiness [the armed forces]." "The Minister's (implicit) wish for the armed forces to disengage from the current position cannot be reconciled with such a view." The armed forces would "potentially" be open to new regulation only if new studies

⁹⁹ Ibid.

¹⁰⁰ BArch, BW 1/502107, BMVg, Füs I 4, draft of the nearly identical presentation to the chief of defense on 14 January 2000 (the presentation is available in BArch, BW 2/38338).

¹⁰¹ BArch, BW 2/38358: BMVg, Füs I 4 to the chief of defense, 14 January 2000. Also cited in what follows; a draft is available in BArch, BW 1/502107, 688.

and surveys registered a change in soldiers' stance on the matter. The minister, however, did not view new studies or surveys as necessary, leading Füs I 4 to conclude in summary that "the [service branches'] adherence to the current position does not allow a change in stance on homosexuality within the armed forces at present." "The expected path through the courts will make a recurring problem of the topic, and places the armed forces under constant pressure to justify itself." The BMVg ran the risk of its position "holding no legal standing," and the Bundeswehr exposed itself to the "accusation of taking social developments into account only under tremendous pressure."¹⁰²

The true scope of the dilemma unfurled itself in a proposal from the office of the chief of defense that the MFR maintain its current position, leaving any changes in regulation to first come about "either as a consequence of investigative results [a study or survey], ministerial orders or a decision at the supreme court." The final version of the document also proposed that the chief of defense "conduct an empirical investigation into the acceptance of homosexual instructors/superiors."¹⁰³ As noted before, this was the idea that the military chiefs of staff finally struck upon in their fight to delay the matter. After the 6 January meeting, the head of Füs I 4 noted with resignation that the "[service branches'] position on homosexuality in my meeting was rock solid: Maintain current policy."¹⁰⁴

The notes prepared for the chief of defense in advance of the MFR meeting on 19 January still had to make the normal ministerial rounds for cosignature. One section in the personnel department suggested articulating more clearly that calls by Füs I 4 for case-by-case inspections did not constitute an "interim solution" but a "complete rejection of the current position."¹⁰⁵ The section in charge of key personnel issues at Army joint staff signed the document, albeit contingent on essential notes and revisions being taken into account. On the one hand, the Army questioned the pessimism regarding the BMVg's chances of success in the ongoing suit, as well as whether the results of a new study or survey would "necessarily lead to a readiness to change."¹⁰⁶ Most important, however, was the note to strike the Füs I 4's suggestions without any replacement, presumably in the unspoken hope that no suggestions would mean no changes. Section R II 2 also signed, thought it emphasized in doing so that in its view "a readiness to comply with the minister's orders

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ Ibid., BMVg, Füs I 4, 6 January 2000.

¹⁰⁵ BArch, BW 1/502107, no pagination: BMVg, PSZ III 1 to Füs I 4, 13 January 2000.

¹⁰⁶ Ibid., BMVg, Füh 1 to Füs I 4, 11 January 2000.

does not have to be mentioned. That is to be taken for granted. The same holds for the obligation to implement court rulings.”¹⁰⁷

At the Military Command Council meeting, the army, air force and navy chiefs all backed the chief of defense in his insistence on maintaining the current line. Change was possible only “if forced by court decision” or on orders from the minister.¹⁰⁸ Thus reinforced, Chief of Defense General Hans Peter von Kirchbach went into a council session on 24 January. Füs I 4 had given him an idea ahead of time of the positions he could expect from the other participants: Minister Scharping was aware of the armed forces’ stance but expected a “departure from [their] previous position”; the insistence of the chief of defense was not likely to meet Scharping’s expectations.¹⁰⁹ State Secretary Schulte was “vehemently opposed to the Bundeswehr position” and could potentially push for the military to rapidly abandon its current practices. State Secretary Kolbow, also of the SPD, was a supporter of the Bundeswehr’s position in his party, for whom “a matter of this sort could not be solved by going against the attitude within the armed forces.” Kolbow was under “heavy criticism” within his party. The permanent state secretary Peter Wichert supported the armed forces; the stance of the other participants was unknown to Füs I 4.¹¹⁰

In speaking with the author of this study, Wichert repeatedly stressed that the antipathy he, the chief of defense and the service branch chiefs had shown toward fully opening the armed forces to homosexuals had not been guided by homophobia but constantly out of concern for the troops. He had “never once met an chief of defense, service branch chief or general who struck him as homophobic.”¹¹¹ “Our, and my own concern,” Wichert recalled in retrospect, had been that if the position on homosexuality were changed, openly homosexual officers or NCOs might then draw attention through cases involving sexual harassment or assault. It would have brought significant damage to the Bundeswehr as an institution had this occurred, or even been linked to the armed forces’ acceptance of outwardly gay soldiers. It had been his and military leadership’s steady aim to “protect the institution of the Bundeswehr from harm in the event it came to incidents like that.”¹¹²

¹⁰⁷ Ibid., BMVg, R II 2 to Füs I 4 and others, undated.

¹⁰⁸ BArch, BW 2/38358: BMVg, Füs I 4, recommended language for MFR meeting on 19 January 2000, TOP 3.

¹⁰⁹ Ibid., BMVg, Füs I 4, speaking notes for the chief of defense for the council session on 24 January 2000.

¹¹⁰ Ibid.

¹¹¹ Interview with retired State Secretary Peter Wichert, Bad Münstereifel, 10 April 2019.

¹¹² Ibid.

While Scharping did not let the chiefs deter him from the changes he sought, the minister's well-known caution and sense of balance brought him to hesitate before a decision against armed forces' leadership, and he continued to search for a way to bring the generals on board and involve them. In this spirit he invited them to a retreat in late February 2000 with the sole set topic of "Assigning homosexual soldiers leadership, educational and instructional roles."¹¹³ Chief of Defense General von Kirchbach arrived at the retreat bearing the by-now familiar position of considering the "vote of the chiefs responsible for operational readiness in their service branch" to hold "weight." In the course of debate, he returned to the idea of commissioning an empirical study as a path out of the entrenched positions, "so that we no longer have to proceed based solely on assumptions."¹¹⁴ In this case, too, the written record tallies with the memories of those involved at the time. Former State Secretary Wichert recalled it simply as a matter of the respect Kirchbach held as the chief of defense for the official responsibilities each service branch chief bore toward their respective branch.¹¹⁵

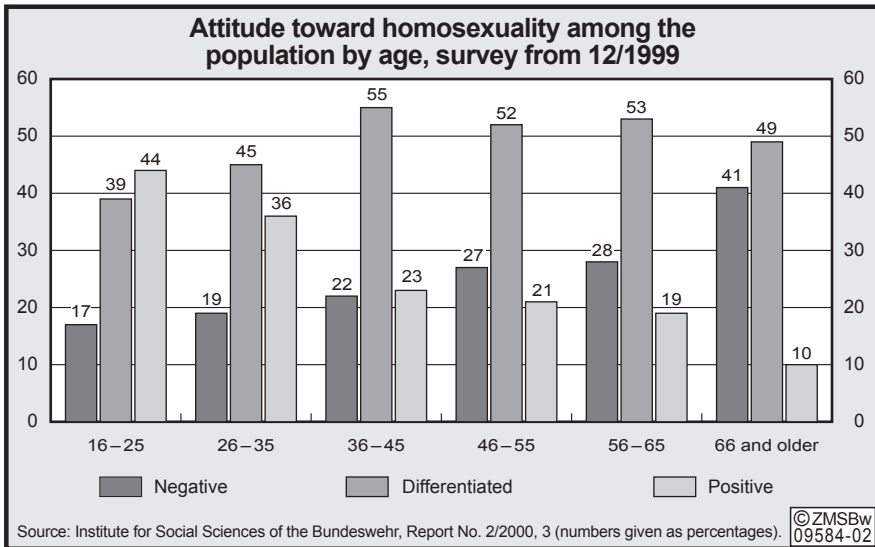
As the new millennium approached, back and forth the BMVg went about whether a new survey regarding soldiers' tolerance of homosexuality made sense or would be useful for the ministry's own position. While political leadership ultimately decided against it, the Bundeswehr Institute of Social Sciences proceeded to act in the meantime. It was not the soldiers who were asked their opinion, however, but the general population, within the context of the institute's annual general survey. In December 1999, researchers consulted around 2,700 people over the age of 16 as to their attitudes toward homosexuality in general, and homosexuality in the armed forces in particular. The numbers that came back showed an ideal distribution as might be found in a textbook: exactly one quarter showed a positive attitude, exactly one quarter had a negative attitude; the remaining half gave "differentiated" answers.¹¹⁶ These results hardly let the BMVg make out sensible arguments for deciding the matter at hand. The Bundeswehr sociologists had the foresight to ask for respondents' age, and the ministry itself was primarily interested in acceptance among younger people – the age-range containing those required to

¹¹³ BArch, BW 2/38358: BMVg, Füs I 4, speaking notes for the chief of defense for retreat with the federal minister of defense on 25 February 2000.

¹¹⁴ Ibid.

¹¹⁵ Interview with retired State Secretary Peter Wichert, Bad Münstereifel, 10 April 2019.

¹¹⁶ BArch, BW 2/38358: Bundeswehr Institute of Social Sciences (SOWI), Report No. 2/2000: "Einstellungsmuster gegenüber Homosexuellen in der deutschen Bevölkerung," March 2000, here p. 3. A copy is available in BW 1/502107, SOWI to BMVg, 3 July 2000.



perform military service and the pool of potential fixed-term soldiers. And it was in fact age that proved the decisive factor.¹¹⁷

Younger people, the key group for the Bundeswehr, showed unmistakably greater tolerance toward gays and lesbians, with acceptance predominating up to the age of forty-five. It was only within the age groups of forty-six and over that negative attitudes took over, increasing with age. Among sixteen to twenty-five-year-olds – young soldiers, conscripts and possible fixed-term soldiers from the Bundeswehr perspective – 44 percent registered a positive attitude toward gays and lesbians, with just 17 percent holding a negative opinion. Twenty-six to thirty-five-year-olds, making up the lion's share of active fixed-term and career soldiers, showed 36 percent holding a positive attitude of gays and lesbians and 19 percent negative. This was telling data for the decision the ministry was facing; the relevant groups for active service or as potential soldiers were clearly favorable toward homosexuals.

While it is important to recall that it was not soldiers who were being surveyed in this case but the general population, the numbers still provided ample firepower at the time for those calling on the Bundeswehr to perform an about-face. Faced with the data now in 2000, their arguments lay more clearly on the table than ever before. The Bundeswehr presented itself as a mirror to society; the armed forces were recruited from the population. And the age groups that were relevant to the

¹¹⁷ Ibid., 6.

armed forces showed an undeniable trend toward tolerance of gays and lesbians. The SOWI researchers drew equally clear conclusions from the results. One quarter of survey participants showed a “markedly positive attitude” toward homosexuals and favored equality, viewing homosexual soldiers as an “expression of normalcy” and disapproving of professional obstacles. The tolerance on display within this group was “unstable in parts, but could be stabilized by political decisions that lead toward opening social institutions reserved for heterosexuals, such as marriage.”¹¹⁸

At the other end of the spectrum stood a quarter of the population that clearly disapproved of homosexuality. A “personal, even physical distaste” came through in answers to the many further questions, only some of which can be reproduced here. The distaste manifested itself in strong positive reactions to statements like “Homosexuals make me uncomfortable,” “Homosexuals are not fit for military leadership” or “I cannot imagine working alongside a homosexual.” Less marked but still significant was the approval that this quarter of respondents showed for the statement “Homosexual soldiers damage the reputation of the Bundeswehr.”¹¹⁹ The “deep distaste” that nearly 25 percent of people felt fed on “fears about the potential erosion of traditional social structures that provide security if ‘abnormality’ were promoted.”¹²⁰ In SOWI’s analysis, “this group believed homosexuals should not take on military leadership roles under any circumstances. [Homosexuals] serving in the Bundeswehr is generally viewed critically, and it is assumed that their presence in the armed forces damages the reputation of the Bundeswehr.”¹²¹

It bears repeating that the age of the respondents in the groups where these opinions prevailed ultimately made them irrelevant for the inner workings of the armed forces. That was not the case with younger survey participants, a majority of whom affirmed statements like “It does not matter to me whether somebody is homosexual,” “I can imagine working alongside homosexuals” or “Homosexuals should have the same career opportunities in the Bundeswehr.” The statement “Homosexual soldiers damage the reputation of the Bundeswehr” met with clear rejection.¹²² With age left out of the question, a total of 54 percent of participants considered homosexuals holding leadership roles to be “problematic.”

At the same time, a 57 percent majority of respondents opposed “obstructing the career” of homosexual soldiers. The pattern of response was “doubtless inconsistent” as SOWI rightly observed, especially among those who “did not want to

¹¹⁸ Ibid., 15.

¹¹⁹ Ibid., 3–4.

¹²⁰ Ibid., 15.

¹²¹ Ibid., 5.

¹²² Ibid., 3.

see homosexuals' careers blocked while still rejecting them for positions of leadership."¹²³ When it came to homosexuality and the Bundeswehr, aspects and opinions came together "that were in part diametrically opposed." In this case the Bundeswehr found itself in no-man's land, caught between fronts; it was "one of the culminating points where traditional institutions came up against alternative living styles."¹²⁴ The number of those showing tolerance, or the "positively inclined" would rise in the future as "adherence to traditional values linked to age" weakened and was "overtaken" by generations whose attitude toward gays and lesbians ranged from indifferent to positive. The moment for the armed forces to act was "already here"; they could either "wait to repeal restrictions on giving homosexuals [military] assignments until other social institutions like marriage and child-rearing opened to homosexuals" or it could lift them now, thereby "demonstrating that the Bundeswehr assesses an individual based on his accomplishments and not against the backdrop to his life." In the first scenario, the future shift in public opinion would force the Bundeswehr to act; the second would allow the Bundeswehr to mitigate the "image of [itself as] an instance of conservative socialization" and "prove that it could come to terms with societal change."¹²⁵ In their choice of phrasing and analysis of the survey data, the SOWI researchers left a clear recommendation for the latter option.

By January 2000 the initial results of the SOWI study lay on the minister's desk; 53.2 percent of survey participants regarded homosexuals as (tending to be) unfit for military leadership, 44.7 percent tended to disagree.¹²⁶ That June, Section Füs I 4 presented the complete survey results to the minister along with two conclusions: First, conscripts' age meant they could be assumed to be relatively tolerant toward homosexuals, although the share of conscripts with a "conservative opinion" and "less education" "may be above average" "due to the realities of conscientious objection."¹²⁷ This led Füs I 4 to conclude that tolerance was "likely to be lower than average for the age group." It could be assumed for officers and longer serving NCOs, on the other hand, that "they would disapprove more strongly than conscripts of homosexuals" due to their seniority and "overwhelming conservative values." "Issues in accepting homosexuals [might] grow virulent" with the shift Scharping announced in the BMVg's position. All this brought Füs I 4 to repeat its recommendation that a survey on attitudes toward homosexuals be conducted spe-

¹²³ Ibid., 11.

¹²⁴ Ibid., 15.

¹²⁵ Ibid., 15–16.

¹²⁶ BArch, BW 2/38358: BMVg, Füs I 4, 20 January 2000, emended by hand to 15 February 2000.

¹²⁷ Ibid., BMVg, Füs I 4 to the defense minister, 9 June 2000.

cifically within the armed forces. “Such an investigation ought to be independent and anonymous, and carried out with the utmost discretion and care.”¹²⁸

There was no question that the survey proposed by military branch leadership and the chiefs of services was being set up against the clearly articulated will within political leadership at the ministry. It represented a last-minute attempt by military leadership to put the brakes on the minister’s impending decision. State Secretary Schulte spotted the intention, noting “This cannot be real!!” on the FÜS I 4 document. Scharping evidently saw things similarly, writing “Internal armed forces investigation *not* required!”¹²⁹

There was no need for a study, then, in the eyes of BMVg political leadership. Yet it may have been more decisive still that by the summer of 2000, it was already too late – in late March, the minister had already decided (or been forced to decide). For all the while the clock had been ticking, specifically at the Federal Constitutional Court, which was expecting an answer from the federal government by the end of March when its extended deadline came up. Scharping found himself in a corner. Forced to decide, he took the political decision to reach an agreement with Lieutenant Stecher and thus initiate a general shift in the armed forces’ position on homosexuality. The decision was thoroughly discussed in the “knitting circle,” as Brigitte Schulte dubbed it twenty years later (the “knitting circle” was the inner circle of political leadership, the minister and the four state secretaries).¹³⁰

5. “The Dam Has Broken!”

To announce the change in course, Scharping selected the most important forum available to a German politician: a full session of the Bundestag. With it, the minister surprised everyone – his party, the opposition and the media alike. The generals in Hardthöhe may have been especially startled; there are no signs of the minister informing military leadership of his decision ahead of time.

Scharping began his speech before the Bundestag deputies with words perfectly suited to his cautious, diplomatic character. It was, he said, an “*imperative of wise leadership* to make a view one holds to be correct, bearable, palatable and understandable in reasonable fashion.” It had become necessary to take account of what in his view were “outdated prejudices or reservations.” One could not “just

¹²⁸ Ibid.

¹²⁹ BArch, 2/38358, handwritten note with the initials BS [Brigitte Schulte] on the document BMVg, FÜS I 4, 9 June 2000 (original emphasis).

¹³⁰ Interview with retired State Secretary Brigitte Schulte, Wachtberg, 16 April 2019.

simply decree” a change in course; tolerance had to be “made possible to understand, develop and [...] learn.”¹³¹

As you are aware, to date *same-sex orientation among members of the Bundeswehr* has led to conclusions regarding their fitness and qualifications in the role of instructors and leaders. It would at most be correct to draw conclusions based on how a person pursues their sexual orientation – be it heterosexual or homosexual – but not the orientation itself.¹³²

There had not been a single case during his tenure as minister, Scharping continued, in which a soldier’s sexual orientation had led to conclusions automatically being drawn. (The transcript registers a “Shout from the SPD: Very good!”) The cases that had sparked public debate had originated in the time of his predecessor in office. Scharping’s self-defense checked out; Lieutenant Stecher had been dismissed as platoon commander in April 1998; another suit filed by a first sergeant after he was rejected for career service dated back to 1997; and First Lieutenant Schmid had been dismissed as a platoon commander in 1996, when he also had a firm offer of acceptance into career service retracted. Still, it was under Scharping’s command that midway through 1999 the ministry appealed Lüneberg Administrative Court’s ruling in favor of the first sergeant, a contradiction subsequently pointed out by Deputy Christina Schenk (PDS) in a minor inquiry.¹³³ Parliamentary State Secretary Kolbow replied that the federal government did not share her view; the case in Lüneberg had “unquestionably come about in the time of his predecessor in office.”¹³⁴ Kolbow’s was a characteristic response to an opposition query: wrong neither in form or content, but circumventing the question. It was true after all that the BMVg had appealed the decision under Scharping’s aegis.

Deputy Günther Nolting of the FDP asked the minister whether it would be “better to reach a *political decision* here in the Bundestag [...] and to do so now?” Scharping replied that the deputy was “somewhat impatient.” Nolting persisted, contending that “we should not constantly let ourselves be driven around by the courts” as had been the case with the ECJ decision about opening the armed forces for women.¹³⁵ Before the full Bundestag, Scharping announced he would seek to

¹³¹ German Bundestag, 14th legislative period, typed transcript of the 95th Session on 23 March 2000, plenary transcript 14/95, 8844–45 (original emphasis).

¹³² Ibid. (original emphasis).

¹³³ BACh, BW 2/38358; Deputy Christina Schenk, inquiry to the federal government, 27 March 2000.

¹³⁴ German Bundestag, Document 14/3275, response from Parliamentary State Secretary Kolbow. A copy is available in BACh, BW 2/38358.

¹³⁵ German Bundestag, 14th legislative period, typed transcript of the 95th Session on 23 March 2000, plenary transcript 14/95, 8845 (original emphasis).

“settle the present case [First Lieutenant Stecher] *without dispute*.” “I’m certain I’ll achieve that.”¹³⁶ Looking beyond the case at hand, he further stated his intention to “give orders for a code of conduct that rules out any automatic procedures based on the mere fact of sexual orientation, and sanctions any form of discrimination due to sexual orientation.”¹³⁷ The minister elaborated:

We have to stop drawing conclusions based on the mere fact of sexual orientation. I’ll say it again: Whether it is a man harassing a woman, a man with a same-sex orientation harassing another man, or a woman with a same-sex orientation harassing another woman, it is the same behavior that must be reproved, and from which conclusions in the specific case can, and when in doubt must, be drawn regarding fitness or qualification.¹³⁸

As the Minister of Defense, Scharping would “come to a comprehensive, well-considered, calm and logical decision so that as many people as possible can enter the armed forces and nobody has to feel pushed aside or tricked.” This too he considered “leadership development and civic education, and an aspect of smart political caretaking.”¹³⁹

“Victory on all fronts,” ran the euphoric headline in Berlin’s *taz* in response to Scharping’s announcement.¹⁴⁰ The editors did not forget to point out who the plaintiff had to thank for his victory, however – the European Court (“of Human Rights,” it would be correct to add here).

The following morning, the minister’s office head forwarded the text of the late-afternoon speech Scharping had delivered before the Bundestag to the joint chiefs of staff. The text was then passed along to the chief of defense, the chiefs of the services, and the Surgeon General of the Bundeswehr along with the announcement that on 27 March 2000 the minister would address “the topic of homosexuality in the armed forces” in council with the chiefs.¹⁴¹ The deadline Karlsruhe had imposed was set to expire three days after the scheduled meeting; on its own, the minister’s announcement did not change things at first for the court.

The council convened on 27 March. One participant (who wished to remain unnamed) recalled that the prospect of Lieutenant Stecher’s stated intention to appeal to the ECHR had loomed over the meeting; Scharping himself described the

¹³⁶ Ibid. (original emphasis).

¹³⁷ Ibid. The protocol records applause from the SPD and Alliance 90/The Greens as well as FDP deputies.

¹³⁸ Ibid., 1845–46.

¹³⁹ Ibid., 1846.

¹⁴⁰ Feddersen, “Sieg auf ganzer Linie.”

¹⁴¹ BArch, BW 24/37667: Internal BMVg emails from 24 March 2000.

“risk of litigation [as] very high.” “How,” the minister asked those gathered, “can we appease the man?” State Secretary Wichert’s response came just as succinctly: By reassigning the lieutenant to his former post as platoon commander. The anonymous participant recalled that the three chiefs of the services and state secretary all spoke out against this option, however, instead making a case to maintain the current line. The council and minister reached an agreement to await the outcome of the legal proceedings in Karlsruhe and Strasbourg as necessary, and thus accept defeat (albeit tacitly) before both courts. Then, however, “quickly and without further consulting the three chiefs of the services,” Scharping had acted on his own initiative and made the u-turn.

A written note confirms the eyewitness recollection; First Lieutenant Stecher should be “appeased by an offer. Since he wants to become an instructor again, ‘the dam’ has broken!”¹⁴² Now everything came very quickly. That same day, 27 March, Scharping instructed State Secretary Wichert via his office manager to coordinate with the Bundeswehr personnel office and come up with a solution for the first lieutenant.¹⁴³ They were to do so moreover without involving the chief of the air force or leadership, as a high-ranking officer in Air Force Command at the time noted in 2018, still with a discernible lack of understanding. A proposal lay on the table the very next day. Once the lieutenant completed his ongoing training in summer 2000 he would be given command of a platoon in his old squadron, though not his original platoon, as the post was already occupied. Since the two posts were “absolutely equal in value,” the “measure” would “take care of” the current lawsuit in Karlsruhe, removing the cause for complaint. There was still the off-chance, however, that the Federal Constitutional Court would rule on the main proceedings if “cases of fundamental importance” had to be clarified or the “breach of constitutional rights [appeared] particularly grievous.” This meant that the plaintiff and his lawyer had to be persuaded at all costs to withdraw the constitutional complaint, which would retroactively eliminate the “legally pending” nature of the constitutional complaint and was binding for the court.

The comment reveals once again the level of worry at the BMVg about a potential defeat in Karlsruhe even after it came to an agreement with the first lieutenant (or the “most awkward of malcontents,” as the magazine *Gigi* described Stecher).¹⁴⁴ Wichert recalled that he had not feared a possible loss at Karlsruhe or Strasbourg as a state secretary at the time but wanted to “let it depend.” Even if the courts did rule against the ministry, their written opinions would have provided the BMVg

142 BArch, BW 2/38358. BMVg, handwritten note for Füs I 4, 27 March 2000.

143 Ibid., BMVg, PSZ III 1, 28 March 2000. Also in what follows.

144 Heilmann, “Helm ab zum Sex!”

with a basis for new regulations. Scharping was a politician, however, and the politicians wanted to avoid defeat in Karlsruhe or Strasbourg if at all possible, not least out of concern about negative headlines in the press.¹⁴⁵ A note from 11 April 2000 confirms an agreement with the officer.¹⁴⁶ This meant there was never a decision from the supreme court, although it is still generally portrayed that way in the media today.¹⁴⁷

It is worth noting that even after reaching an agreement with the service and returning to his old post, Stecher gave up on his ambition of entering career service. The years-long dispute had left behind scorched earth, and the armed forces lost a highly talented officer. What remains to be said? It was the lieutenant's lawsuit and the work of his exceptional lawyer, Maria Sabine Augstein, that forced the BMVg to perform an about-face. This represents Winfried Stecher's great and enduring legacy; not the first, but certainly the best-known known case of a homosexual officer petitioning for his rights. Those who know the man, his military career and his attitude toward a soldier's life will know Stecher would have gladly spared himself the fame and continued to serve in the air force with daring and courage, if without drawing attention to himself. Yet personnel leadership and the ministry, its legal staff and administrative judges stood opposed.

It now remained for the two other suits still pending before administrative courts to be settled in a comparable way. Section PSZ III 6, the office in charge of the affair at the BMVg, rated the trial prospects in both cases as "extremely poor, and will worsen further still in the case of the first lieutenant in the reserve if PSZ III 6 does not immediately enter into extrajudicial negotiations with the aim of conciliation/settlement."¹⁴⁸ There was a risk of demands for compensation and press reports "to public effect." While the settled suit pertained to an assignment decision and not, as with the other two suits, to a decision on status, the BMVg had applied the same argument in every case: "Lack of fitness due to homosexual tendencies." Following Scharping's decision it was no longer possible to use a lack of fitness blocking acceptance as a career soldier as the working premise. Ministry documents reveal that the signature of the joint chiefs of staff was not sought in deciding on the other two cases as was customary, i.e. they were not involved.

¹⁴⁵ Interview with retired State Secretary Peter Wichert, Bad Münstereifel, 10 April 2019.

¹⁴⁶ BArch, BW 2/38358: BMVg, Füs I 4, 11 April 2000.

¹⁴⁷ For example: "In 2000 an officer filed suit before the Federal Constitutional Court against his discrimination. The supreme German judges ruled in his favor." Friederichs, "Homosexualität als militärischer Makel."

¹⁴⁸ BArch, BW 2/38358: BMVg, PSZ III 6, 12 April 2000. Also in what follows.

In early May 2000 personnel advised leadership to settle the lawsuits amicably and avoid a decision in court.¹⁴⁹ That July, the first sergeant from Münster was reinstated as a career soldier, and later accepted into the career track of a specialist officer; he has since gone on to become a staff captain.¹⁵⁰

First Lieutenant Schmid, whose suit lay before Berlin Administrative Court, was also offered a career post in the military;¹⁵¹ personnel leadership set the process in motion immediately following on the BMVg's "change in heart" toward homosexuals. Schmid was given a spot, quite belatedly, in the staff officer training course at the Bundeswehr Command and Staff College.¹⁵² Yet Schmid did not enter career service either, turning the offer down at the last moment during a ceremony in the office of his commanding officer.

I was supposed to receive my letter of acceptance for career service on Friday morning, practically one day before the course began. I had been ordered to report to the head of Berlin command, my battalion commander was present. But in the moment I refused to accept. Even before the surprising turn of events, I had already come to terms with the fact that I no longer had any real chances at a career and started to look elsewhere. During the (brief) preparations for the staff officers' training course, it became quite clear to me that I would not experience fair treatment "as the first of my kind," there would always be exaggerations in one direction or the other. And somehow I was already over it. What mattered to me was to use the unique position of my case to finally do away all the established practices, connected with the hope of finally scoring a breakthrough.¹⁵³

It was self-evident to the offices involved in the matter at Hardthöhe that the three precedent cases would hold a "normative function for subsequent cases."¹⁵⁴ The same ministry orders from March 1984 prescribing different treatment for homosexual and heterosexual soldiers was still in effect, though the policy unit for military personnel noted that their continued existence should not be made public knowledge. Rather, their abolition was necessary. That did not make new ministry orders necessary from the section leader's point of view, however, as they would (now) constitute "an undesirable form of unequal treatment."¹⁵⁵ Going forward,

149 BArch, BW 2/38358: BMVg, PSZ III 1, 15 May 2000, with a reference to a decision template from PSZ III 6 from 2 May 2000.

150 BArch, BW 1/503302: BMVg, PSZ I 8, 20 June 2002.

151 Ibid.

152 Email from Erich Schmid to the author, 15 November 2018.

153 Ibid. Erich Schmid added the final sentence later.

154 BArch, BW 2/38358: BMVg, Füs I 4, 11 April 2000.

155 Ibid., BMVg, PSZ III 1, 17 May 2000, signed by Colonel Ohm, as well as an eyewitness interview with Ret. Colonel Dieter Ohm, Meckenheim, 17 April 2019.

“separate consideration of homosexual soldiers” so as to develop “case-by-case perspectives on suitability” could not be reconciled with Scharping’s statements before the Bundestag. The minister had willed that in the future homosexuality would “no longer be specially regarded as a criteria for suitability.”¹⁵⁶

The next time the top leadership circle at Hardthöhe convened on 4 July 2000, Scharping had set homosexuality as the top agenda item, ahead of problems with field post delivery abroad, improving fueling aircraft and security in the Caspian region.¹⁵⁷ The council meeting resulted in the note “BM-decision: 1.) No SOWI study 2.) Prepare a code of conduct.”¹⁵⁸

The dice had finally been cast, the minister had decided. On 3 July 2000, the day before the council meeting, the BMVg repealed the old decree issued by P II 1 on 13 March 1984. As revolutionary as it was for those it affected, the paper was composed only of two tight-lipped sentences. Beneath the subject heading “Personnel management of homosexual soldiers” stood the phrase “Homosexuality is not grounds for restrictions with regards to assignment or employment status, and as such does not represent a suitability criteria requiring separate examination.”¹⁵⁹ The paper was drawn up and signed by Colonel Dieter Ohm, head of the section PSZ III 1 responsible for policy matters.

On 1 July 2000 Chief of Defense General Hans Peter von Kirchbach made his departure. Regarding the timing, it seems obvious at least not to rule out a connection to Scharping’s shift on homosexuality. Yet even if von Kirchbach’s retirement did fall exactly in the same period as Scharping’s change in course, multiple eyewitness recalled the two events as not having any causal connection. Other weighty differences between the Bundeswehr’s top soldier and the minister underlay the general’s retirement.¹⁶⁰

So what did dictate the BMVg’s change in position? The timeframe clearly suggests First Lieutenant Stecher’s suit before constitutional court as a deciding factor. Internal papers leave no doubt as to the pressure the federal government was under from Karlsruhe, a pressure that only increased with the deadline Court Pres-

¹⁵⁶ BAarch, BW 2/38358: PSZ III 1, 17 May 2000, signed by Colonel Ohm.

¹⁵⁷ Ibid., BMVg, Office of State Secretary Biederbick, 29 June 2000, daily council agenda on 4 July 2000.

¹⁵⁸ Ibid., written note from 4 July 2000 from BMVg, FÜS I 4 to the chief of defense, 30 June 2000.

¹⁵⁹ BMVg, PSZ III 1, 3 July 2000, as well as an interview with retired Colonel Dieter Ohm, Meckenheim, 17 April 2019. Copy is in possession of the author.

¹⁶⁰ Among others, this was Peter Wichert’s firm belief in an interview with the author (Bad Münstereifel, 10 April 2019). Kirchbach’s release was known about by 24 May 2000. “Tensions between Scharping and Kirchbach had been reported for weeks.” See *Der Spiegel*, “Scharping entlässt Generalinspekteur Kirchbach”; Leersch, “Scharpings falsches Spiel.”

ident Jutta Limbach set for answering the questions. When Federal Minister of the Interior Otto Schily and Justice Minister Herta Däubler-Gmelin refused to cosign the BMVg's draft response, insisting as it did on the ministry's well-trodden position, Scharping was forced to convince his cabinet members of the defense ministry's stance – that, or bring about change in his own institution. Time ran out at the end of March 2000. This meant it was likely no coincidence that Scharping made his surprise announcement on 23 March, before coming to a last-minute agreement with Lieutenant Stecher. While the decision initially pertained to an individual case, it had a signaling effect.

A number of leading politicians, civil servants and officers involved in the March 2000 decision, by contrast, did not view the pending constitutional complaint as a make-or-break scenario. On its own, Stecher's case would have been unlikely to bring about any fundamental changes in the BMVg's attitude toward homosexuals; the ministry could have reached an individual agreement with the plaintiff if necessary without redirecting the general course of ship, operating under the motto "That's how we've always done it."¹⁶¹ Weighing more heavily for those interviewed was the European Court of Justice's ruling from January 2000, which had mandated that the Bundeswehr fully open to women. Present-day Navy Commander Alexander Schüttpeitz put it succinctly in an interview for a book from 2014: "Strictly speaking we have four British soldiers, one German woman and the European courts to thank for the sudden improvement in the legal standing of homosexual soldiers in the Bundeswehr at the dawn of the new decade."¹⁶² Another staff officer in active service, Torsten Rissmann, took a similar view in retrospect, commenting aptly in 2010 on the change from ten years' previous:

all of a sudden everything went very quickly, the Bundeswehr was out in front of society. Even without any sort of European anti-discrimination regulations being put in place or implemented at the national level, the Bundeswehr reacted to changes in society. One reason in part was certainly every [military] career group and assignment opening to women soldiers.¹⁶³

Rissman's reference to women gaining access to the full range of military career tracks is crucial in understanding the BMVg's shift. A fact nearly forgotten today, in 2000 both the public and the military were much more preoccupied with the question of women in the military than how homosexual soldiers were treated.

¹⁶¹ For example, interview with Ret. Colonel Dieter Ohm of Meckenheim, 17 April 2019.

¹⁶² Schadendorf, *Der Regenbogen-Faktor*, 69–70.

¹⁶³ "Obama: Bald 'Ask and Tell'?"

The Bundeswehr first began to admit women in 1975, adopting previously trained female doctors and pharmacists into its ranks. Starting in 1989 young women were able to apply for the career of officer in the medical corps without restriction, and after 1991 permitted to join as volunteer NCOs and enlisted soldiers in the medical corps, as well to serve in the music corps and soldier-athletes.¹⁶⁴ Yet outside of these three specialized and smaller fields, women remained excluded from every other branch of troop category and assignment. When a woman applied and was rejected for service as a fixed-term soldier, she filed suit at Hannover Administrative Court, claiming her right to equal professional treatment had been violated under EU law. The court referred the case to the European Court of Justice in Luxembourg for review. In January 2000, the court found the Federal Republic of Germany in breach of the provisions of the European equal treatment directive. In the wake of their defeat in Luxembourg, the BMVg and German lawmakers had been forced to create legal and organizational parameters for female volunteers within every arena of the armed forces. Many of the decision-makers from 2000 interviewed by the author for this study confirmed that the armed forces' approach to women serving in the future had been the key matter. It, not the question of homosexual soldiers' treatment, had occupied the center of attention,¹⁶⁵ demanding the creation of legal and internal regulations to fully open the armed forces to women volunteers.

The Bundestag voted in favor of the necessary legislative packet in June 2000; that December Article 12a of the Basic Law was emended. On 2 January 2001 the first 244 women entered voluntary service as NCOs and enlisted soldiers, followed on 2 July 2001 by the first female officer cadets outside the medical corps and music corps. Women have been able to serve in every troop category and assignment since then; by May 2005 the percentage of women in uniform had risen to 5.4% (16,830 female soldiers in absolute numbers) and as of 2020 the share was 12.55%.¹⁶⁶

The farsighted had immediately read the ECJ ruling as a signpost indicating the future of homosexual soldiers: "While it may largely have gotten lost or overshadowed in the initial reactions to the Luxembourg ruling, homosexual soldiers also spoke up, demanding an end to their discrimination."¹⁶⁷

As one staff officer serving at the time at the Center for Leadership Development and Civic Education told the author, the ECJ ruling made the Bundeswehr's policy toward gays and lesbians "a complete absurdity." It was a "crying injustice"

164 Biesold, "Der Umgang mit Sexualität in der Bundeswehr," 6–7.

165 Among others, interview with Ret. General Harald Kujat, Neuruppin, 30 January 2019.

166 Biesold, "Der Umgang mit Sexualität in der Bundeswehr," 7.

167 Kümmel, Klein and Lohmann, "Zwischen Differenz und Gleichheit," 76.

if women were now allowed to volunteer and make a career in the service without having to perform military service, while gays still had to perform basic service but were blocked from any career. It left the latter “good enough to serve at the bottom, but unfit for anything higher up.”¹⁶⁸ At the time, the eyewitness had assessed the Bundeswehr’s position as one “of maximum discrimination.” It had been clear to him that the Bundeswehr would “now quickly have to open itself up to homosexuals, and could not wait for Karlsruhe or Strasbourg to force the issue.” The armed forces should show its own soldiers and the public that it had the “courage to change of its own accord.” The major himself at least had the courage to share his conviction “loudly and audibly,” though his initiative had run up against a “solid wall of rejection” at the Center for Leadership Development and Civic Education and the BMVg alike. “Everything was rejected regardless of how good the arguments were – there was not even a response.” From his point of view in Koblenz, the Bundeswehr and its political leadership had lost all credibility where homosexuality was concerned, “not simply as an institution but each individual politician, jurist, civil servant, general and officer who for years, for decades, had kept silent about their comrades’ discrimination. None of them did anything, they kept silent and looked the other way.” At his center he had at least managed to create the first seminar on minority treatment in the Bundeswehr, giving homosexual soldiers a chance to have their say. Lesbians seem never to have come up as a topic.

Looking back on his time as section head for policy issues in the personnel department, a now retired colonel also saw the ECJ’s ruling on women in the military as decisive:

With the [Bundeswehr] opening to women, [there were also] good arguments for fundamentally changing how homosexuals were treated [...] When the Bundeswehr opened to women, the question of sexuality in the armed forces came up again [...] the topic of homosexuality now had to be reevaluated from the [new] standpoint. Those opposed to opening to homosexuals thus ran out of their previous arguments [...] it was all so simple and logical that nobody at the BMVg could escape it, in fact.¹⁶⁹

An employee in the minister’s immediate circle, on the other hand, remembered Lieutenant Stecher’s pending suit as providing the sole focus.¹⁷⁰ Otherwise, the witness (who wished to go unnamed) confirmed the impression written sources give, that the agreements reached with the plaintiff soldiers and the fundamental

168 Interview with Ret. Lieutenant Colonel Joachim Meier, Karlsruhe, 16 July 2018. Meier’s views are given in further quotes below.

169 Interview with Ret. Colonel Dieter Ohm, Meckenheim, 17 April 2019.

170 Interview by phone (anonymous), 13 May 2019.

shifts within the BMVg that followed in tow had not “gone uncontested, not by a long shot.”

The three chiefs of the services and the chief of defense had all clearly made their objections known to the minister. What use could cosignature from the service branches bring still if the chiefs had already voiced their reservations to the minister? Nor could the armed forces be expected to simply follow the minister on the matter without any protest after representing a different stance for decades and up to the last minute. It would have come across as opportunistic had they done an about-face overnight.¹⁷¹

Yet neither the consent of the chiefs nor that of the ministerial “apparatus” was necessary to begin with. Instead, Scharping made a political decision, then implemented it at the ministry level and the Bundeswehr as a whole. The much-cited “primacy of politics” in Germany meant that as the one holding the power of command, Scharping was not dependent on approval from the generals or the “institution.” “There was no change in position at the BMVg. The BMVg apparatus and military leadership stuck to their position and Rudolf Scharping enacted his decision politically.”¹⁷²

This raises still other questions, why for example did not Scharping assert the primacy of politics earlier and more quickly? Why did not he act after moving into the minister’s office in fall of 1998? Why wait a year and a half, thereby bolstering the impression of an indecisive and irresolute politician? Yet it also raises questions as to the BMVg’s decision-making process in 1999 and 2000. Every high-ranking employee within Scharping’s orbit interviewed for this study, all the generals and officers asserted that during those two years, homosexuality had not been at the center of the ministry’s focus. The thoughts and actions of the minister, those of the state secretaries and the apparatus itself had been taken up by other, more pressing concerns – for example, to name but a few, the ongoing deployments to Bosnia and Macedonia, the Kosovo crisis, and especially the bombing of Yugoslavia from February to June 1999 and the following Kosovo Force mission in Kosovo.

And yet: Scharping’s display of hesitation and reticence before military leadership did not leave a good impression where the primacy of politics was concerned. It was also a case of a weak minister demonstrating a lack of leadership on the matter for too long. Scharping preferred exposing himself and his party to the accusation of broken campaign promises over letting things deteriorate with the generals. The weakness, even lack, of political leadership did not simply exacerbate the issue, it “frightened” many an observer and citizen. One Munich man found

171 Ibid.

172 Ibid.

unequivocal words in October 1999. Mr. S. drew on a radio interview with State Secretary Brigitte Schulte in which she painted a general picture of Scharping as desiring change but being slowed by the joint chiefs of staff. The man reported Schulte as saying: "A minister cannot simply disregard it if commanding officers take this sort of stance."¹⁷³ Scharping was "more liberal in his positions" Schulte had said in the interview, and a possible court clarification of the matter "was not the worst thing."¹⁷⁴ S. was horrified. "It is not for the joint chiefs of staff to decide on political issues but lawmakers and the elected government." It gave "cause for concern" if "the supreme commander of the armed forces was neither able nor willing to push his ideas through in such a hierarchical organization." So long as the military "is supposed to be led politically as the constitution provides, the minister cannot let himself be told what to do by those he is supposed to lead."¹⁷⁵

Even with a good twenty years' hindsight one could not formulate it anymore clearly. Incidentally, when the state secretary received the ministry's draft response to Karlsruhe representing the familiar line of the BMVg to date, she dismissed it with an emphatic line drawn across the page, accompanied by the remark "no – not like this!"¹⁷⁶ Instead, beneath the new version of the response composed on her behalf, Schulte added in writing that she would "fight resolutely against any form of discrimination of homosexuals, you can count on that."¹⁷⁷

Still, it was not the growing pressure from the media and public, or even the outrage from the governing SPD and Green parties that was ultimately able to change the position of the BMVg and Minister Scharping. It was only under the pressure of European court rulings and the anticipation of similar decisions in Karlsruhe that Scharping, against the bitter resistance of the military leadership, changed course and steered the ship in the opposite direction. In reaching an out-of-court settlement, Bundeswehr jurists succeeded at the last minute in preventing the BMVg's previous practices from being classified as unconstitutional. Lieutenant Stecher's settlement turning into a policy decision, "a breach in the dam," likely had to do with the fact that two further lawsuits were pending. Had BMVg jurists insisted on the old line, loss in court was practically a foregone conclusion, at least by Karlsruhe. The prospect of further defeat on the horizon made it impossible to

173 BArch, BW 2/38357, Letter from Mr. S. to the BMVg, Parliamentary State Secretary Brigitte Schulte, 5 October 1999.

174 Ibid.

175 Ibid.

176 BArch, BW 2/38357: BMVg, FÜS I 4, draft response from 3 November 1999, Military Disciplinary Code and Military Complaints Code with handwritten remark from Parliamentary State Secretary Brigitte Schulte, 15 November 1999.

177 Ibid., BMVg, Parliamentary State Secretary Brigitte Schulte, 27 December 1999.

isolate Stecher's case. Under sober consideration, by the end of March 2000 the BMVg was left with no other choice but immediately to initiate a turnabout.¹⁷⁸

6. New Working Principles: Tolerance and Privacy Protection

A paper put out on 3 July 2000 represented a first step in the paradigm shift. The second followed soon thereafter in December 2000,¹⁷⁹ when the new Chief of Defense General Harald Kujat issued "Leadership assistance in dealing with sexuality." Scharping's previous announcement in parliament of a military code of conduct toward homosexual comrades never came about; instead, the ministry opted to draft a general guide that did not focus on homosexuality alone. "This guide is intended to help break down uncertainties in conduct in light of the armed forces' continued opening to women, changes in the Bundeswehr's previous stance toward female and male soldiers with a same-sex orientation and the problems active-duty soldiers encounter when 'dealing with sexuality'."¹⁸⁰ The introduction to the guide laid out the general legal principles that also applied to the armed forces: The "intimate and sexual life of a person [...] [stood] under constitutional protection as a part of their private life" under the Basic Law (Article 2 Section 1, in conjunction with Article 1 Section 1). The principle of equal treatment under Article 3 of the Basic Law and the ban on discrimination under Article 14 of the European Convention on Human Rights protected further against "unequal treatment based on sexual orientation." The direct reference to Article 14 of the convention came as a clear acknowledgment of the ECHR rulings in 1999 and 2000. It was no coincidence for the guide to expressly state that "a ban on discrimination is fixed in European law by Article 14 of the European Convention on Human Rights and is legally binding for the Federal Republic of Germany." This obviously applied only insofar as normal barracks operations and one's comrades were not disrupted or otherwise bothered; couples holding hands while walking through the barracks should still be avoided. It was demanded of soldiers that they show "tolerance toward different, non-criminal sexual orientations," explicitly mentioning homosexually oriented

178 A similar position is represented in Schadendorf, *Der Regenbogen-Faktor*, 72. Schadendorf also cites the law governing civil partnerships, adopted by the Bundestag in November 2000 and taking effect on 1 August 2001, as evidence for a shift in how homosexuals were treated. Ibid.

179 Multiple witnesses viewed the ministry orders as a "paradigm shift" or "minor explosion." Biesold also views the orders from December 2000 as a shift in paradigm in Biesold, "Der Umgang mit Sexualität in der Bundeswehr," 4.

180 BMVg, FüS I 4, Az 35-04-09 from 20 December 2000, also cited in what follows. The author holds possession of a copy.

male and female soldiers. While the ministry thus overnight ordered tolerance among the troops by decree “from on high,” a change in regulations did not also mean a change in soldiers’ minds. This led the chief of defense to call on superiors to remain “sensitive to sexually motivated tensions and disruptions in cohesion in the areas under their command.” “It is moreover particularly important to demand tolerance of other sexual orientations.”¹⁸¹

The convention of “Leadership assistance” is one tool the chief of defense has at his disposal to influence troops directly, and the one Kujat elected to use. The origin and occasion was the armed forces’ scheduled opening for women volunteers at the start of 2001, a transition that necessitated legal as well as internal regulatory frameworks, among them for determining how sexuality between female and male soldiers would be treated in the future. The joint chiefs of staff composed an initial draft that revolved exclusively around the practical aspects of life together, including the possibility of sexuality between men and women. Kujat found the draft too conservative and said as much; homosexuality, for example, was not mentioned once. Kujat discarded the proposal, and one weekend before Christmas 2000 sat down in the peace and quiet of home to compose a new paper himself. His wife had encouraged him “to be progressive.”¹⁸²

Kujat took her advice. The new set of orders broke new ground in referring to soldiers’ homosexuality, both individually and between them. The former chief of defense recalled that numerous conversations within NATO circles at the national and international level had drawn his attention to the importance of homosexuality among soldiers as a topic, and he decided to take the opportunity to “clear up the matter at once.” The statement that held most weight for the general was that “intimate and sexual life” belonged to “a person’s private sphere,” and was thus a private matter. That went for soldiers as well, and showed up expressly in the document for homosexual soldiers.¹⁸³

When the press found out about the leadership assistance document it gladly shortened it to “Sex Orders,” and *Bild* struck up a campaign against the guide. It was not homosexuality within the ranks that bothered the editors, however, nor heterosexual issues for that matter. Rather, it was the ban on pornographic photos in soldiers’ lockers that drew their ire, and they now responded to the chief of defense by running a new image of a naked woman daily. While it was nothing exceptional for the tabloid, *Bild* still had the cover girl asking the general “What do you have

181 Ibid.

182 Interview with Ret. General Harald Kujat, Neuruppin, 30 January 2019.

183 Ibid.

against me?” in accusatory fashion.¹⁸⁴ The newfound tolerance of homosexual soldiers either drew no attention whatsoever in the newspaper, or the editors did not see any potential for agitation. The lack of a media sensation over the topic, even at *Bild*, shows just how strongly public opinion toward gays and lesbians had shifted, even normalized, by the new millennium.

Gay officers still clearly remember just how pivotal the chief of defenses decree was. “With him [Kujat], sexuality was taken up as a topic for the first time. Before it was taboo. And for the first time it was mentioned that homosexuality between soldiers existed.”¹⁸⁵ For one present-day navy commander, General Kujat had been the “great role-model” in 2000–01; the chief of defenses guide had been of tremendous importance to him as a lieutenant at the time. It had been a sign of encouragement for an chief of defense to set his signature beneath the orders, instilling in the eyewitness a new sense of self-confidence as a homosexual officer.¹⁸⁶ Other former officers and NCOs interviewed for the study found the orders “liberating”; some, looking back over a distance of eighteen years, lumped Kujat’s orders and Scharping’s decisions beforehand into one, referring to them as the “Scharping decree” for short. A captain in special service today recalled that the orders had “freed him from the heavy burden of having to hide and conceal his private life in service.” Although he had “otherwise been able to take little” from Scharping’s record as minister, he had been quite grateful for the minister’s decision and would have “liked to hug him and said ‘Rudi, you really did well by this!’”¹⁸⁷ Other contemporaries share the sentiment: “Now appeal was possible if I was discriminated against for being gay (I was never discriminated against, or noticed it). Now I could live openly and my partner could go with me even to official events.”¹⁸⁸ Still, the “sex orders,” as the media dubbed them, do not seem to have attracted a broad audience. One major general recalled the guide was “completely unknown” at Military District Command IV (comprising Bavaria and Baden-Württemberg) when he took command there. He responded at the time by setting it on the meeting agendas for commanders and company chiefs, and presenting on the subject himself.¹⁸⁹

The next step in bringing regulations to the armed forces’ new position up to speed came in February 2002, following on the new personnel department orders and the guide of the chief of defense. Annex B 173 to Joint Service Regulation 14/3

¹⁸⁴ The *Bild* campaign came to an end once Kujat agreed to be interviewed on the matter. Interview with Ret. General Harald Kujat, Neuruppin, 30 January 2019.

¹⁸⁵ A retired Lieutenant Colonel, Berlin, to the author, 30 January 2019.

¹⁸⁶ Interview with Navy Commander Alexander Schüttpehl, Berlin, 24 January 2019.

¹⁸⁷ Interview with Captain H., 12 June 2018.

¹⁸⁸ Email from First Class Sergeant in the Reserve S. to the author, 5 April 2018.

¹⁸⁹ Email from Ret. Major General Justus Gräbner to the author, 12 July 2017.

(of the Military Disciplinary Code and the Military Complaints Code) regulated every last service-related detail regarding “sexual conduct of and between soldiers.” From the outset, the 2002 version now stated categorically that

a person's intimate life, as a part of a soldier's right to personality, is fundamentally excluded from influence by the service. As such, a soldier's relationship to his sexuality is only relevant under service law in the event that it complicates joint work in the line of service or negatively impacts cohesion among comrades and thus brings about lasting disruptions to official order. Sexual orientation as such, whether heterosexual or homosexual, is irrelevant.¹⁹⁰

The regulations also paved the way for heterosexual and homosexual relationships between superiors and subordinates in principle, albeit qualified with the “if” and “however” clauses typical of German legalese:

Regarding the general acceptance of non-conjugal domestic partnerships, long-term heterosexual relationships, including those between soldiers of different rank, is fundamentally irrelevant in a disciplinary context. This applies, however, only insofar as no negative impacts on working operations touching on the respectability or trustworthiness of the superior result, or circumstances otherwise intervene that are liable to gravely detract from the public reputation of the Bundeswehr. The same applies – despite lower thresholds of tolerance within society and the line of service – for homosexual domestic partnerships between soldiers of different rank. As a rule, consensual heterosexual or homosexual activity between soldiers of different rank outside the context of a long-term domestic partnership is likewise irrelevant in a disciplinary context [...] The existence of a direct superior–subordinate relationship between those involved in a consensual heterosexual or homosexual relationship may entail risk of causing serious damage to the respectability and trustworthiness of the superior, especially if such a relationship is clearly not intended to last.¹⁹¹

In March 2002, the alternative leftist magazine *Gigi: Zeitschrift für sexuelle Emanzipation* devoted its cover story to the Bundeswehr's newfound liberal streak in a piece whose title played on a dog food ad: “A Whole Man Thanks to Scharping.” The piece tied equal treatment for gay and lesbian soldiers to the armed forces' opening fully to women. The publishers found off-kilter titles for other pieces as well, such as “Helmet off for sex!” or “Fucking for Volk and Fatherland.”¹⁹²

That liberal streak still had its limits, however, applying in the same measure for heterosexual and homosexual soldiers alike:

¹⁹⁰ ZDv 14/3 Military Disciplinary Code, Appendix B 173, revision from 20 February 2002.

¹⁹¹ Ibid.

¹⁹² *Gigi* no. 18, March/April 2002. Title page and pages 14–16.

Sexual activity among female or male soldiers cannot be tolerated while on duty, even if consensual. It is irrelevant whether the relationship is heterosexual or homosexual. Service operations must unfold in a 'sexually neutral' manner. As a rule, sexual activity while in service shall be regarded as a disruption to service operations that must be stopped and subjected to disciplinary assessment. The same holds for sexual activity that may occur outside service hours but on military property.¹⁹³

In short, no sex during service and no sex after service in the barracks.

Two years later in June 2004, a new version of ministry orders entitled "Dealing with Sexuality in the Bundeswehr" also permitted "sexual activity" during leisure time spent in the barracks. From now on, "sexual activity within service accommodations and facilities [...] was fundamentally irrelevant in terms of disciplinary law."¹⁹⁴ The rule from two years previous ordering "no sex during service, and no sex after service in the barracks" now no longer applied, at least during one's free time in the barracks. The deciding factor in this case had been the increasing number of foreign deployments. The narrow confines of private life in military camps in Afghanistan, Kosovo and Bosnia or onboard the navy's fleet were common knowledge. Tours of duty often lasting four to six months had regularly resulted in intimate contact between soldiers, including those of the same sex, and encounters could not always be concealed with close confines hardly offering a chance to withdraw. This gave rise to a latent risk of disciplinary punishment for breach of service, whether for heterosexual or homosexual contact.

The 2002 leadership guide's reference to "lower thresholds of tolerance within society and the line of service for homosexual domestic partnerships" was struck from the 2004 version. Heterosexual and homosexual encounters were set on equal footing in every context; "heterosexual as well as homosexual partnerships and activity outside the line of duty are as a rule of no disciplinary relevance," including situations in which "the partners are of different rank."¹⁹⁵ "Bundeswehr tolerates sexual relationships," *FAZ* announced in a pithy headline.¹⁹⁶

The new approach to "homosexual and bisexual members of the Bundeswehr" also drew the attention of the parliamentary commissioner for the armed forces. In his annual report for 2003, Wilfried Penner found that despite every Bundeswehr member's obligation "to refrain from and stand up against sexual discrimination," "intolerance, fear of contact or simple uncertainty and a lack of knowledge was

¹⁹³ ZDv 14/3 Military Disciplinary Code Appendix B 173, revision from 20 February 2002.

¹⁹⁴ *Ibid.*, revision from 30 June 2004.

¹⁹⁵ *Ibid.*

¹⁹⁶ The *FAZ* article from 18 August 2004 is cited in Lutze, "Sexuelle Beziehungen und die Truppe," 193.

present in everyday troop life.”¹⁹⁷ In a statement on the commissioner’s report, the BMVg clarified again in September 2004 that sexual orientation generally formed “part of Bundeswehr soldiers’ right to personality and was irrelevant under disciplinary law.” Soldiers’ duty to camaraderie ruled out discrimination and demanded tolerance. The troop instructors’ guide on “dealing with sexuality” from 2000 had already required superiors to show particular sensitivity toward sexually-motivated tensions within the areas under their command, and to demand requisite tolerance toward different sexual orientations. “Although there is no evidence that superiors are not fulfilling their duties,” the BMVg’s response continued, “it should be assumed that deep-seated prejudices continue to exist within society, and thus among individual members of the Bundeswehr.”¹⁹⁸

One master sergeant was forced to learn as much in 2007 when his immediate superior, also the officer directing personnel affairs at the post, chanced upon a photograph of the sergeant’s partner and exclaimed “But that’s no woman that you have there!? I have to know. That has to go in your personnel file! That’s a breach of duty!”¹⁹⁹ Surprised and taken aback, the master sergeant referred his superior to the revised ministry orders from 2000, explaining he did not have to provide any further information about his private life or sexual orientation – in fact, these were the very questions that were no longer permissible. The run-in had left an already tense relationship between the sergeant and his superior in tatters. Over the following two years the senior NCO recalled he had experienced the “power of bullying”; in the end he transferred to another barracks.²⁰⁰

It should be noted here in passing that while open discrimination was (and remains) prohibited and legal recourse was/is available, informal sanctions that could only be challenged with difficulty continued to run their course. This might include negative assessments or personnel measures such as transfers or removal from a service post or course, as well as personnel selection, general staff officers’ training, for example. This kind of rejection is obviously no longer justified along the lines of the candidate’s sexual orientation but by means of other, “watertight” alibis, making them extremely difficult, and often impossible to counter. Within any hierarchically organized group, measures that lie at the discretion of superiors or personnel leadership form a gray-zone for informal sanctions and covert discrimination. One gay master sergeant confirmed that while open discrimina-

197 “Umgang Mit Homosexualität in Der Bundeswehr”, <https://www.queerbw.de/ahsab-ev/der-ver-ein/historie> (last accessed 3 April 2017).

198 Ibid.

199 Interview with Master Sergeant H., Berlin, 2 July 2018.

200 Ibid.

tion is no longer an issue in everyday military life, “every person [naturally] had their own view on any number of topics, including homosexuality and ‘marriage for all’.”²⁰¹ “Subliminal, furtive forms of discrimination” still exist, as in the form of “words spoken behind one’s back.” Assessments represent another shadowy realm in which superiors might still give free, “subliminal” reign to a concealed antipathy toward homosexuals within the realm of their discretionary powers, making successful appeal impossible.²⁰²

In 2006, the Act on Equal Opportunities for Female and Male Military Personnel, while implementing broader European guidelines regarding the principle of equal treatment, also wrote a ban on discrimination based on sexual identity into the Soldier’s Act.²⁰³ Since then, Section 3 has stipulated that “sex, sexual identity, ancestry, race, belief, worldview, religious or political views, country of origin [and] ethnic or other extraction” cannot be taken into account as deciding criteria for appointments and assignments.²⁰⁴ The act’s adoption in 2006 finalized the legal framework for ensuring homosexual soldiers’ equal treatment.

The framework in place since the change in millennium guarantees all men and women the same legal standing regardless of whether they are heterosexual, homosexual or bisexual, with all assignments and career prospects equally open to everyone. Yet equality before the law did not mean that complete acceptance set in among the troops overnight. Acceptance, or tolerance at least is always up to the individual. Tolerance may, however, be demanded of all soldiers as a professional duty. The ban on discrimination and the regulatory canon described above provide a secure basis for each and every soldier to live out his or her sexual identity. Practically every interview conducted for this study revealed a slow and steady growth in homosexual soldiers’ self-assurance after the millennium, and their increasing trust in the Bundeswehr’s newfound liberalism as inscribed in ministry orders and regulations. The question of potential rehabilitation and compensation for damages suffered, on the other hand, remains unresolved.

201 Interview with Master Sergeant H., 29 March 2018.

202 *Ibid.*

203 §§1 (1) and 3 (1) in the Equal Treatment Act for Soldiers (SoldGG), <http://www.gesetze-im-internet.de/soldgg/SoldGG.pdf>.

204 The present commentary emphasizes with a view to the past that “by introducing sexual identity in section one [of §3 SG] (in 2006) as a further characteristic that cannot be considered in appointing and assigning soldiers, lawmakers put a line through a contrary practice that until recently was condoned by the highest courts.” Walz, Eichen and Sohm, *Kommentar zum Soldatengesetz*, 73.

7. Lindner v. the Federal Republic of Germany: A Former Captain's Struggle for Restitution

In April 2018 AHsAB, the Working Group for Homosexual Members of the Bundeswehr, wrote a letter calling on the Minister of Defense to annul “verdicts reached [by military service courts] against soldiers of all ranks merely on the basis of consensual homosexual activity”. To do so the letter continued, the existing law on criminal rehabilitation should be revised and expanded to include court decisions. The working group also demanded financial compensation for soldiers who had not received further assignment as fixed-term or career soldiers due to their homosexuality prior to 2000, while also encouraging the BMVg to issue an “apology that was long overdue” to those affected by past policies.²⁰⁵

In responding to the group's demands for financial compensation the ministry legal department acknowledged the career disadvantages homosexual soldiers had suffered. Yet it “was not homosexuality as such that had primarily been seen as the problem” but “fears about the affected parties losing their authority as superiors based on the general views of society” as well as their “susceptibility to blackmail.” This explained why the soldiers had been excluded from “certain assignments,” a practice from which Bundeswehr had “distanced itself considerably”. Nonetheless, “regardless of the injustices that were doubtless inflicted, the legal system does not anticipate any individual compensation.”²⁰⁶ Claims of that nature presupposed a “criminal breach of duty on the part of those acting,” which the legal department did not view to be the case. “As much as the prevailing practices at the time disregarded the rights of those impacted from today's perspective, the parties involved cannot be blamed. The Bundeswehr's approach was established within the context of contemporary societal values and the applicable laws, and was regularly upheld by court decision at the Federal Administrative Court.”²⁰⁷

The legal press also supports this view. The rehabilitation act explicitly excluded career measures in the past “such as a loss of professional position,” instead serving “exclusively to remove the taint of criminality suffered as a result of previous conviction.” Legal scholars stressed explicitly that the law does not view prior conviction.

²⁰⁵ Letter from the Working Group for Homosexual Members of the Bundeswehr to the federal minister of defense, 16 April 2018.

²⁰⁶ BMVg, R I 5 to the Working Group for Homosexual Members of the Bundeswehr, 16 August 2018.

²⁰⁷ Ibid.

tions as unconstitutional, which would contradict the 1957 and 1973 rulings at the Federal Administrative Court.²⁰⁸

To date, one officer at least has succeeded in managing to wrest financial compensation from the BMVg. When the BMVg fundamentally revised its position toward homosexual soldiers in 2000, Captain Michael Lindner, in retirement since 1982 for health reasons, spotted a chance to have his own case reassessed and ruled on anew. He applied for reappointment into career service, simultaneously submitting a petition to the parliamentary commissioner for the armed forces and the Bundestag petitions committee.²⁰⁹ The personnel section reported to the state secretary that the retired captain was “the first former soldier to apply for reappointment based on the shift in the BMVg’s position regarding the personnel management of homosexual soldiers.”²¹⁰ After reviewing the case, the section head found reappointment “unwarranted,” noting that “we would have to use the legal landscape from twenty years ago as the basis for evaluation.”²¹¹ Personnel informed the petitioner that his 1982 retirement was “final, and that no official interest in reappointment existed.”²¹² The ministry determined that Lindner had already exceeded all age groups eligible for retirement, making reappointment impossible from a legal perspective. The alternative petition for raising his pension entitlement had “no legal basis for support.”²¹³ Military administrators likewise came to the conclusion that Lindner was not entitled to compensation; his retirement in 1982 had been lawful. Military District Administration West nevertheless recommended “weighing the possibility of reaching an accommodating one-time decision without acknowledgment of a legal obligation.”²¹⁴ Lindner did not give up, and after ten years of countless petitions, complaints and finally lawsuits, his claim was finally acknowledged: The Bundeswehr had accommodated Lindner on two previous occasions; designating him major in the reserve in 2004, and two years later promoting him to lieutenant colonel in the reserve.²¹⁵ In 2004 Lindner,

208 Rampp, Johnson and Wilms, “Die seit Jahrzehnten belastende Schmach fällt von mir ab,” 1146.

209 BArch, BW 1/503302, Petition from Lindner to the BMVg, 30 March 2001, along with petition to the parliamentary commissioner, 31 March 2001 *ibid.*, parliamentary commissioner for the armed forces to Defense Minister Scharping, 4 April 2001; the author is in possession of Lindner’s petition to the Bundestag petitions committee. Thanks to Michael Lindner for sharing this and numerous other documents pertaining to his legal battle for restitution.

210 BArch, BW 1/503302: BMVg, PSZ III 6 to State Secretary Biederbick, 29 June 2001.

211 *Ibid.*, Head of personnel office, 2 May 2001.

212 Personnel office to Ret. Captain Lindner, 15 May 2001.

213 BArch, BW 1/503302: BMVg, PSZ III 6 to State Secretary Biederbick, 29 June 2001.

214 *Ibid.*, Military District Administration West.

215 Certificates from the personnel office from 30 April 2004 and 28 July 2006.

who had gone on to complete a degree in geography after his time in the service, was accepted as a senior civil service employee at the Bundeswehr geoinformatics office in Euskirchen, where he received a collective pay rate until reaching retirement age in 2009.²¹⁶

Lindner's culminating legal battle aimed at adjusting his pension. After six German lawyers had found his case stood little chance of success under German law, Lindner finally met a lawyer in Vienna who saw better prospects in his lawsuit under European law and was also authorized to argue before the ECJ in Strasbourg. Thus prepared, Lindner submitted a request that he receive the same pension beginning in 2009 that he would have received had he remained in regular service as an officer after 1982 and reached pay grade A 14 (lieutenant colonel).²¹⁷ On this matter too, Lindner, now a retired captain and lieutenant colonel in the reserve, persevered with his inborn tenacity. Hamburg Administrative Court heard Lindner's case against the Federal Republic of Germany in June 2012. The court found that while the action was likely to prove unsuccessful based on the current facts and laws in the case, as German law did not provide for compensation claims,

the legal situation before the ECHR is likely to be different, based on the European Convention for Human Rights. In the view of the court there is much to speak for the fact that having exhausted the national legal process, the plaintiff [in light of the English cases] could be awarded compensation under Article 41 of the convention [...] The [plaintiff's] 1982 retirement could be viewed as a violation of Article 8 as well as Article 2 paragraph 1 in conjunction with Article 1 paragraph 1 of the Basic Law. Both norms protect the plaintiff's right to sexual self-determination. This was interfered with by the defendant without justification [...] The blanket policy that prevailed in the Bundeswehr at the time whereby homosexual soldiers were not promoted or allowed to work as instructors is likely to constitute a sufficiently intensive form of discrimination. Through this policy homosexual soldiers were, in the view of the court, at least indirectly forced out of the Bundeswehr solely on the basis of their sexual orientation. The plaintiff was impacted by the policy, as it ultimately led to his being determined unfit to serve.²¹⁸

The presiding judge strongly suggested a settlement during the hearing. The BMVg acceded with surprising speed.

²¹⁶ Military District Administration West, testimonial from 2 July 2009.

²¹⁷ Lindner to the BMVg, 30 January 2008 and 13 January 2009.

²¹⁸ Hamburg Administrative Court, Az 20 K 3130/09, 19 June 2012. The author holds a copy in his possession.