

DISTRICT OF COLUMBIA
COMMISSION ON HUMAN RIGHTS

In the Matter of:

ROLAND POOL and
MICHAEL GELLER
Complainants

v.

Docket Numbers 93-030-(PA) and
93-031-(PA)

BOY SCOUTS OF AMERICA and
NATIONAL CAPITAL AREA COUNCIL
Respondents

FINAL DECISION AND ORDER

Before:

Commissioner Kewana C. Battle-Mason
Commissioner Mark Chichester
Commissioner Daniel Wedderburn

Chief Hearing Examiner Cornelius R. Alexander, Jr.

Appearances

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SUMMARY OF PROCEEDING

On October 16, 1992, Roland Pool and Michael Geller (hereinafter the “Complainants”) file their complaints of discrimination with the District of Columbia Department of Human Rights and Minority Business Development (now known as the Office of Human Rights, hereinafter the “Office”). The Complainants charged the Boy Scouts of America and the National Capital Area Council (hereinafter the “Respondents”) with engaging in unlawful discriminatory practices by revoking their scout membership because of their sexual orientation (homosexual) in violation of the District of Columbia Human Rights Act of 1977 (hereinafter the “Act”).

The Office investigated the complaints and dismissed both matters on or before April 18, 1995. As grounds for the dismissal, the Office held that under the federal public accommodations law, a denial of Boy Scout membership did not qualify as a denial of access to a “place of public accommodation.” See *Welsh v. Boy Scouts of America*, 993 F.2d 1267, 1269 (7th Cir. 1993). Per the dismissal, the Office closed the proceedings. Complainants did not, at that time, request the reopening of the matter within the required (30) day period. However, the Office reopened the case, *sua sponte*, and the Office reversed its prior decision and found probable cause to believe that the respondents violated the Act in a place of public accommodation. Accordingly, the Office certified the case on June 27, 1997 to the Commission for a public hearing.

Shortly thereafter, the Respondents filed a separate action against the Office in the District of Columbia Superior Court alleging that the Office violated its own rules of procedure by reopening the case. The Court ruled for the Office on grounds that Respondents failed to exhaust their administrative remedies. Respondents appealed to

the District of Columbia Court of Appeals. On September 25, 1997, Respondents filed before the Commission a Motion to Stay Administrative Proceedings, arguing that the Commission should halt the hearing process until the Appeals Court ruled on the appeal. On November 5, 1997, the Commission denied the motion and ordered the hearing process to move forward.¹

In the meantime, the Commission scheduled a status conference on August 1, 1997. All discovery and hearing schedules were agreed upon. Throughout the discovery period, various discovery motions were filed and ruled upon by the Commission. On December 17, 1997, the Commission conducted a prehearing conference in which dispositive rulings on witnesses and exhibits were given. On January 20, 22-23, 27-30, 1998, February 2-5, 1998 and March 19, 1998, the Commission conducted a hearing before Commissioners Battle-Mason, Chichester, Wedderburn and Chief Hearing Examiner Cornelius R. Alexander, Jr. Having reviewed the entire record in this matter (including observing the testimony of the witnesses, examining the exhibits admitted into the record, and reviewing the transcripts of the proceeding), the Commission issues the following Findings of Fact and Conclusions of Law.²

FINDINGS OF FACT

I. The Complainants

A. Michael Geller

1. At the time of the hearing, Michael Geller was a 35 year old gay male and resident of the District of Columbia. He worked at the World Bank. (Tr. at 26, 28, 95)

¹ The Commission reasoned that by halting the hearing process, it would be second guessing the Appeals Court on the issue. The Commission also reasoned that it would move forward with the hearing unless the Appeals Court ordered otherwise.

² Because the tribunal of commissioners sat throughout the entire hearing, the ruling automatically becomes a final decision and order. See 4 DCMR §430.2

2. Mr. Geller was born in Sarr, Pennsylvania, grew up in Owego, New York (between 1962-1980) and graduated from Cornell University. (Tr. at 27)
3. Mr. Geller comes from a family steeped in Scouting tradition. Two of his uncles were Eagle Scouts. His father is a Life Scout who in 1997 celebrated 55 years in Scouting. His father received the Silver Beaver Award from the Boy Scouts for his dedicated years of service. Mr. Geller's brother, Davis, is also an Eagle Scout as well as his three cousins. (Tr. at 43)
4. Mr. Geller became a Boy Scout on his 11th birthday, the first day he was eligible. He was a member of Troop 37 in Owego, New York, sponsored by St. Paul's Episcopal Church. His troop was located in the Baden-Powell Council, named after the founder of the scouting movement in England in 1907. (Tr. at 46 and 47)
5. Mr. Geller reached the rank of Eagle Scout in 1979 after six years of scouting. (Tr. at 55-56, Complainant's Exhibit C202) Upon attaining the rank of Eagle Scout, Mr. Geller received congratulatory letters from President Carter and Congressman Mathew McHugh. (Complainant's Exhibits C204 and C205)
6. In 1977, Mr. Geller was elected to the Order of the Arrow, the National Brotherhood of Scout Honor Campers. The election signified that Mr. Geller was "One who lives according to the Scout Oath or promise and law." (Tr. at 67. Complainant's Exhibit C209 and C209a.)
7. From 1980 through 1992, Michael Geller was continually registered as an adult leader of Troop 37 in the Baden-Powell Council. (Tr. at 93-98 and Exhibits C210 and C211)
8. Mr. Geller became aware that he was gay in 1983. (Tr. 95)

B. Roland Pool

9. Mr. Pool has been a resident of the District of Columbia since 1987 (Tr. at 705-706)
10. Mr. Pool graduated from Louisiana State University in Baton Rouge, Louisiana in 1985. He attended Dartmouth College on a graduate fellowship to study volcanology. (Tr. at 707 and 708)
11. Mr. Pool worked for three years at the Smithsonian Institution as a computer specialist. He became a geologist at the Museum of Natural History at the Smithsonian Institution. There he planned and designed a volcano exhibit for the

new Rock, Gem and Geology Hall, which opened in 1997. and collaborated on a one-book encyclopedia entitled, “Volcanoes of the World.” (Tr. at 708-710)

12. In 1997, Mr. Pool entered the Wesley Theological Seminary in the District of Columbia. At the time of the hearing, he was studying pastoral skills and theology with the goal of becoming a pastor in the Religious Society of Friends. (Tr. 711)
13. Mr. Pool’s scouting experience began with the Cub Scouts and progressed to the levels of Bobcat, Wolf, Bear and Weblo. (Tr. 716)
14. As a Boy Scout, Mr. Pool advanced through the levels from Scout, Tenderfoot, Second Class, First Class, Star and Life. In 1979, he became an Eagle Scout—the first Eagle Scout in Troop 85 in Mandeville, Louisiana. (Tr. 722, Exhibits C102, C106, C108, C109)
15. Mr. Pool was elected into the Order of the Arrow by the other boys in his Troop. (Tr. 740. Exhibit 115) He advanced to the Brotherhood rank and received the Vigil Honor, the highest rank of the Order of the Arrow.³
16. Mr. Pool became an Explorer as well as a Boy Scout, serving as the Vice-president of the Aquatics Explorer post in Mandeville, Louisiana from 1976-1977. (Tr. 745).
17. Upon the age of 18, Mr. Pool re-registered with the Boy Scouts as an Assistant Scoutmaster with Troop 85. He actively participated as an Assistant Scoutmaster for two years. (Tr. 746-747, Exhibit C104)
18. In 1977 and 1981, Mr. Geller was selected as an adult leader for the special troops assembled for the Boy Scouts’ National Jamborees. (Tr. 723-725)
19. In addition to his other scouting activities, Mr. Pool was actively involved with the Philmont Ranch. Philmont is the “premier high-adventure backpacking destination for Scouts in the United States,” and competition for positions at Philmont is “Extremely competitive.” Mr. Pool was a Scout participant at Philmont in 1978 and 1979. He also was a staff employee there for five years from 1980 through 1984. He was a Ranger for two summers in 1980 and 1981; a Training Ranger for two summers in 1982 and 1983; and the Assistant Director for Conservation in 1984. (Tr. at 439-440, 752-761, 754-756, Exhibit C111.) As the Assistant Director for Conservation, Mr. Pool had the responsibility to supervise a \$70,000 grant from the Tandy Corporation to develop an environmental program. He also wrote the Land chapter of the Philmont Field Guide, published in 1985 by the Boy Scouts of America. At the end of his

³ Mr. Pool was elected to the Vigil Honor Rank by a committee appointed by the Order of the Arrow Lodge. (Tr. 741, Exhibits C101A, C101B, C101C, C105) He also served as Vice Lodge Chief and later as Lodge Chief of the Order of the Arrow, (Tr. 748-749)

summer as Assistant Director of Conservation, Mr. Pool was recommended by his superiors to be Chief Ranger—the supervisor of 150 Philmont Rangers. (Tr. 756-761, Exhibit C111)

20. Mr. Pool became aware that he was gay at the age of 13 (Tr. 766-768). At no time did his sexual orientation become a subject of discussion with others in the Boy Scouts, including his five summers at Philmont. (Tr. 766-768)
21. Between 1985 and 1992, Mr. Pool went to graduate school, began work and was not an active scouter. However, he retained his interest in Scouting, collecting Boy Scout memorabilia and attending the 1989 National Jamboree. (Tr. 778, 942)

II. The Respondents

A. The Boy Scouts of America

22. The Boy Scouts of America is a non-profit corporation. It was originally incorporated in the District of Columbia in 1910. Currently it is a Texas corporation with its national office in Irving, Texas. At the time of the hearing, the Chief Executive Officer was Jere B. Ratcliffe. (Tr. at 4930, 4933, Exhibit C1129 at NCAC4925)
23. In 1916, the Boy Scouts obtained a charter by Act of Congress; “to promote, through organization and cooperation with other agencies, the ability of boys to do things for themselves and others, to train them in Scoutcraft, to teach them patriotism, courage, self-reliance, and kindred virtues, using the methods which are not in common use by Boy Scouts.” (Ex. C1300 §3, 36 U.S.C. §23 (1916))
24. The Boy Scouts of America (BSA) is a nationwide organization that, since 1910, has had over 93,000,000 members. As of December 31, 1996, its membership was approximately 4,400,000 youth and 1,200,000 million adult members, including 3,540 professionals involved in Scouting nationwide. (Exhibit C1122 at NCAC4881, C1310 at 27)
25. Scouting programs include: Cub Scouts for boys ages 7-10, including the Tiger Cubs (the program for seven-year olds); Webelos (the transition program for 10-years-olds); Boy Scouts for boys ages 11-18; Explorers, a coeducational program for teenagers ages 14-20. In addition the BSA runs, through a subsidiary, the Learning for Life program—a coeducational school-based program for youth from Kindergarten through high school. (Exhibits C1134 at NCAC4888, C1000-1004) Effective August 1, 1998, the Explorers program was separated into two different programs-Venture Exploring and Career Exploring. (Tr. at 2466-67, Exhibit C1007)

26. The BSA maintains four regional offices and divides each region into smaller geographical areas. The District of Columbia is located in Area VI of the North East Region, which has its regional headquarters in Dayton, New Jersey. (C1300 at 112-113, Flythe Dep. At 10, C313 at A1172)
27. Within the areas of each of its geographic regions, the BSA charters councils. As of December 31, 1996, there were 335 councils nationwide. (Exhibits C1300 at NCAC114, C1310 at 27) Neither the National Council nor the Local Council maintains any facilities in the District of Columbia. (Respondents Brief, p 14)

B. The National Capital Area Council

28. The National Capital Area Council (NCAC) is a District of Columbia corporation chartered by BSA for the purpose of carrying out the BSA's program in the District of Columbia and 16 surrounding counties in Virginia and Maryland. At the time of the hearing, Ron L. Carroll was the Scout Executive—a professional who serves as the Chief Executive Officer of the National Capital Area Council. (Tr. 567-568, 1095, Exhibits C313 at NCAC1172)
29. The NCAC is divided into districts. The District of Columbia is covered by two such districts: The Benjamin Banneker District and the Horizon District. The Banneker District covers Northwest Washington and Northeast Washington to Maryland Avenue. The Horizon District covers the remaining portions of the city. Each district has a District Committee whose responsibility is to provide activities for the chartered organizations. (Tr. at 303, 305-306)

III. Organization Structure within the Districts

30. Each district has at least one professional District Executive, a volunteer District Commissioner, who oversees Assistant District Commissioners and Unit Commissioners, and a Chairman, which is also a volunteer position. The District Executive, the District Commissioner and the Chairman are considered as the “Key Three”, who are responsible for carrying out the BSA program and seeking to achieve its objectives. (Tr. 301-305, Exhibit C909 at NCAC378)
31. The District Commissioner runs a “Commissioner staff,” which typically includes Assistant District Commissioners, who report to the District Commissioner, and Unit Commissioners, who report to the Assistant District Commissioners. Unit Commissioners assist adults in “units” (Cub Scout packs, Boy Scout troops or Explorer Posts) by conveying to them the information they need to run the program and by performing quality control to make sure that the program is being run properly. (Tr. 299-302, Bond Dep. At 47, Exhibit C906)

32. The Commissioner staff is both a channel of communication through which the BSA and its councils tell adult leaders at the troop level what they need to know to run the Scouting program and is also a source of expertise and guidance on how that program is to be run. (Tr. 299-302)
33. The BSA is required by its charter to operate its program through cooperation with other organizations. (Ex C1300 §3)
34. Organizations such as public schools, government organizations, churches, synagogues, mosques, civic groups or groups of citizens obtain a charter from the Boy Scouts to sponsor an individual Scouting unit. (Exhibit C1153)
35. Boy Scout troops and Cub Scout packs have a troop or pack committee made up of representatives from the sponsoring organization, parents, and others, who pick the troops' Scoutmaster and provide various types of support, including transportation, chaperons and resources to the troop. (Tr. 281-282)
36. The sponsoring organization plays a central role in the governance of the Boy Scouts. The membership of each local council does not consist of all the members of the Boy Scouts within the Council. Rather, it consists of "a chartered organization representative from each chartered organization and additional members at large from within the territorial boundaries of the local council totaling a minimum of 100 adults." (Ex. C1300 at NCAC114 (art. VI, §7, cl. 1) These councils, in turn, choose approximately 2,000 adult representatives to the BSA National Executive Board. (Tr. at 2444459-61, 2507-2513, Ex. C1300 at NCAC 108-109, Arts I-III)

IV. Scout Ranks

37. A Scoutmaster is the adult leader of a Scout troop. Assistant Scoutmasters are adults who work with the Scoutmaster. A Junior Assistant Scoutmaster is a senior youth scout in the troop. Boy Scout troops are divided into patrols, which are groups of 3-8 boys, led by a youth who acts as patrol leader. A senior patrol leader is an experienced older scout who is elected by all the scouts of the troop (Exhibit C701 at 21-22, 33-49)
38. Scoutmasters, Assistant Scoutmasters and troop committee members are required to be members of the BSA. Once registered as members, they do not need to complete new applications to remain in their positions. Instead, their names can be submitted on an annual roster when the troop reregisters with the BSA. (Hill Dep. at 164). Adult troop leaders are required to receive a "fast-start" training to familiarize themselves with the program and a more intensive training called "Scoutmastership Fundamentals." (Tr. at 293)

39. Individual scouts progress through ranks. The scout ranks are scout, tenderfoot, second class, first class, star, life, and the highest rank, Eagle Scout. (Tr. at 55). In order to progress, scouts must meet requirements specific to each rank and earn merit badges. (Ex. C700 at 589)
40. Only about two percent of *all* Boy Scouts ever attain the rank of Eagle Scout, which is Scouting's highest honor. (Bond Dep. at 82 and 121, Ex. C1313 at NCAC2059, Ex. C1122 at NCAC4881)
41. The Order of the Arrow is a national brotherhood of scout campers that recognizes those campers "who best exemplify the Scout Oath and Law in their daily lives and by such recognition cause other campers to conduct themselves in such manner as to warrant recognition." (Ex. C115 at 14) Scouts can only become members of the Order of the Arrow by being chosen from the members of their troop. The Order of the Arrow has lodges at the council level and sections at the area level. (Tr. 515-518). Youths can obtain leadership positions in their Order of the Arrow lodge by becoming vice lodge chiefs and lodge chiefs. They can also progress through three advancements: Ordeal, Brotherhood and Vigil Honor (Tr. at 520-521)
42. The Vigil Honor is the highest honor that the Order of the Arrow can present its members for service to the local lodge and council (Bond Dep. at 122, Ex. C115 at 23) It is for those deemed to have demonstrated the highest level of altruistic service to the Scouting program and to their community and available only to a limited number of order of the Arrow members in each council. (Tr. 521 Ex. C115 at 23, 71-72, Ex. C115 at 70)

V. The Scout Oath, Law, Motto, Slogan

43. The Scout oath states:

On my honor I will do my best
 To do my duty to God and my country
 And to obey the Scout Law;
 To help other people at all times;
 To keep myself physically strong, mentally awake, and morally straight.
 (Ex. C700 at 5 Tr. 550-551)

44. The Scout Law states:

A Scout is TRUSTWORTHY. A scout tells the truth. He keeps his promises. Honesty is a part of his code of conduct. People can always depend on him.

A Scout is LOYAL. A Scout is true to his family, friends, Scout leaders, school, nation and world community.

A Scout is HELPFUL. A Scout is concerned about other people. He willingly volunteers to help others without expecting payment or reward.

A Scout is FRIENDLY. A Scout is a friend to all. He is a brother to other Scouts. He seeks to understand others. He respects those with ideas and customs that are different from his own.

A Scout is COURTEOUS. A Scout is polite to everyone regardless of age or position. He knows that good manners make it easier for people to get along together.

A Scout is KIND. A Scout understands there is strength in being gentle. He treats others as he wants to be treated. He does not harm or kill anything without reason.

A Scout is OBEDIENT. A Scout follows the rules of his family, school, and troop. He obeys the laws of his community and country. If he thinks these rules and laws are unfair, he tries to have them changed in an orderly manner rather than disobey them.

A Scout is CHEERFUL. A Scout looks for the bright side of life. He cheerfully does tasks that come his way. He tries to make others happy.

A Scout is THRIFTY. A Scout works to pay his way and to help others. He saves for the future. He protects and conserves natural resources. He carefully uses time and property.

A Scout is BRAVE. A Scout can face danger even if he is afraid. He has the courage to stand for what he thinks is right even if others laugh at him or threaten him.

A Scout is CLEAN. A Scout keeps his body and mind fit and clean. He goes around those who believe in living by these same ideals. He helps keep his home and community clean.

A Scout is REVERENT. A Scout is reverent toward God. He is faithful in his religious duties. He respects the beliefs of others. (Ex. C700 at 7-8, Ex. R175 at 9-11)

45. The Scout Motto is “Be Prepared.” (Ex. C700 at 562)

46. The Scout Slogan is “Do a Good Turn Daily.” (Ex. C700 at 563)

VI. Termination of Complainants' BSA Membership.

A. Michael Geller

47. On February 25, 1992, Mr. Geller read an article in the *Washington Post* which included a statement by Ron Carroll, NCAC Scout Executive, to the effect that he did not believe that gay men made good role models for youth as they progress into manhood and, therefore, the Boy Scouts did not accept gays as adult leaders.(Tr. at 100-101, Ex. C400). Also contained in the article was a statement from Mr. Carroll that the exclusion was a national policy of the Boy Scouts. (Tr. at 102)
48. Prior to reading the article, Mr. Geller was unaware of any Boy Scout policy excluding gays. (Tr. at 102)
49. In response to the article, Mr. Geller wrote to Ron Carroll on February 26, 1992 to express his disagreement with Mr. Carroll's view that gays were inappropriate role models within the Boy Scouts (Tr. 107, Ex. C400). Mr. Geller specifically stated that he believed Mr. Carroll's remarks were unacceptable and unforgivable. He expressed his concern that role models for young people were at a premium. Mr. Geller listed his qualities he believed that made him a role model including Chairing the Gay and Lesbian Employees Association of his employer. He also mentioned that he lived with his "lover" of two years. (Tr. 107-111)
50. On February 27, 1992, the very same day that Mr. Carroll received Mr. Geller's February 26, 1993 letter, Mr. Geller's membership in the Boy Scouts was deleted from the Boy Scout's membership database (Ex. C401)
51. On March 2, 1992, Rudy Flythe, Northeast Regional Director, wrote Mr. Geller and stated that ". . .after careful review, we have decided that your registration with the Boy Scouts of America should be denied," and requested that Mr. Geller sever any relations that he may have with the Boy Scouts of America. (Tr. 118-119, Ex. C402). In the letter, Mr. Flythe did not give any reason for the Boy Scouts' decision to require Mr. Geller to sever all relations with them.⁴
52. In response to Mr. Flythe's March 2, 1992 letter, Mr. Geller wrote several letters to the Boy Scouts requesting them to state the reason for their decision requiring

⁴ The Commission notes that the process of revoking Mr. Geller's BSA membership might be in violation of procedures. The Scout Executive or his delegate should be the only individual engaged in implementing Boy Scout Procedures for removing someone from membership. (Ex.C603, Fullman Dep. at 27, Carroll Dep. at 137. Mr. Flythe testified in his deposition that his office had no involvement in the revocation of membership.)Flythe Dep. at 37. While the process of how Mr. Geller's membership was terminated is murky, the Commission also finds that the Boy Scouts contacted the Scout Executive for Mr. Geller's council—Del Newquist of the Baden-Powell Council. On May 5, 1992, the Baden-Powell Council wrote a letter to the National Board of BSA objecting to Mr. Geller's severance from the Boy Scouts and urged the BSA to allow local troops decide whether they want gays as adult leaders. (Tr. at 142, 482-485, C1210)

him to sever all ties with the organization. The Boy Scouts never advised Mr. Geller of the reasons for their decision. (Exhibits C403, C406)

53. On April 6, 1992, while Mr. Geller's appeal of their decision was pending, the Boy Scouts placed Mr. Geller in the Ineligible Volunteer File as "an admitted gay leader." (Exhibit C407)
54. On April 21, 1992, David K. Park, the Boy Scouts' National Legal Counsel, advised Mr. Geller that there would be a national review of the revocation of his registration, and that he would be advised accordingly. (Exhibit C408)
55. On September 11, 1992, Ben Love, Chief Scout Executive, advised Mr. Geller that on September 9, 1992, a review committee of the BSA conducted a review of the denial of his registration and upheld the action of the Regional Review Committee in denying that registration. Mr. Geller was not given the opportunity to appear before the committee in his own defense. (Tr. 135, 136, Exhibit C409)

B. Roland Pool

56. In February 1992, Mr. Pool read an article in the *Washington Blade*, which referenced the *Washington Post* article indicating that gays were inappropriate for Scouting. Prior to reading that article, Mr. Pool had no knowledge of any Boy Scout policy excluding gays.⁵ (Tr. 773)
57. In March of April 1992, Mr. Pool ran into an acquaintance, Bart Church, and briefly discussed the Boy Scout's policy excluding homosexuals.⁶ When Mr. Pool told Mr. Church that he had been an Eagle Scout, Mr. Church referred him to the American Civil Liberties Union (ACLU) for legal advice.⁷ (Tr. at 775-776)
58. Mr. Pool contacted the ACLU and became a plaintiff. (Tr. 819-821)
59. In June 1992, Mr. Pool called the NCAC about obtaining an Assistant Scoutmaster position. He was directed to Banneker District Executive Stuart M. Bond. Mr. Bond suggested that Mr. Pool might be interested in the higher position of Unit Commissioner. (Tr. at 778, Bond Dep. at 114-115)

⁵ From 1985 to 1992, several of Mr. Pool's friends involved in Scouting became aware of his sexual orientation. None of these individuals advised Mr. Pool that he could no longer participate in Scouting. (Tr. 774-775)

⁶ Mr. Church was a member of the organization Queer Nation. That organization was protesting BSA about its exclusionary policies. However, it should be noted that Mr. Pool was never a member of Queer Nation, never participated in Queer Nation's planning sessions and never attended Queer Nation events. Accordingly, the Commission finds that Mr. Pool was not a Queer Nation activist. (Tr. 806-811, 824, 827-828)

⁷ Queer Nation was looking for potential plaintiffs to challenge BSA policies. Although, Mr. Church advised Mr. Pool to seek counsel with the ACLU, there is no indication in the record that Mr. Pool meeting the ACLU and its agreement to be a counsel was based on the protest policies of Queer Nation.

60. Unit Commissioners do not generally work with youth. Although Unit Commissioners are supposed to attend troop meetings on occasion, it is up to the Scoutmaster if youth in a troop are even introduced to a Unit Commissioner. The contact with youth would be so limited that experienced commissioners and youth may well not even know each other by name. Unit Commissioners are never in direct supervision of the youth. (Tr. 310, 529, Kay Dep. at 80-81, Exhibit C909 at NCAC367.)
61. According to Mr. Jones and other scouters who met him, Mr. Pool's skills and experience were particularly well-suited to serving as a Unit Commissioner. His status as an Eagle Scout, a Vigil Honor member of the Order of the Arrow, his extensive experience at Philmont and his knowledge of conservation were particularly high credentials. Mr. Pool's experience would be a significant addition to any district. (Tr. 371-374, 530, 606-607, 1970-1973)
62. On June 23, 1992, Mr. Pool attended the Banneker District Committee meeting at Mr. Bond's request. The meeting was held in the Banneker District at St. Paul's Episcopal Church in the District of Columbia. At the meeting, Mr. Bond introduced Mr. Pool as a new Unit Commissioner. (Tr. at 352, 371, 778-779, C1105)
63. At the District Committee meeting, various scouters spoke about the need of the Banneker District to attract new members. One also spoke about what the Boy Scouts refer to as the "three G's"—the Boy Scout's policies of excluding "gays, girls and the godless [i.e., atheists]." (Tr. at 770, Exhibit C1105)
64. At the District Committee meeting, Mr. Pool was invited to a Unit Commissioner training session that had been scheduled for June 27, 1992. Usually this training is conducted in the Banneker District; however, because of a conflict of schedule, it was conducted at the Council headquarters in Bethesda, Maryland. (Tr. 377, 782)
65. At the training session, Mr. Pool was handed a notebook identifying him as "Unit Commissioner Roland Pool," an organizational chart with his name included as Unit Commissioner, and program materials concerning the Banneker District assembled by the District Commissioner, Thornell Jones. (Tr. 378-389, 405-406, 787-788, Exhibits C300, C302 and C313)
66. The training session taught about the job of unit Commissioner and how to schedule matters and how to rate performance. It was not part of the training to discuss the Boy Scout's policy concerning gays. (Tr. at 376, 785-789, Bond Dep. at 124.)
67. The subject of the Boy Scouts exclusion of gays, however, arose at lunch. Messrs. Press and Kirkner, who were both lawyers, discussed the policy and

expressed the view that the policy was wrong, illegal in the District of Columbia and contrary to the principles of Scouting. Mr. Bond was present during that conversation. (Tr. 380-382, 1973-1981, Bond Dep. at 124-125)

68. Mr. Pool did not initiate this conversation or take any part in it. He never mentioned his sexual orientation at the meeting and no one was left with any knowledge about his sexual orientation. (Tr. at 407-408, 7870)
69. At the end of the training session, Mr. Pool received a patch and certificate signed by Scout Executive Ron Carroll demonstrating Mr. Pool's successful completion of his training as a Unit Commissioner. (Exhibit C301, Bond Dep. at 117-119)
70. On July 3, 1992, Mr. Pool submitted to Mr. Bond his application to become a Unit Commissioner in the Banneker district. In the cover letter, Mr. Pool advised Mr. Bond that he was gay. In the attached application, Mr. Pool stated that he was a member of the Smithsonian Lesbian and Gay Issues Group, had previously been affiliated with the Sexual Minority Youth Assistant League ("SMYAL"), and had served as a peer counselor at Whitman-Walker Clinic, the region's premier gay men's health clinic. The completed application did not refer to Mr. Pool's sexual orientation. In Section "6" of the application entitled "Additional Information", the application asked whether the applicant used drugs, was ever convicted of an offense, was charged with child neglect or abuse or had his driver's license suspended or revoked. Question 6e asked whether there was "any fact or circumstance involving you or your background that would call into question your being entrusted with the supervision, guidance, and care of young people." Mr. Pool answered "no" to each of the subparts in question 6 of the Application, including Question 6e. (Tr. at 791-795, Exhibits C303, C304)
71. Eleven days later, on July 14, 1992, Ron Carroll wrote to Roland Pool stating that "after careful review, we have decided that your registration with the Boy Scouts of America must be denied. We are, therefore, compelled to request that you sever any relations that you may have with the Boy Scouts of America." Mr. Carroll's letter did not state the reason why Mr. Pool's registration with the Boy Scouts of America must be denied. (Exhibit C309)
72. Mr. Carroll's decision to send this letter in the mail, with no explanation, violated the Boy Scout's own procedures. Under the Boy Scouts' procedures, the Scout Executive was to have the letter delivered and to provide an explanation for the decision. (Mack Dep. at 162-164, Exhibit C603 at NCAC2581)
73. On the same day of Mr. Carroll's letter, Steven Montgomery, Associate Scout Executive, sent information to Paul Ernst, Director, Registration Service of the Boy Scouts of America, for the purpose of adding Mr. Pool to the Ineligible Volunteer File maintained by the BSA in Irving, Texas. The BSA developed this "Ineligible Volunteer File" to record and bar from membership individuals known by the BSA to be unfit for membership. Such individuals included people who

engaged in all manners of crimes and financial misdealing, theft, child abuse, as well as gays. Mr. Carroll's letter to Mr. Pool did not inform him that the Ineligible Volunteer File existed or that he was being placed in it. (Exhibit C307, C309, C1505)

74. On July 29, 1992, Mr. Pool wrote Mr. Carroll expressing his disappointment over the Boy Scouts' decision and requesting a reason why he had to sever his relations with the Boy Scouts. In response to the letter, Mr. Carroll wrote to Mr. Pool on August 6, 1992 and stated, "I'm sorry Roland . . . that it was necessary for you to write a letter to me requesting an explanation as to why your membership in Scouting has been rejected. It was my impression that you were made aware of the policy that the Boy Scouts of America does not accept homosexuals as youth leaders." Mr. Carroll further stated "I would share with you that this is a policy of our National Organization which this council is bound to comply with and one that our council leadership supports." (Tr. at 798-799, Exhibits C310, C311)
75. After learning of Mr. Pool's membership rejection, Mr. Jones raised the issue of whether anyone would have a problem with a gay Unit Commissioner both at a meeting of his commissioner staff and at a round table attended by 20 to 40 Scoutmasters, Assistant Scoutmasters and other adult leaders in the Banneker District. Not one of them expressed any view that it was inappropriate to have Mr. Pool be a member of the Scouting organization. (Tr. at 409-412, 593)

VII. The Boy Scouts' Exclusionary Policy

76. The Boy Scouts concede that its Executive Board never adopted a resolution on a policy excluding gays in the organization. If there is anything in the minutes of the Executive Board, it appears that the information is a privileged discussion with its attorneys. (Tr. 2473-2474, 2479-2480, Exhibit C1507)
77. The first written materials reflecting the exclusionary policy were two 1978 memoranda and "Position Statements" generated for media relations. The February 13, 1978 and March 17, 1978 memoranda are the first documents that purport to set forth a Boy Scouts' policy concerning homosexuals. Each memorandum was issued in response to inquiries asking the BSA on its official position regarding gay volunteers and professional leaders. In those memoranda, the Boy Scouts responded that "an individual who openly declares himself to be a homosexual" could not be a volunteer Scout leader. Within the memorandums, the Boy Scouts advised its professional staff that when situations arose involving homosexuals, they should use the procedures from "Maintaining Standards of Leadership,"—a document that explains how to investigate and exclude persons from Scouting when they are alleged to be involved in crimes, child molestation or other offenses. The March 17, 1978 memorandum also explained that, "in the event that an individual involved in Scouting is alleged to be homosexual: The

matter should be investigated in a discreet and responsible fashion, with the utmost regard for the concerned individual's civil rights." (Exhibits C500, C501 at NCAC2521 and NCAC2523, C600-01, C603-04, C 1501 at 17, C1505 par 5, C1506 pars. 4 and 6)⁸

78. The memoranda further state that the reason to investigate individuals who are alleged to be homosexuals is that the BSA "is a private membership organization and leadership therein is a privilege and not a right" and that the BSA does not "believe that homosexuality and leadership in Scouting are appropriate" and the BSA "will continue to select only those individuals who in our judgment meet our standards and qualifications for leadership." (Exhibit C501 at NCAC2521, C500)
79. The Commission notes and finds that the 1978 memoranda do not suggest that gay scout volunteers are contrary to the Scout Oath or the Scout Law, or that gays are inappropriate role models. Rather, the March 17, 1978 memorandum states that in the absence of any law [in the United States] to the contrary, the Boy Scouts would have to obey laws that prohibit discrimination against an individual's employment on the basis of homosexuality. (Exhibit C501 at C2522)⁹
80. Between 1978 and 1991, there is little information regarding the Boy Scouts' exclusionary policy. However, David Park, BSA's legal counsel, sent a letter in 1981 to individuals identified as being Boy Scouts since 1916, requesting confirmation that there has always been a policy excluding gays. This letter was sent as part of the *Curran v. Mount Diablo Council of Boy Scouts* litigation, a case involving the exclusion of a gay Scout leader in California. (Exhibit R152)¹⁰
81. During the 1980's, as part of Scoutmastership Fundamentals, a required training course for adult troop leaders, the Boy Scouts informed leaders of numerous policies, including the Boy Scouts policy (changed in 1988, see Exhibit C607 at A8122) of excluding women from being Scoutmasters, Assistant Scoutmasters, Webelos Den Leaders, Assistant Webelos Den Leaders and certain other leadership positions. (Exhibit C900 at 1066-67). The Boy Scouts sent nothing to its members about a policy of excluding gays.
82. In the early 1990s, the *Curran* case went to trial and the policy of excluding gays received large amount of publicity. (Tr. 828-30). At this point, the Commission finds that the Boy Scouts' views on homosexuality shifted from near silence to a public relations campaign.

⁸ The Commission notes that the two memoranda do not purport to reaffirm any historic policy.

⁹ The Commission further notes that the memorandum speaks of employment discrimination rather than discrimination on the basis of a volunteer position. However, the memorandum is noteworthy that the BSA states that it will obey and uphold laws of any statute within the United States.

¹⁰ The letter was generated to receive affidavits from individuals who swore that there was always an exclusionary policy. This was an attempt by BSA to document the historical nature of the policy of the Scouts excluding homosexuals since there was no empirical evidence of its existence.

83. The Commission finds that the BSA is an intensely media conscious organization. (Exhibits C518, C519, C520 C522, C523, C607 at NCAC8118), Teare Dep. at 112-114, Lewis Dep. at 119-122, Carroll Dep. at 125). As a result, the BSA considers media relations to be “the art and science of systematically building and maintaining favorable contact with reporters and other members of the news media.” (C520 at NCAC5581, C518 at NCAC2812). The BSA looks for opportunities to “shape the public’s perception of the Boy Scouts of America,” and to “position the BSA as *the* credible, leading expert on the subject of youth development. (Exhibit C520 at NCAC5578 and NCAC5580)(emphasis in original). The BSA aggressively train their professional staff so that they can win interview situations. (Exhibit C519 at NCAC2796, Teare Dep. at 58-59) According to the BSA, the “lack of direction during an interview can spell disaster for the image of both the Scouting and the local council.” Thus an agenda must be set for the interview and communicate it effectively (C519 at 2796, C520 at NCAC5580) In order to be confident about the agenda, the BSA developed a series of position statements about “issues” perceived to be national in importance. (Ex. C520 at NCAC5586, Teare Dep. at 130-131; Mack Dep. at 191-94, 205-208, 224-225) According to the BSA, “an issue is a significant focus of attention on a policy, value or standard of Scouting.” An issue “routinely emerges over a relatively long period of time, generally measured in weeks, months, or frequently, even years.” On the other hand, a “crisis is an immediate and intense focus from the media, and ultimately the public, on a particular activity or event,” that “develops unexpectedly over a relatively short period of time, generally measured in hours or days.” (C520 at NCAC5580 and NCAC5580-81)
84. By the early 1990s, homosexuality had become one of the “issues” perceived by the BSA as receiving a “significant focus of attention (Exhibit C520 at NCAC5580, Teare Dep. at 66). The BSA became afraid that there was a potential that a Scout leader might “declare his homosexuality to the media and proceed to publicly condemn the BSA’s position on the six o’clock news and the front page of the local newspaper. (Exhibit C520 at NCAC5581)
85. Accordingly, the BSA issued a series of position statements, Q&As and media training materials designed to inform designated spokespersons at the national and council level what to say about the BSA’s policy on homosexuals in Scouting. The statements were updated or reissued when the BSA determined that its position was not well understood in the media. (Exhibits C503-523, Teare Dep. at 130-131.)
86. The position statements excluding gays were not drafted by the program divisions of the BSA—Cub Scout, Boy Scout or Exploring Divisions but were drafted by a public relations firm hired by the BSA, Edelman Worldwide, with help from the BSA’s Office of External Communications.¹¹ The national office of the Boy

¹¹ The Commission notes that it appears that there is no record of a vote by the National Board or the Scouts members regarding the position of excluding homosexuals.

Scouts designated an Edelman employee as its “national spokesperson” and empowered that person to speak for its National Board. (Tr. at 2543-2544, Teare Dep. at 23, 27, 34-35, 56-57, 126, 135-136, Lewis Dep. at 18-20, Exhibit C519 at NCAC2806)

87. On February 15, 1991 and June 6, 1991, the BSA and its public relations firm issued in different typeface, otherwise identical documents entitled “POSITION STATEMENT HOMOSEXUALITY AND THE BSA”. (Exhibits C503 and C504). These statements read in part:

. . . We believe that homosexual conduct is inconsistent with the requirements in the Scout Oath that a Scout be morally straight and in the Scout law that Scout be clean in word and deed and that homosexuals do not prove a desirable role model for Scouts.

Because of these beliefs, the Boy Scouts of American does not accept homosexuals as members or as leaders, whether in volunteer or professional capacities.

Our position on this issue is based solely upon our desire to provide the appropriate environment and role models which reflect Scouting’s values and beliefs.

As a private membership organization, we believe our right to determine the qualification of our members and leaders is protected by the Constitution of the United States. (Exhibits C503, C504)

88. In a February 15, 1991 Questions and Answers document, the BSA reiterates its 1978 statement concerning their determination to investigate allegations of homosexuality “in a discreet and responsible fashion.” The document also avoids any statement by the BSA’s own position on the morality of homosexuality. (C504 at NCAC2596)
89. The Commission finds that for the first time, BSA’s 1991 position statement asserts that the exclusion of homosexuals is based upon the terms “morally straight” or “clean” or any provision of the Scout Oath or Law. Also, the statements declare that the BSA would not merely agree to follow laws against discrimination, but assert a constitutional right not to follow such laws.
90. As of 1991, the Boy Scouts prevented gays from serving as professional leaders. At that time, they did not require its professional employees to subscribe to the Scout Oath or Law. That requirement was added in a December 1, 1992 revision to its professional employment policy. This revision also changed the Boy Scouts’ previous statement that it would refrain from discriminating on any “criterion prohibited by applicable law.” As of that date, the Boy Scouts would

only follow “non-discrimination laws to the extent that they may constitutionally be applied to it.” (Exhibit C501, Exhibit C2000 at A1556 and A1557)

91. In February 1992, the BSA National Office discussed its exclusionary policy in response to news reports. On February 4, 1992, the San Jose *Mercury News* published a report that a Scout Troop there had issued a resolution stating that being homosexual was not contrary to the words “Morally Straight.” (Exhibit C506 at NCAC5460) Later that month, a “Boy Scout Task Force” commissioned by the United Way in the San Francisco area issued a draft report recommending that the Boy Scouts cease disallowing gays to be members or leaders, or to adopt a local policy that allowed gays to participate in Scouting. (Exhibits C507 at NCAC5462, C519 at NCAC2804-05). The BSA National Office responded to these events. First, it issued a memorandum to Scout Executives attaching the San Jose Troop resolution and stating that troops are obligated to follow national BSA policies. (Exhibit C506). Then it issued a memorandum to the National Executive Board and a “Media Training Guide,” drafted by Edelman Worldwide, that included a “Q&A for United Way of the Bay Area Task Force Issue.”
92. BSA’s response to the San Jose Troop resolution did not discuss the exclusionary policy. Rather, it gave the San Jose Troop the opportunity to “reaffirm their agreement to uphold national policy.” (Exhibit C506 at NCAC5458). The Boy Scouts took the position that Scouts and Scouters could remain with the BSA even if they did not believe that “homosexuality” was contrary to the requirement to be “Morally Straight,” at least so long as they did not actually choose a homosexual leader. (Cahn Testimony at 88-89, Exhibit C506 at NCAAC 55460)
93. The BSA public relations firm reacted to the draft report of the United Way Task Force by stating that the Task Force as a group was commissioned “to examine ways of molding the Boy Scouts into conformation with [United Way’s] ‘politically correct’ values and standards.” (Exhibit C519 at NCAC2804)
94. In March or April 1992, the BSA’s public relations firm, Edelman Worldwide, produced a video with companion written modules called the “Issues and Crisis Communications Guide.” It was created for distribution to the councils and to be used “if the local Scout executive had something to come up and needed to have some verbiage or some help in explaining something to the media, or for him to share with local council volunteers when they needed some help in sharing or explaining something with media.” Still in effect at the time of the hearing, the guide begins with basic training material on how policies were to be characterized if the press inquired. It also contains specific modules on various “issues,” including “Module 4 Homosexuality.” That issue was discussed because BSA’s policy on homosexuals and other matters “were the issues of the time that were in the media, both in newspapers and in television.” The videotape references the San Jose *Mercury News* story about the Boy Scout Troop resolution. The guide also advises that “gay rights organizations have attacked Scouting to further their

own agenda. Scouting isn't changing. Scouting won't change.' (Lewis Dep. at 30-31, 149-151, 159-160, Teare Dep. at 66, Exhibits C520, C522, C523, C508)

95. In bold block letters, the Guide informs Scout Executives that the "BSA's position regarding homosexuality is as follows": THE BOYS SCOUTS OF AMERICA HAS EMPHASIZED TRADITIONAL FAMILY VALUES SINCE INCEPTION OF THE MOVEMENT. WE BELIEVE HOMOSEXUALS DO NOT PROVIDE A ROLE MODEL FOR SCOUTS THAT IS CONSISTENT WITH THESE TRADITIONAL VALUES. ACCORDINGLY, THE BOY SCOUTS OF AMERICA DOES NOT ACCEPT HOMOSEXUALS AS MEMBERS OR LEADERS. (Exhibit C508 at A1023)
96. On May 6, 1992, the Boy Scouts issued another position statement regarding homosexuality. (Exhibit C509). The statement states again that the Boy Scouts "also places strong emphasis on traditional values," in addition to bringing the "moral values of the Scout Oath and Scout Law to American Boys." It also states "We believe that homosexual conduct is inconsistent with the requirements in [sic] the Scout Oath and Scout Law. Because of these beliefs, the Boy Scouts of America does not accept homosexuals as members or as leaders, whether in volunteer or professional capacities." The Commission notes that this position statement is identical to the 1991 statements with two exceptions. The 1991 position statements that "the requirements in the Scout Oath that a Scout be morally straight and in the Scout law that a Scout be clean in word and deed. The 1992 statement deletes the references to "morally straight" and "clean" being the portions of the Scout oath and Law that are supposed to apply to homosexuals.
97. In an undated position statement on "Homosexuality and the BSA", reference is made to "family values" and "role models" as the basis for the policy of the BSA excluding gays as members or leaders. This version contains no reference to the Scout Oath or the Scout Law. (Exhibit C510)
98. In September, 1992, the BSA issued a document directed to its general membership that mentioned a policy of excluding homosexuals. In *Scouting Magazine*—the magazine for adult Scouters—the BSA published an editorial entitled "Maintaining BSA Standards." (Ex. C511 at NCAC5286) In this editorial, there was no explanation of how BSA's policy operated or whether it applied to "all" homosexuals, "known" homosexuals, "avowed" homosexuals or some combination of "known or avowed." Although the editorial generally referenced the Scout Oath and Scout law, it did not explain how the Oath or Law applied to homosexuality. It also asserted that "for more than 82 years, the BSA has taken a strong stand for the teaching of traditional American family values," and that, "the BSA is committed to maintaining its rights under the Constitution of the United States." The editorial attacked those who challenged BSA's exclusion of homosexuals. The editorial began by saying "recently, the Boy Scouts of America has been attacked by special interest groups who claim that we

will not allow them to participate in the BSA because of their differences with our long-held standards.” (C511 at NCAC5286)

99. In January 1993, four months after the *Scouting* Magazine editorial appeared, the BSA issued another position statement that contained “Support Points” which included:

The Boy Scouts of America does not ask prospective members about their sexual preference, nor do we check on the sexual orientation of boys who are already Scouts.

The reality is that Scouting serves children who have no knowledge of, or interest in, sexual preference. We allow youth to live as children and enjoy Scouting and its diversity without immersing them in the politics of the day.

Membership in Scouting is open to all youth who meet basic requirements for membership and who agree to live by the applicable oath and law.

Scouting involves poor, middle-class and rich youth, boys from the city, suburbs and the country; boys from all faiths, from Judaism, Christianity and Moslem.

Scouts come from all walks of life and experience diversity that they often cannot see elsewhere in their lives.

The position of the Boy Scouts of America has been conveyed to the American public frequently and consistently; exceptions to the national policies of the BSA are not granted, and any youth or adult presenting himself to any office of the Boy Scouts of America will be reformed of our policy and position. However, a youth does not join the BSA through a council or office, but rather, through a local troop or pack.

The BSA respects the rights of persons and groups with values which differ from those of the BSA; however, the BSA expects that those who oppose Scouting’s positions exercise the same respect for the rights of the BSA (Exhibit C512)

The Commission notes that this position statement appears to acknowledge that teaching about the morality of homosexuality is not part of the Boy Scout’s program. Although it references the “applicable oath and law”, it does not even refer specifically to the Scout Oath and Law or assert that the Scout Oath and Law are what require the exclusion of gays. Instead the position statement which touted “family values” discusses tolerance. (Exhibit C512) The Commission further notes that this position statement suggests that the Boy Scouts have no problem with homosexuals, only those individuals who admit to being

homosexuals. In the statement, the BSA says it excludes “avowed” homosexuals.¹²

100. In February 1993, Jere B. Ratcliffe succeeded Ben H. Love as Chief Scout Executive. On March 29, 1993, he broadcast a speech to Boy Scouts professionals nationwide. In the speech, it was noted that “another set of issues that we face are the Constitutional issues we deal with—those referred to in the field as the “Three G’s” Mr. Ratcliffe cited the Scout Oath in the context of discussing the Boy Scouts’ exclusion of atheists. However, in discussing gays, the speech made no mention of the Scout Oath or Scout Law. It stated, “BSA has always reflected the expectations that Scouting families have had for the organization and we do not believe that homosexuals provide a role model consistent with these expectations. The Commission notes that Mr. Ratcliffe did not distinguish “known or avowed homosexuals.”¹³ (Teare Dep. at 141-143, Exhibit C1129 at NCAC4933, C513)

101. In February 1996, the BSA issued a Scout Executive Reference Manual with a number of policy statements on various issues. One statement contained a “Position Statement on Homosexuality and the BSA” (C607) It is identical to the BSA’s June 6, 1991 statement (C505) with the exception that the June 1991 statements says “because of these beliefs, the Boy Scouts of America does not accept homosexuals. . .” The Scout Executive Reference Manual adds the words “known and avowed” before the word “homosexuals.” (Exhibit C607 at NCAC8132)

102. On December 11, 1996, the Chief Scout Executive Ratcliffe sent the National Executive Board and Advisory Council a memorandum stating that the “policy of the Boy Scouts of America has not changed,” and that “all councils are to continue to follow the position on homosexuality which is attached.” The councils were instructed to follow the June 1, 1994 statement which refers to “avowed homosexuals” not “known or avowed” homosexuals. (Exhibit C517 at NCAC4950-51, C515)

103. On March 2, 1998, the New Jersey Superior Court, Appellate Division decided *Dale v. Boy Scouts of America*, finding that BSA’s policy of excluding homosexuals violate New Jersey law and was not constitutionally protected. The next day, Gregg Shields of Edelman Worldwide, who was the then current spokesperson for BSA stated that the Boy Scouts “have long taught traditional family values and a homosexual is simply not a role model for those values.” The Commission notes that the statement was not “known or avowed homosexual.” (Exhibit C528)

¹² In November 1993 and June 1994, the public relations office of BSA issued two other similar statements. (Exhibits C514, C515)

¹³ The Commission notes that the speech was written by Scott Teare, then Director of BSA External Communications.

VIII. Awareness of the Policy

104. There is a difference in opinion as to the awareness of the exclusionary policy. The BSA contends that its views regarding the exclusion of homosexuals have been known by all of its adult volunteers. The BSA points to the 1992 *Scouting Magazine* article which discusses the policy of excluding homosexuals from serving as adult volunteers. (C-511). BSA also points to the 1972 edition of the *Scoutmaster Handbook*, the edition which was in use during the bulk of Complainants' Scouting experience, advises leaders:

Incidents of sexual experimentation that may occur in the Troop could run from the innocent to the scandalous. They call for a private and thorough investigation, and frank discussion with those involved. It is important to distinguish between youthful acts of innocence, and the practices of a confirmed homosexual who may be using his Scouting association to make contacts. A boy of 15 or so cannot be assumed to be acting out of innocence, and should be separated from the Troop for the protection of younger boys. (Exhibit R-171 at 74 (emphasis added))

However, the Complainants believe otherwise. Complainants contend that the exclusionary policy was issued via public relations statements to people outside of Scouting but never issued to volunteers to tell them what policy that are supposed to implement. (Lewis Dep. at 140). Various testimony from adult volunteers help support Complainants' allegations. For example, Thornell Jones, a member of the District Committee of the Banneker District and its Adult Training Chairman was once the District Commissioner. He had been a troop committee chairman. As a District Commissioner, a council-level-officer and one of the "key three", any policy of the Boy Scouts to be implemented would have been conveyed through him.¹⁴ He never received any position statements, Q&A statements or other public relations documents regarding BSA's exclusionary policy. The first time Mr. Jones learned of the policy was when two of the Commissioners on his staff, Kirkner and Press, told him about it. (Tr. 283, 288-90, 301-306, 380,81, 384-404, 423-25) In addition, no one told Mr. Jones that the BSA investigates allegations of homosexuality. (Tr. 385-86) Nor has he ever heard the term "traditional family values" used in context of Scouting. (Tr. 387-88) Furthermore, Mr. Jones believes that nothing in his Scouting experience led him to understand that homosexuality was supposed to be contrary to the words "morally straight" in the Scout Oath or "clean" in the Scout Law. (Tr. 389-90)

105. Charles Wolfe, who at the time of the hearing was the Director of External Affairs for Governor Lawton Chiles of Florida, never learned of the exclusionary

¹⁴ Note, District Commissioners are responsible for making sure that the Boy Scout Program within the District of Columbia meets BSA standards. He is also responsible for supervising the staff responsible for communicating those standards to the adult leaders.

policy from the BSA. Mr. Wolfe served in various youth and leadership positions between 1970 and 1996. He was an Eagle Scout and leader of the Explorers. In 1981, he was elected National Explorer President of the BSA. In that capacity he traveled approximately 75,000 miles representing the BSA and served as a voting member of the Executive Board of the BSA's National Council. He was a member of the Executive Board of his council. He was active on the Board of Review which evaluated whether Scouts had met the requirements for advancement through the ranks of Scouting and discussed whether Scouts were living up to the ideals of the Scout Oath and Law. Mr. Wolfe learned of the exclusionary policy from a newspaper article and assumed that the article was false because the BSA "don't say no to anybody." With his positions at the national and council levels, he stated that the BSA never showed him any of its position statements. Mr. Wolfe was never told that "morally straight" or "clean" was supposed to mean heterosexual. (Tr. 1699-1708, 1710-1712, 1720-1721)

106. William Kirkner, an attorney and product manager for MCI, never learned of the exclusionary policy from the BSA, despite his various youth and adult leadership positions.¹⁵ The first time Mr. Kirkner heard about the Boy Scout's policy of excluding gays was in approximately 1991 or 1992, while he was giving a talk at a Boy Scouts dinner about the Boy Scout's Ethics in Action program. Someone in the audience asked how the principles of tolerance taught to Cub Scouts in the Ethics in Action program squared with the Boy Scout's exclusion of gay Eagle Scout, Timothy Curran, from Scouting. Mr. Kirkner responded to the questioner that he [the questioner] had to be wrong about the BSA position, for the position did not match what he had been reading in the Ethics in Action program. (Tr. 1954-55, 1965-67)

107. Daniel Press, an attorney, who had been a Unit Commissioner and Assistant Commissioner heard of the exclusionary policy "through the grapevine." No one sent him any position statements on the subject. (Tr. 512-513, 537-40, 574-75)

108. David Geller, Complainant Michael Geller's father, has maintained continuous registration with Troop 37 in Owego, New York for over 56 years. During that time he had been a Scout, Scoutmaster, troop committee chairman and a member of the Executive Board of the Baden-Powell Council. During his service with the Scouts, Mr. Geller never understood or believed that the Scout Oath or Law to have a sexual component or that the Boy Scout program was involved with the morality of homosexuality. Mr. Geller did not know of the BSA's exclusionary

¹⁵ Mr. Kirkner received his Arrow of Light in the Cub Scouts, became an Eagle Scouts, received the Explorer Achievement Award in the Explorers and became a Vigil Honor member of the Order of the Arrow. His adult positions included Unit Commissioner, Assistant District Commissioner, Program and Section Director at Camp Spencer. Mr. Kirkner was a Section Chief of the Order of the Arrow. In that capacity, he organized its training conclave and reviewed and commented on the Boy Scout Handbook's section on sexual responsibility (Tr. 1915-19, 1921-1926, 1937-39.)

policy until after his son was expelled from Scouting. (Tr. at 466-469, 472, 473-477, 481)

109. Other individuals such as David Rice [via testimony in the *Matter of Richardson v. Chicago Area Council of the Boy Scouts of America*], Michael Cahn [via *Richardson* testimony], Michael Herde, Russell McLaren, Daniel Shaw and William Kealy, all individuals with various youth and adult positions in the BSA never learned of the exclusionary policy by way of a publication of the Boy Scouts. Rather, they learned of the policy by some other source. (Rice Testimony at 228-38, 239, 241-263, Cahn Testimony at 7079, 85-86, Tr. at 442-443, 439, Shaw affidavit, Kealey affidavit, McLaren affidavit)
110. The Commission finds that the BSA exclusionary policy was not routinely disseminated to the adult leaders in the various councils and troops. Rather, the BSA issued policy statements to be used for addressing the issue to the media. These statements were issued only to those individuals who were designated to address the media. Consequently, if an “issue” or “crisis” concerning gays in the BSA did not develop at the “grass roots” level in the various councils, the adult leaders would never know or see the existence of the subsequent policy.

Meaning of “Known or Avowed”

111. The Commission finds that the BSA is unclear as to what “known or avowed” means in context of the exclusionary policy. For instance, Mr. Teare believes that once an individual identifies himself as being gay, that person is “known or avowed” and therefore he can no longer be a scout leader. (Teare Dep. At 81-82) Mr. Leet believes that if someone engages in homosexual sex behind closed doors, that individual can take the Scout Oath and Law and be part of Scouting. John Thomas, who has 50 years experience on the Executive Board of a Boy Scout Council and was a member of the Boy Scouts National Religious Relationships Committee, is unsure whether the policy applies to someone who is homosexual or a practicing homosexual. Furthermore, Mr. Thomas was uncertain of whether the BSA would exclude a celibate homosexual or one who indicated that he had no intention of discussing his sexual orientation. (Tr. At 1144-46, 1303-07)
112. Additional evidence concerning the confusion of their policy can be seen when the Denver Area Council issued a public statement indicating that the Boy Scout’s policy did not apply to gays in private relationships, but only to individuals who “openly profess their sex” to children. (Hobbs Aff. Par.2; Exhibit C1200 at A77) The Boy Scouts maintain that this statement is incorrect. (Teare Dep. At 152-53) Some individuals maintain that the only significance to the words “known” or “avowed” is that the BSA intends to exclude anyone who is gay but simply cannot exclude people unless they know about them. (Mack Dep. at 30-34, Tr. at 1393-94, Bond Dep. at 1334-35, Carroll Dep. at 158-59)

113. Further evidence of the confusion concerning “known” or “avowed” can be demonstrated in the BSA’s application for adult volunteers. On the application, the BSA asks whether the applicant used illegal drugs, have been convicted of a criminal offense, have been charged for child neglect, or has had their driver’s license revoked. (Exhibit C305) Then on Question 6(e), the applicant is asked “. . . is there any fact or circumstances involving you or your background that would call into question your being entrusted with the supervision, guidance and care of young people? (If yes, explain below)” Although the question does not mention homosexuality, the BSA expects that a homosexual would answer the question yes, then explain that their sexual orientation status calls into question their being entrusted to supervise young people. (Teare Dep. at 74-76, Tr. 1204-10, Mack Dep. at 34-41, Bond Dep. at 105-106)¹⁶

IX. Investigation of Allegations of Homosexuality

114. According to BSA, whenever there is a “substantive” allegation of homosexuality, the policy is to conduct an extensive “fact-finding.” (Mack Dep. at 197)¹⁷

115. If there is an allegation, the BSA would ask the people in the troop committee if they knew anything about the individual’s “lifestyle”. The BSA would also ask the adult leader who is under investigation. If the leader refuses to answer any questions about his sexual orientation, he could be removed. (Mack Dep. 196-200)¹⁸

116. The Boy Scouts contend that they are not an “investigative organization”. They argue that they would not investigate someone unless that individual did “something” such as write something on the application that they were gay or belong to an organization that is known to be gay. (Tr. at 1215-16)

¹⁶ The Commission notes that the application was revised in 1989. At that time, the BSA eliminated a question concerning “marital status”.

¹⁷ The BSA asserts that they would not investigate anyone on mere suspicion of being gay. (Fullman Dep. at 34-35)

¹⁸ The Commission notes that the BSA has no general policy of excluding persons who engage in adultery or premarital sex and the Boy Scouts do not generally police the sexual conduct of heterosexuals. (Tr. at 341, Teare Dep. at 82-84. The Boy Scouts do not have a general policy of excluding heterosexuals who believe that homosexuality is moral—even if they publicly avow such a belief, or for example, march in a gay and lesbian parade. (Tr. 1306-09) The Commission finds that the contrasts between the Boy Scout’s treatment of homosexuals and heterosexuals is illustrated by the files maintained by the NCAC involving the possible removal of individuals from Scouting. Of the 99 files maintained by the NCAC and produced in discovery, 7 files involved individuals identified as or alleged to be homosexuals. All seven were told to sever all of their ties with the Boy Scouts. (NCAC File Nos. 19, 25, 33, 58, 74, 77, 89) The NCAC forwarded the files to Irving Texas for inclusion in the Ineligible Volunteer File. In contrast none of the other 93 individuals were terminated for adultery and pre-marital sex

117. Roland Pool was excluded from the BSA because he wrote on his adult volunteer application that he volunteered at the Whitman-Walker Clinic, a clinic that treats patients with AIDS and because many of the patients at Whitman-Walker Clinic are members of the gay community. (Bond Dep. at 144)
118. The Commission finds that the adult volunteer application questions and investigative process demonstrate the BSA's concern is not just with "known" or "avowed" homosexuals, but any homosexual.

X. The Boy Scouts Mission

119. The purpose of Scouting is to serve youth. (Tr. at 930) The Boy Scouts' Mission statement states: "It is the mission of the Boy Scouts of America to serve others by helping to instill values in young people and, in other ways, to prepare them to make ethical choices over their lifetime in achieving their full potential. The values we strive instill are based on those found in the Scout Oath and Law." (Exhibit R-1, and R-23)
120. The Scouting movement is built on teaching boys the positive values of the Scout Oath and Law. The Scouting movement aims to build moral strength and character, to foster participating citizenship, and to develop physical, mental and emotional fitness. (Exhibits R-10, R-5, R-11) Fitness includes moral fitness. (Exhibit R-5)
121. The basic purpose of Scouting is and always has been the inculcation of moral and religious values in boys and young people. All Scouting activities are guided and aimed towards fostering the "practice in daily life" of the values expressed in the Scout Oath and the Scout law. (Exhibits R-10, R-152, R-5, C1300)
122. The Scout Oath and Law provides a positive code of life for Scouts to follow. Scouting has never "tried to enumerate or make a list of all things that you should not do. That list would be impossible to produce. So we have always taken a positive approach of what you should do as opposed to what you should not do." (Carroll Dep. at 19) The *Boy Scout Handbook* explains to Scouts that the Scout Law provides, not only the "rules of Scouting," but also a guide for living "your whole life" and the way to earn respect and the respect of others. (Exhibit R-3)
123. Through repetition, the Scout Oath and Law becomes part of a Scout. (Tr. 73, 158).
124. The BSA contends that the Scout Oath and Law addresses sexual behavior and morality in the words "morally straight" and "clean". "Morally Straight" in the

Scout Oath is described in the handbook as “To be a person of strong character, guide your life with honesty, purity and justice. Respect and defend the rights of all people. Your relationships with others should be honest and open. Be clean in your speech and actions, and faithful in your religious beliefs. The values you follow as a Scout will help you become virtuous and self-reliant. (Exhibit R-3 at 551). However, the Commission finds that the oath never suggests that “morally straight” refers to sexual orientation or conduct. The corroborative testimony of several witnesses supports this conclusion. Thornell Jones testified that “morally straight” means that “everybody should have some kind of ethic” (Tr. at 336-37) Charles Wolfe testified that “morally straight” is “never discussed...” in relation to someone’s sexual orientation either homosexual or heterosexual. (Tr. 1710) Mr. Kirkner stated that his “understanding of ‘morally straight’ is that you’re forthright . . .The idea of being ‘morally straight’ is the idea of being a straight-shooter, a plain dealer . . .”

125. The *Boy Scout Handbook* describes the Scout Law-a Scout is clean- as “a Scout [who] keeps his body and mind fit and clean. He chooses the company of those who live by these same ideals. He helps keep his home and community clean. You never need to be ashamed of dirt that will wash off. If you play hard and work hard you can’t help getting dirty. But when the game is over or the work is done, that kind of dirt disappears with soap and water. There’s another kind of dirt that won’t come off by washing. It is the kind that shows up in foul language and harmful thoughts. Swear words, profanity, and dirty stories are weapons that ridicule other people and hurt their feelings. The same is true of racial slurs and jokes making fun of ethnic groups or people with physical or mental limitations. A Scout knows there is no kindness or honor in such mean-spirited behavior. He avoids it in his own words and deeds. He defends those who are targets of insults.” (Exhibit R-3 at 561, C700 at 561) As with “morally straight”, the Commission finds that “clean” has no sexual component within its meaning. (See testimony of Thornell Jones, Tr. 389-90, Press Tr. at 576-77, Wolfe Tr. at 1710-12)

XI. Role of Religion within the BSA

126. The Boy Scout’s policy concerning a belief in God and the role of religion is very clearly stated. Clause 1 of the Scouting Declaration of Religious Principles contained in the BSA By-Laws states: “The Boy Scouts of America maintains that no member can grow into the best kind of citizen without recognizing an obligation to God. In the first part of the Scout oath or Promise the member declares ‘On my honor I will do my best to do my duty to God and my country and to obey the Scout Law.’ . . .The Boy Scouts of America, therefore, recognizes the religious element in the training of the member but it is absolutely nonsectarian in its attitude toward that religious training. Its policy is that the

home and the organization or group with which the member is connected shall give definite attention to religious life.” (Exhibit C1300 at NCAC116)

127. Clause 3 of the Religious Principles state: “In no case where a unit is connected with a church or other distinctively religious organization shall members of other denominations or faith be required, because of their membership in the unit, to take part in or observe a religious ceremony distinctly unique to that organization or church. (Exhibit C1300)

128. In explaining the above religious principles in its Advancement Guidelines, the BSA states: “ (1) [it] Does not define what constitutes belief in God or the practices of religion. (2) Does not require membership in a religious organization or association for enrollment in the movement but does prefer, and strongly encourages, membership and participation in the religious programs and activities of a church, synagogue or other religious association. (3) Respects the convictions of those who exercise their constitutional freedom to practice religion as individuals without formal membership in organized religious organizations. . . .” In addition, the Advancement Guidelines provide: “Throughout life, Scouts are associated with people of different faiths. Scouts believe in religious freedom, respecting others whose religion may differ from theirs. Scouting believes in the right of all to worship God in their own way.” (Exhibit C731 at 2374)

129. From the above principles, the Commission finds and as supported by testimony that it is contrary to BSA’s by-laws, literature and principles for the Scouts to pick and choose among the moral views of different religions or among the faithful within particular religions. (See Hill Dep. at 65, Tr. at 327-28, 333-35, 550-553)¹⁹

130. However, the BSA believes that the view of various religions on the morality of homosexuality supports its general exclusion of gays. First, religious organizations sponsor a substantial amount of troops in the country including the District of Columbia. The four largest sponsors of Scouting Units nationally in terms of units are the Church of Jesus Christ of Latter-Day Saints (the LDS Mormon Church”, the Methodist church, the Roman Catholic Church, and the Baptist Church (Exhibit R-16, R-180, Tr. at 1456-57, Tr. at 1865-66, Tr. 1106)

131. The LDS Mormon Church sponsors approximately 30,297 Scouting units or about 23% of all Scouting units nationally. (Exhibit R-180, Att.A). There are approximately 402,828 youth registered in those units, a little over 11% of all

¹⁹ An example that the BSA follows this tenet is the Religious Emblems program. This program provides Scouts with an award for the successful completion of a program of religious endeavor designed by the Scout’s religion. The Scouts are allowed to wear the emblem on their uniform, however, these emblems are not Scouting awards. These awards are sponsored and administered, not by the BSA, but by the various religious organizations that sponsor Scout troops.

scouting youth. (Exhibit R-180m Att. A) The LDS Mormon Church views “same-gender sexual relationships” as immoral. (Tr. at 1876)

132. The United Methodist Church sponsors approximately 11,701 units nationally. (Exhibit R-180, Att. A) There are approximately 418,427 youth registered in Methodists units nationally, which comprises 12% of all Scouting youth (Exhibit R-180, Att. A) The position of the United Methodist Church on the morality of homosexuality is that it is not accepted and it is incompatible with Christian teaching. (Tr. at 1277) The United Methodist Church’s *Book of Discipline* provides that “while persons set apart by the Church for ordained ministry are subject to all the frailties of the human condition and the pressures of society, they are required to maintain the highest standards of holy living in the world. Since the practice of homosexuality is incompatible with Christian teaching, self-avowed practicing homosexuals are not accepted as candidates, ordained ministers, or appointed to serve in the United Methodist Church (Tr. 1790, 1815-1817, Exhibit C-1738)
133. The Roman Catholic Church sponsors directly 9,665 units across the United States (Exhibit R-180, Att. A) A total of 355,416 youth are registered in these units, comprising over 10% of all Scouting youth. (Exhibit R-180) The Roman Catholic Church views homosexuality as a sin. (Tr. at 1458-59)
134. The Baptist Church sponsors about 4,937 units nationally, which more than 113,485 youth are registered. The vast majority of Baptist Churches nationally are Southern Baptist. (Tr. at 1351-1352) In 1992, the Southern Baptist Convention passed a resolution denouncing homosexuality and passed a resolution supporting the Boy Scouts for its stance prohibiting open homosexual leadership. (Tr. 1376, Exhibit R-97)
135. Other denominations such as the Lutheran Church Missouri Synod and Evangelical Lutheran Church in American; the Presbyterian Church; the African Methodist Episcopal Church (AME); and the Conservative and Orthodox Judaism have expressed similar views stating that homosexuality is incompatible to their religious teachings. (Exhibits R-131, R-155, R-132, R-156, R-181, Tr. at 1681-82, 1684 Exhibit R-78, R-154, R-102)
136. While the above findings suggest that major denominations have expressed their views on homosexuality, the Commission finds that there is no agreement on this issue in general or with regard to the BSA exclusionary policy. For instance the People’s Congressional United Church in the District of Columbia supports gays and lesbians in church life. (Tr. 2038, 2051) Further evidence can be found by the testimony of Reverend Michael W. Hopkins, who is Vicar of St. George’s Mission, an Episcopal Church within the Washington Diocese, who testified that the Episcopal Church Canon is binding on all dioceses. It forbids discrimination against gays and lesbians in both the ordination process and the participation of lay people in the life of a congregation. Rev. Hopkins further testified that

between one-half and two-thirds of all Episcopalians, including those in the Washington Diocese, belong to dioceses that ordain openly gay priests. He further testified that St. Timothy's Episcopal Church in Washington sponsors Troop 1650. (Tr. at 2286, 2289, 2290-2292, 2297, 2298) Additional evidence can be found with the Quakers who serve as a charter organization for a number of Scouting units nationwide. Hayden Wetzel, a member and leader within the Friends Meeting of Washington, testified that "gay presence in [our] meeting is . . . known and easily accepted." Roland Pool is a member of the Meeting and has been active on numerous committees integral to the life of the Meeting. (Exhibit R-180, Tr. at 2352, 2355, 2357-58)

137. Further evidence of the acceptance of gays in religious denominations that charter troops can be found with the testimony of Rabbi Robert Saks, who is the rabbi of the Congregation Bet Mishpachah, a non-denominational gay and lesbian Jewish Congregation. Rabbi Saks who has practiced since 1972 as a Reform Rabbi testified that the Reform Jewish movement represents 40% of affiliated Jews. (Tr. 2326) and it has a strong tradition of welcoming lesbian and gay Jews in all aspects of synagogue life including ordination. The Central Conference of American Rabbis, which is the umbrella group for Reform Rabbis, passed a resolution calling upon the BSA to open its membership to gay boys and men. (Tr. at 2328, 2312-14, 2326, 2316-17, Exhibits C 1715, C1718, C1720 at A002185, R-180)

138. The Foundry United Methodist Church, located in Washington, DC, has for years made a point of being open to persons without regard to their sexual orientation. The governing body of the Foundry United Methodist Church adopted a Statement of Reconciliation declaring itself to be a church that welcomes everyone into its membership, specifically gays and lesbians. Reverend Philip Wogamen who testified on this issue stated that there was nothing in the doctrine of the United Methodist church that prevents the church from having such a policy.²⁰

139. The Commission notes that with regard to the Mormon Church on homosexuality, the restriction is not as great as BSA's policy. In the Mormon Church, homosexual orientation by itself is not a transgression. (Tr. at 1894-98, Exhibit C1727 at A1778-79) The Mormon Church acknowledges that it has homosexuals as members, and that these are good people who are not engaging in transgression. (Tr. at 1894-98) Significantly, it is as much a transgression in the Mormon faith for a heterosexual to engage in premarital sex as it is for a homosexual to engage in sex. (Tr. 1875-76, 1892-93, Exhibit R-81, C1727 at A1778-79) If a homosexual engages in sexual conduct, he is subject to discipline, but the type of discipline is not automatic and depends upon the circumstances. (Tr. 1898-99) The church teaches its leaders to have compassion for homosexuals and to work with them. (Tr. at 1899-1901, Exhibit R-82)

²⁰ The only limitation the church has with regard to the policy is with respect to ordination of gay ministers.

140. The Commission further notes that the Roman Catholic Church, unlike the BSA, distinguishes between homosexual orientation and conduct. According to the Catholic Church, homosexual orientation is morally neutral. (Tr. at 1469)
141. The Commission finds that the religious sponsors have various views on the acceptance of homosexuality and therefore there is no uniform view from these sponsors that can be used as a basis for excluding gays from the BSA.

XII. Sponsorship of Scout Troops

142. The National Council, with the help of the Local Council, charters sponsoring groups who meet the requirements of the *Charter and Bylaws, Rules and Regulations*, and policies of the National Council to organize and maintain Cub Scout Packs, Boy Scout Troops, and Explorer Posts (Exhibit C-1300, C1301)
143. At the time of the hearing, there were 56 sponsors of Boy Scout Troops in the District of Columbia. Forty-four or 79% of those troops are sponsored by churches. Also at the time of the hearing, there were 61 sponsors of Cub Scout Packs in the District of Columbia of which 48 or 79% are sponsored by churches. Overall there are 144 sponsors of Packs, Troops and Posts in the District of Columbia, which 95 or 66% are church sponsored. (Exhibit R-16) The other sponsoring organizations are civic organizations, Rotary Clubs, PTA's and PTO's (Tr. 1106)
144. Sponsoring groups provide Packs, Troops and Posts with suitable facilities for meetings and activities. (Exhibit R-5) Troops most often meet in churches or private buildings. Patrols and Cub Scout Dens often meet in private homes. (Tr. at 313, 154, 48)
145. Each sponsor appoints a chartered organization representative, who serves as a voting member of the Local Council that elects the Executive Board of the Local Council. Approximately 80 volunteers, including chartered organization representatives as well as at-large representatives, serve on the Local Council's Executive Board. Several delegates from this Executive Board in turn are voting members of the National Council. (Tr. 1109-1110)
146. The National Council, which is itself a volunteer body made up of delegates from all local councils and at-large representatives, elects a National Executive Board. This Executive Board is the final reviewing authority on all Scouting policies. (Exhibit C1300, Tr. at 2548)
147. Troop meetings take place out of public view, typically either in a church basement or, if in a school building, then at night or on the weekend. (Tr. at 48, 313, 976, 2080, 1650)

148. Troop meetings and other primary Scout activities are not open to anyone other than Scouts and their leaders, with occasional visits by parents or recruits. (Tr. at 193, 1088-1089)

XIII. Size, Stature and Nature of the Boy Scouts

149. The Boy Scouts of America is the largest youth organization in America. (Exhibit C1005 at 5623)

150. The BSA is a nationwide organization that, since 1910, has had over 93 million members. (Exhibit C1122 at NCAC4881)

151. As of December 31, 1996, the BSA membership was approximately 4,400,000 youth and 1,200,000 million adult members, including 3,540 professionals involved in Scouting nationwide. (Exhibit C1310 at 27)²¹

152. The Boy Scouts are chartered by an Act of Congress. 36 U.S.C. § 23 (1916). (Exhibit C1300 §2) The Act requires the BSA to report to Congress each year on the status of the organization. (Exhibit C1300 at NCAC103)

153. The BSA delivers its annual "Report to the Nation" to the President of the United States. (Tr. at 1186-1187)

154. The BSA is required by its Congressional charter to operate through other agencies or organizations. (Exhibit 1300 at NCAC102) Some of these agencies or organizations are governmental, some are private, some are secular and some are religious. (Exhibit 1153)

155. As of 1990, approximately three times as many registered youth were in units sponsored by public schools than in units sponsored by other organizations. (Exhibit C1304 at NCAC2410, Tr. 513, 2498-99)

156. In the District of Columbia, sponsors include the U.S. Park Police, Metropolitan Police Department (7th District), U.S. Customs Service, Bancker High School, and Malcolm X Elementary School. (Exhibit R-16)

157. Scouts are required to do community service with those outside of Scouting. (Tr. at 314-15) For example, the Boy Scouts, nationally and locally, run a national "Scouting for Food" program to provide food for needy people. The Scouts work with the National Park Service to develop historic trails in the District of

²¹ In 1940, the Boy Scouts described the Boy Scout Handbook as "the country's best seller, with the exception of the Bible." (Exhibit C717 at 1474) Since 1911, the Boy Scouts have printed more than 33 million copies (Ex. C700 at 583) Also since 1911, *Boy's Life* has placed "more than 16 billion magazines in circulation, with more than 2 million boys receiving the periodical each month. (C1122 at NCAC4882, C700 at 583)

Columbia. They also participate in events such as the National Tree Lighting Ceremony and the National Easter Egg Hunt at the White House. They also participate in presidential inaugural activities. (Tr. 561, 620, 2362-2365, 2503-04, Exhibits C313 at A1159, C1122 at NCAC4882, C1100 at NCAC6159 at NCAC6189, and NCAC6347)

158. Since 1981, every Boy Scout national jamboree has taken place at Fort A.P. Hill military base in Virginia. Congress has passed laws authorizing the military to provide free transportation to the Boy Scouts for attendance at jamborees and to loan equipment for use by the Boy Scouts free of charge. (Tr. at 519, Exhibits C1167, C1168, C1169, Pub. L. 87-459; U.S.C. § 2544, U.S.C. § 7541)

159. The Navy also has regulations on how to assist the Boy Scout's program. (Exhibit C1170)

160. In addition to units operating in churches, some units operate their programs in public buildings such as public schools. Some of these programs include meetings, recruitment drives and the Learning for Life Program. In the District of Columbia, some of the activities take place at Martin Luther King Library and Mount Vernon Square, the Rayburn Building, Bolling Air Force Base, Fort McNair and various parks in the city. (Tr. at 316, 319-320, 568, 1650, Hill Dep. at 125, Exhibits 1100 at NCAC5690, NCAC5689, NCAC5925, NCAC6280)

161. In addition to the above activities, the BSA in the District of Columbia has activities to recruit and to increase their visibility. One activity is the Extravaganza on the Mall. Held every two years, the NCAC runs the Extravaganza in which Boy Scouts from all over the Council demonstrate their scouting skills to the public and create public relations and awareness of Scouting. (Tr. 316, 317-18, 562-563, Hill Dep. at 100-01, 117-118, Carroll Dep. at 107-108, Bond Dep. at 69-72, Exhibit C313 at A1160) In addition the Boy Scouts conduct "Join Scouting Night", a large annual event in which the BSA recruit members in most of the public schools in the District of Columbia. At the junior high level the BSA recruits for potential Explorers with "First Nighter" program. To run these recruitment programs, the BSA obtains approval for use of the buildings and makes arrangements with the District of Columbia School Superintendent. The BSA distributes flyers through public school teachers, with the approval of the principals and the School Superintendent. (Tr. at 319-20, Hill Dep. at 75-81, 79-81, Bond Dep. at 59-61, Carroll Dep. at 80-84, Exhibits C801-803, C313 at A1188)

162. The Boy Scouts operate a field day on Third Street north of Missouri Ave. Every month the District Committee meets, the commissioners for the District meet, and round tables meet, all in the District of Columbia (Tr. at 316, 352-54)

163. In addition to Fort A.P. Hill, the BSA use a large collection of military bases, campgrounds, state parks and other facilities in the greater Washington Area for

Scout activities. Such sites include Fort Belvoir, the C&O Canal, Quantico Marine Base, Fort Myer, Patuxent Naval Air Station and Patapsco Valley State Park. The NCAC runs Goshen, a large multi-camp facility in Virginia. (Tr. at 568-569, Hill Dep. at 102-07, Bond Dep. at 65-68, Carroll Dep. at 34, Exhibits C1100 at NCAC5726, NCAC5733, NCAC6051, NCAC6161, NCAC6242)

164.As of December 31, 1996, the BSA had assets totaling \$440,887,000 and net worth assets of \$325,238,000. (Exhibit C1310 at 31)

165.In 1996, the BSA received \$114,352,000 in revenues, with only \$75,303,000 in functional expenses. (Exhibit C1310 at 32-33)

166.The BSA maintains extensive and sophisticated fundraising operations designed to obtain contributions from the general public and support from organizations. The NCAC obtains funding from organizations like the United Way. (Tr. at 393-94, Teare Dep. at 20-23, Carroll Dep. at 92-107, Exhibits C1100 and C1400)

167.The Boy Scouts assert that any boy who meets the age requirement and is willing to subscribe to religious principles can be a Scout. The BSA States: “Our federal charter sets forth our obligation to serve boys. Neither the charter nor the bylaws of the Boy Scouts of America permits the exclusion of any boy. The National Council and Executive Board have always taken the position that Scouting should be made available for all boys who meet entrance age requirements. (Exhibits C901 at 12, C1155 at 2)

168. It is a major priority of Boy Scouts at all levels to encourage and to expand membership of both youth and adults. (Tr. at 2490-91, 2522-23)²² The Boy Scouts believe that “local councils have an opportunity to help fulfill the Scouting mission that all boys and young adults have the opportunity to be part of the Boy Scouts of America. (Exhibit C1153 at 25; Exhibit C607 at NCAC8056)

169.The BSA identifies increasing membership as the first function of a scouting District. To be a “Quality District” and to receive an award, a district has to increase the number of members and the number of units (Tr. at 368-69, Exhibit C906 at NCAC152, Hill Dep. at 72-73)

170.In the Banneker District in the District of Columbia, the BSA states that “every boy who wants to be a Scout should be.” (Tr. a 318, Bond Dep. at 85-86, Exhibit 1100 at NCAC5779)

²² As examples, the 1992 Annual Report announced BSA’s “commitment to making Scouting more widely available than ever.” (Exhibit C1306 at 1901) The BSA noted “demographic information and forecasts indicate the number of youths who could benefit from Scouting is steadily increasing.” (Tr. at 2523-25, Exhibit C1306)

171. Other objectives of the Banneker District are to “make Scouting available to every boy who wants it” and “increase Adult Partner involvement.” (Tr. 367, 370, Exhibit C1100 at NCAC5779).
172. In the Banneker District, the goal of increasing membership required extremely active and intensive recruitment. Almost every unit in the District lacked sufficient numbers of adults. With respect to the adult Unit Commissioners—the position for which Roland Pool applied—there was, at the time of his application, a substantial need for adult leaders. (Tr. 309-12, 344, 370, 530-34, Mack Dep. at 122-23, Exhibit C909 at NCAC366)
173. As of June 1992, the Banneker District had only one active Unit Commissioner (Kirkner) and two active Assistant District Commissioners to service 72 units. The District Commissioner needed about 30 more people on his staff to function properly. (Tr. 348-57, 356-57, Exhibit C300, C1105)
174. The Boy Scouts inform potential adults for membership that “if you have an interest, we have a volunteer job for you.” (Exhibit C1101 at NCAC5082)
175. In order to encourage membership, the BSA did not engage in routine screening of youth applicants and almost no routine screening of adult applicants (Tr. at 298, 321, Kay Dep. at 31-36, 42-44, Flythe Dep. at 29)
176. It is very rare for anyone to be denied as a youth or adult member of the BSA. (Teare Dep. at 50-52, Bond Dep. 35-38, Hill Dep. at 163-67, Mack Dep. at 165-72, Kay Dep. at 36-37, 48-49, 54-55, Fullman Dep. at 28-30, Flythe Dep. at 32, 34-35)
177. Out of over 93,000,000 people who have been members of the BSA in its history, the Boy Scouts have a record of only 7,000 (.0075 percent) individuals it considered inappropriate for Scouting for any reason—including child molesting, arrest or conviction for various crimes, other misconduct or being a homosexual. (Exhibit C1122 at NCAC4881, C1506, C1505)
178. The Commission finds that based on the above, the Boy Scouts of America and its regional and local units are not a selective organization. Rather, the membership is practically open to anyone who meets the minimum qualifications.

XIV. Boy Scout Troop Meetings

179. Troops, composed of about 25 Scouts, meet together in uniform about once a week in the evening or on Saturday. The meetings last about two hours and are divided into several segments. The meeting begins with a gathering period, a call to order and a formal opening ceremony. The opening is followed by activities

of Patrols, which are subgroups of three to eight Scouts. The Troop then comes together to engage in an inter-patrol competition or learning activity. Finally, the Scouts participate in a closing ceremony. (Tr. 156, 158-159, 1080, 2090, Exhibit R-5)

180. The opening ceremony features a recitation of the Pledge of Allegiance and the Scout Oath or Law. While reciting the Scout Oath, Scouts make the Scout Sign. (Tr. at 163, 836, 982, 1648, Exhibits R-4, R-176K, R-48J, R-48Y, R-173A&B)

181. After announcements, the boys break up into Patrols and work on various projects. Projects may include such tasks as building sleds for a winter “Klondike Derby” or building a tower for the Scout Show. The boys may be working on perfecting their knots and lashes or working on citizenship badges. Older Scouts or Merit Badge Counselors often demonstrate a Scout skill or make a presentation. If a camping trip or some special event is coming up, the Scouts make plans and allocate responsibilities. The patrols then reassemble and often engage in competitions or a Scouting game. (Tr. at 159, 163-164, 837, 1648-49, 1659, Exhibit R-176A)

182. During the closing ceremony, the boys recite the Scout Oath or Law, whichever was not recited during the opening, and listen to the Scoutmaster’s Minute. The Scoutmaster’s Minute is an opportunity for a Scoutmaster to address the Troop directly about whatever he thinks is appropriate, including exercising good judgment and moral questions. (Tr. at 837, 983-986)

183. Throughout the year a Troop participates in a variety of outdoor activities, which teach Scouts teamwork. Since few opportunities to camp exist in the District of Columbia, or even within the area of the Local Council, most District Troops go to Goshen Scout Camp in Appalachia Virginia or other campgrounds in Maryland, Virginia or Pennsylvania. If Scouts camp on Sundays, the Scouts themselves conduct a nondenominational religious service called a Scouts’ Own. (Tr. at 568-570, 853, 986, 988, 1662-1663, 2094, 2112)

XV. Adult Volunteer Leaders as Role Models

184. The vast majority of adult volunteer leaders in Scouting serve at the Troop level. (Tr. at 305, 416, 2464-2465)

185. Most leaders volunteer because their sons are involved in Scouting.²³ (Tr. 975, 1627-1628)

186. Adult volunteer leaders at all levels donate their time without compensation or material reward of any kind. (Tr. at 413, 598, 1268, 1423)

²³ They also become leaders because they were involved in Scouting as a youth.

187. In addition to donating their vacation time and weekends without monetary compensation, volunteers spend their own money for items such as food for the boys, travel expenses, and equipment. (Tr. 413, 1034, 1423)
188. The only recompense is whatever personal satisfaction may come of giving one's self to others. (Exhibit R-4)
189. A troop Committee seeking a Scoutmaster or Assistant Scoutmaster applies numerous formal and informal criteria in order to select only those capable of accepting the responsibility for the moral education and care of other people's children away from home in accordance with Scouting's values. (Exhibits C-804, C-816, R-19, R-25)
190. In order to select the proper adult leaders, the BSA recommends following a six step process to identify potential leaders who, first and foremost, possess "High moral standards" and "Commitment to the ideals of Scouting." (Exhibits R-11, C-816, R-25)
191. Potential adult leaders are generally known and recruited because of their personal qualities by current leaders. (Tr. 1645) Adult leaders are selected "by their peer group, by the church . . . that sponsors that Scout or Cub Pack. (Tr. 1132) The single most important responsibility of the Troop Committee is "recruiting adult leaders (Exhibit R-11) If the parents on the committee do not like the candidate for the adult leader, the candidate does not get selected. (Tr. at 1090)
192. After an applicant has been approved by the unit, the Local Council must approve the application before it is transmitted to the National Council to be checked against a list of persons deemed ineligible for Scouting membership. (Tr. at 1132, Exhibits R-17 and C-806)
193. One of the most important methods of Scouting is "adult association." Scouting instills the values of the Oath and Law in youth by providing a program run by adult volunteers who set an example by living according to the Oath and Law themselves. (Exhibits R-3, R-5)
194. The BSA asserts that "Boys learn from the example of their adult leaders. . . . Providing good examples of manhood is one of the methods of Scouting." (Exhibit R-4) As a Scoutmaster, the adult leader provides an "example of what a man should be like. Your role as a friend, coach and leader to Scouts is a most important part of Scouting." (Exhibit R-4)
195. The BSA has a strong policy of "two-deep leadership", in which Scouts are never alone with one Scout leader in a troop. (Tr. 2093-94) Thus, the Commission finds that this policy lessens the possibility of a leader instilling any ideas to a Scout that may be inappropriate such as discussion about sex and sexual practices.

196. The BSA does not discuss their policy of excluding gays when they recruit either youth or adults to become members. (Hill Dep. at 85, 88, Tr. 322, 399-400)
197. Applicants are not told anything about the policy unless they ask. (Hill Dep. at 143-50)
198. The Boy Scouts do not discuss homosexuality when they provide training for adult volunteers. (Tr. at 322, 425-26)
199. Adult volunteer leaders are to refrain from giving advice or discussing the subject of sex and family life. The BSA believes that the adult leaders are not qualified to give such advice and the subject should be discussed with parents or spiritual leaders. (Exhibit C727 at 6934)²⁴ The Commission finds this policy is a significant deterrent of having inappropriate discussion of sex and family life between a scout and adult leader.
200. The Complainants and Respondents differ on the view as to whether homosexuals can be adult role models in Scouting. More specifically, the concern is whether a gay scout leader would legitimize the value of homosexual behavior and lead to homosexual conduct or behavior by the boys in a troop. Each side introduced expert testimony on this subject. Dr. George Rekers, expert for the BSA, believes that scouts are in a developmental stage which their attitudes, behaviors (including sexual behaviors), values, self concepts, and identity are particularly susceptible to influence. The Commission notes that Dr. Rekers bases this statement on personal experience as a father of five children, from his attendance at Troop meetings, his observation of scout activities in two troops, speaking to parents, scoutmasters and grasp of the research which indicates that children identify with older people and incorporate their values by observation and by imitation of what older people do. (Tr. at 1498, 1499) Dr. Rekers testified that moral values affect behavior in children and adolescents and he referred to research that demonstrates that moral values regarding sexual conduct have a very strong influence on both children and adolescents. (Tr. at 1500) Dr. Rekers states that having an openly gay Scout leader in a Troop would legitimize the value of homosexual behavior and convey a moral value that would subsequently legitimize this form of sexual behavior so that more boys would be open to it and then lead to more homosexual conduct or behavior by the boys in their troops (Tr. at 1500, 1501-1502)

²⁴ The BSA believes that the discussion of sex including homosexuality should not be discussed under the Scout Oath and Law of being "moral." As the Seventh Edition of the Scoutmaster Handbook indicates, that was used between 1980 and 1989, "Morality is somewhat more difficult area than [physical or mental fitness] because of the moral contradictions we all encounter. What you consider moral or immoral depends upon your upbringing and background." (Exhibit 727 at 6907-08) In the eighth edition of the Scoutmaster Handbook, scout leaders are instructed to accept all youth as they are in areas dealing with sex, sexual curiosity. (Exhibit C701)

201. Dr. Savin-Williams, Complainant's expert, testified that modeling may have some influence on some aspects of behavior but not in terms of basic values and beliefs and that for modeling to work he indicates that it requires a lot of repetition and practice, particularly, if the message being reinforced is counter to the values or behaviors and the way the child has been raised. Dr. Savin-Williams also testified that peers have much less influence than once was believed. He notes that parents and biology have the greatest influence on the adolescent, then peers, siblings, and relatives (Tr. at 2201-2204)
202. According to Dr. Savin-Williams, "sexual orientation" is an enduring, stable sense that one is attracted to members of one gender over another or both genders or no gender. The consensus in psychology is that sexual orientation is either formed at the time of birth or in the first three to five years of life (Tr. 2159, 2162-63, Exhibit C1905) The reason for this conclusion is not that any one study is conclusive, or has methodological perfection, but that (1) there is a good deal of scientific data pointing to observable differences between heterosexuals and homosexuals at birth (Tr. at 2162-66, 2169-71) (2) every systematic study attempting to test out hypotheses for causes of sexual orientation at some later point in life has been so unsuccessful in coming up with any evidence to support that conclusion that it is currently viewed as a "dead-end" in science, (Tr. 2171-72) (3) the only serious arguments being presented for post-birth causes of homosexuality are psychoanalytic theories of development that would take place very early in life (Tr. 2172-73) and (4) there is a considerable body of research in which individuals can trace awareness of same sex attractions to very early ages and in which scientists have drawn connections between gender non-conformity very early in life and homosexuality. (Tr. 2174-79)
203. Both Dr. Rekers and Savin-Williams assert that parents can recognize as early as six months sex-atypical behavior that has a very strong relationship to sexual orientation. (Tr. at 1578, 2177-79)
204. The American Psychiatric Association, the nation's leading organization of physicians specializing in psychiatry, determined that it was wrong to declare homosexuality as a mental disorder (i.e., a deviation from some accepted norm of heterosexuality). The American Psychological Association endorsed this decision and neither has changed its view on this matter. (Tr. 2181-82, 2188-89)²⁵

CONCLUSIONS OF LAW

Before analyzing the facts with the appropriate law, it is important to point out that this case concerns the status of the complainants being gay. The parties have

stipulated that this case does not involve homosexual conduct. Therefore, the analysis of the law is in accordance with that stipulation.

Section 1-2519 of the District of Columbia Human Rights Act of 1977 declares the following:

(a) General. It shall be an unlawful discriminatory practice to do any of the following acts, wholly or partially for a discriminatory reason based on the . . . sexual orientation. . . of any individual.

(1) To deny, directly or indirectly, any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodations;

(2) To print, circulate, post or mail, or otherwise, cause, directly or indirectly, to be published a statement, advertisement, or sign which indicates that the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation will be unlawfully refused, withheld from or denied an individual; or that an individual's patronage of, or presence at, a place of public accommodation is objectional, unwelcome, unacceptable or undesirable.

The District of Columbia Human Rights Act was enacted to “secure an end in the District of Columbia to discrimination for any reason other than that of individual merit, including but not limited to discrimination by reason of race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, matriculation, political affiliation, physical handicap, source of income, and place of residence or business,” Sect. 1-2501 of the Act.²⁶ In enacting the Act, the City Council intended that it be construed broadly and enforced aggressively, because the eradication of discrimination in the District is a goal of the “highest priority.” District of

²⁵ They made the change because blind studies demonstrated that purportedly-expert psychiatrists could not identify who was or was not homosexual based upon the results of psychiatric testing, and there was therefore no basis for associating homosexuality, per se, with pathology.

Columbia City Council, Committee Report of Bill 2-179, “The Human Rights Act,” at 1, 3 (July 5, 1977)

In analyzing discrimination cases brought under the District of Columbia Human Rights Act, the Commission on Human Rights and the District of Columbia Court of Appeals follow the legal framework set out by the United States Supreme Court in reviewing cases brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e) et seq. See *McDonnell Douglas Corp. Green*, 411 U.S. 792 (1973); *Rap Inc. v. D.C. Comm’n on Human Rights*, 485 A.2d 173 (D.C. 1984); *Thompson v. Int’l Ass’n of Machinists*, 614 F. Supp. 1002 (D.D.C. 1985). In deciding cases involving the enjoyment of goods and services in a place of public accommodation, the Commission uses the *McDonnell Douglas* formula, by analogy. See *John Doe v. D.C. Comm’n on Human Rights*, 624 A.2d 440 (D.C. 1993) *Green v. Rock Creek Golf Course*, COHR Docket 90-131-PA(N) (Decided July 11, 1997), *In the Matter of Michael Lewis, Esq. On behalf of Gregory Smith v. Dr. Richard S. Runkle*, COHR Docket Number 92-154-PA(N) (Decided July 1, 1993), *Wilson v. The Eagle Restaurant, Inc.*, Docket Number 9-PA-623, *aff’d in part and rev’d in part, Wilson v. Human Rights Comm’n of the District of Columbia*, No. 85-01 (D.C. App. Dec. 18, 1985)

In litigating cases of discrimination where there is no direct proof of discrimination, the Complainant must invoke the *McDonnell Douglas* shifting burden analysis in order to establish whether discrimination has occurred.²⁷ However, in cases

²⁶ The Commission notes that since the filing of the instant complaint, the Human Rights Act has been amended to include familial status as a protected class and physical handicap has been changed to disability.

²⁷ In *McDonnell Douglas*, the court enumerated the following elements in order to find discrimination: The plaintiff bears the burden of production of evidence sufficient to establish a prima facie case of

such as this one where there is direct evidence of discrimination, the shifting burden analysis is not required. (The Boy Scouts concede that they discriminate. However, they argue that they are not a public accommodation under the Act. See infra.) See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 247 (1989). Once the act of discrimination is established the respondent must establish that its actions are an exception under the “business necessity” provision to the Act. Then finally, the Complainants must establish that the affirmative defense is pretext for discrimination. The Commission will analyze the facts of the proceeding in accordance with the direct evidence proof of discrimination.

I. Jurisdiction

A. Michael Geller

The Boy Scouts initially argue that the Commission does not have jurisdiction over Michael Geller because none of the alleged discriminatory actions took place in the District of Columbia. The Commission disagrees. Section 1-2519 (2) of the Act states that it is an unlawful discriminatory practice in public accommodations “to print,

discrimination. When that burden is met, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory explanation for the circumstances giving rise to the prima face case. Thereafter, the plaintiff demonstrates that the defendant’s explanation is pretext for discrimination. 411 U.S. 792

The prima facie elements are;

- (1) the plaintiff is a member of a protected class
- (2) The plaintiff was qualified and applied for a vacant position,
- (3) The plaintiff was rejected, and
- (4) The position remained vacant while the defendant continued to seek applicants with the plaintiff’s qualifications. McDonnell Douglas at 802.

Although the facts in McDonnell Douglas concerned a failure to hire, the Court specified that the prima facie elements would vary depending on the facts of the case in questions. Thus for this case if the prima facie elements were used, the Complainants would have to establish:

- (1) They are a member of a protected class
- (2) The Respondents are a place of public accommodation within the meaning of the Human Rights Act §1-2502 (24)
- (3) The Complainants solicited services (membership) at the place of public accommodation, and

circulate, post, or mail, or otherwise, directly or *indirectly* (emphasis added) to be published a statement, advertisement, or sign which indicates that the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation will be unlawfully refused, *withheld*, from or denied an individual; or that an individual's patronage of, or presence at, a place of public accommodation is objectional, unwelcome, unacceptable, or undesirable." The evidence introduced in the record indicates that after Mr. Geller read an article in the *Washington Post* which included a statement from NCAC Scout Executive Ron Carroll that gay men did not make good role models as scout leaders, Mr. Geller wrote a letter to Mr. Carroll objecting to those remarks. Mr. Geller listed all of the good qualities he had which would make him a good role model. He further indicated that he lived with his "lover" of two years and he was Chair of the Gay and Lesbian Employee Association of his employer. Immediately upon receipt of the letter, the BSA deleted Mr. Geller's membership from the database. Thereafter, Rudy Flythe, Northeast Regional Director, wrote Mr. Geller informing him that his registration with the Boy Scouts was denied and that he should sever all relations with the BSA. See Findings 47-51. Mr. Geller received this letter in the District of Columbia, where he is a resident. This letter informed Mr. Geller that BSA withdrew his membership solely because of his status of being a homosexual. Clearly, the Northeast Regional Director, who sent the letter from New Jersey to the District was denying Mr. Geller's membership in the BSA based on a national exclusionary policy. This policy was developed outside of the District of Columbia and applied to residents within the District of Columbia. The purpose of §1-2519(2) of the Act is to prevent such a scenario. The Act forbids any organization from discriminating

(4) Others not in the Complainant's protected class were treated more favorably.

within the District of Columbia whether the act of discrimination was by *withholding* services, membership or any other act.²⁸ A similar issue was addressed by the D.C. Court of Appeals in *Mathews v. Automatic Business Systems & Services*, 558 A2d 1175 (D.C. 1989). In *Mathews*, an employment discrimination claim, the court was confronted with an employment discrimination claim involving some acts of discrimination occurred within and without the District. The Court held that the “purpose of the Human Rights Act is ‘to secure an end in the District of Columbia to discrimination for any reason other than that of individual merit’ D.C. Code §2501 (1987) (emphasis in opinion). If the events alleged in Mathews’s complaint occurred in the District of Columbia, they are subject to scrutiny under section 1-2512, regardless of whether her ‘actual place of employment’ was in Maryland, the District, or both.” 558 A2d at 1180 (second emphasis added). Thus based on the foregoing, the Commission finds that withholding membership of the BSA, based on one of the protected classes of the Act, *within* the District may violate the Human Rights Act and individual has standing to sue for redress of claim.

An underlying issue raised by the BSA in regard to jurisdiction concerns the applicability of the Commission’s decision in *Estate of Augustine R. Quander, Gwendolyn Y. Quander, Personal Representative v. Sutton Pl. Gourmet*, COHR Docket Number 87-533-P (CN). In *Sutton Pl. Gourmet*, the Commission held that the complaint was dismissed because none of the alleged acts of discrimination occurred in the District of Columbia. The complainant in that case was employed by Sutton Place Gourmet II, a separate corporation and entity from the District corporation. Sutton Place

²⁸ In this particular case, the Respondents mailed to the Complainants the information regarding their membership revocation. The Act prohibits any organization mailing discriminatory conduct.

Gourmet II was incorporated in Maryland. The Complainant performed a substantial part of his work in Maryland, paid, taxes to the State of Maryland and received his supervision from Maryland. The decision to terminate him occurred in Maryland. As a consequence, the Commission found that there was no act of discrimination within the District of Columbia to impose jurisdiction over the Respondent. Hence, the factual situation in *Sutton Place Gourmet* is quite different than the present case. Here, we have an alleged act of discrimination that was developed outside the District and applied in the District of Columbia.

B. Roland Pool

The BSA also argues that Roland Pool as well as Michael Geller are testers and therefore they have no “standing” to bring a claim under the Human Rights Act. Specifically, the BSA states that Mr. Pool has no sincere interest in Scouting in the District of Columbia. They assert that Mr. Pool was not active in Scouting after 1985 and has never been involved or connected in any way with Scouting in the District of Columbia before bringing the present action. In April 1992 after reading an article in the *Washington Blade* which stated that the activist organization Queer Nation was soliciting “testers” to challenge the Boy Scouts’ exclusionary policy, Mr. Pool ran into Bart Church of Queer Nation and informed him that he was an Eagle Scout. Mr. Church instructed Mr. Pool to get in contact with the American Civil Liberties Union about becoming a plaintiff. The ACLU referred Mr. Pool to his current attorneys. In June 1992, Mr. Pool called the NCAC about becoming a Scoutmaster position. He was directed to Banneker

District Executive Stuart Bond. Mr. Bond advised Mr. Pool that based on his qualifications, he might be interested in becoming a Unit Commissioner. On June 23, 1992, Mr. Pool attended the Banneker District Committee meeting at Mr. Bond's request. The meeting was held in the Banneker District at St. Paul's Episcopal Church in the District of Columbia. At this meeting, Mr. Pool heard adult leaders discuss the exclusionary policy against homosexuals. On July 3, 1992, Mr. Pool submitted his application to Mr. Bond to become a Unit Commissioner in the Banneker District. On his application, Mr. Pool listed that he was member of several gay organizations. On July 14, 1992, Ron Carroll, NCAC Scout Executive, wrote to Mr. Pool informing him that he must sever his relations with the organization. Mr. Carroll's office is in Bethesda, Maryland. See Findings 56-75. Based on these facts, the BSA believes that Mr. Pool had no intention of becoming a Unit Commissioner but rather stand as a plaintiff to challenge the exclusionary policy. Thus, the BSA believes that Mr. Pool has no standing to bring a claim. The Commission disagrees. The Court in *Molovinsky v. Fair Employment Council of Greater Washington, Inc.*, 683 A.2d 142 (DC 1996) held that "testers" who challenge discriminatory practices filed under the Human Rights Act have standing to bring the claim. The Court stated that the Human Rights Act allows "any (emphasis added) person claiming to be aggrieved by a discriminatory practice [can] bring an action in court against the offending party. D.C. code § 1-2556(a)." The Supreme Court has construed the nearly identical language of the Civil Rights Act of 1968 ("any person who claims to have been injured") to confer standing to the full extent that Article III of the Constitution permits. *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 209 (1972). The DC Appeals Court in *Molovinsky* further indicated that the Court was not

bound by Article III, however, the quoted language indicates that standing under the Human Rights Act is co-extensive with standing under Article III. Accordingly, the Commission finds that both Michael Geller and Roland Pool have standing to bring this action before the Commission.

III. Place of Public Accommodation Under the Human Rights Act.

In order for Complainants to be able to maintain this action under the Human Rights Act, the Commission must determine whether the Boy Scouts of America are subject to the public accommodation provision of the Act or whether the organization is distinctly private and therefore it is beyond the reach of the Act. Section 1-2502(24) of the Human Rights Act defines a “place of public accommodation” as:

All places included in the meaning of such terms as inns, taverns, road houses, hotels, motels, whether conducted for the entertainment of transient guests or for the accommodation of those seeking health, recreation or rest; restaurants or eating houses, or any place where food is sold for consumption on the premises; buffets, saloons, barrooms, or any store, park or enclosure where spirituous or malt liquors are sold; ice cream parlors, confectioneries, soda fountains and all stores where ice cream, ice and fruit preparation or their derivatives, or where beverages of any kind are retailed for consumption on the premises; wholesale and retail stores, and establishments dealing with goods and services of any kind, including, but not limited to, the credit facilities thereof, banks, savings and loan associations, establishments or mortgage bankers and brokers, all other financial institutions, and credit information bureaus; insurance companies and establishments of insurance policy brokers; dispensaries, clinics, hospitals, bath-houses, swimming pools, laundries and all other cleaning establishments; barber shops, beauty parlors, theaters, motion picture houses, airdromes, roof gardens, music halls, race courses, skating rinks, amusement and recreation parks, trailer camps, resort camps, fairs, bowling alleys, golf courses, gymnasiums, shooting galleries, billiards and pool parlors, garages, all public conveyances operated on land or water or in the air, as well as the stations and terminals thereof; travel or tour advisory services, agencies or bureaus; public halls and public elevators of buildings and structures, occupied by 2 or more tenants, or by the owner and 1 or more tenants. Such term shall not include any institution, club, or place of accommodation which is in its nature distinctly private except, that any such

institution, club or place of accommodation shall be subject to the provisions of § 1-2531. A place of accommodation, institution, or club shall not be considered in its nature distinctly private if the place of accommodation, institution, or club:

- (A) Has 350 or more members;
- (B) Serves meals on a regular basis; and
- (C) Regularly receives payment for dues, fees, use of space, facilities, services, meals, or beverages directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business.

It is important to note that the phrase “goods or services of any kind” and the references to “institutions” and “clubs” applies to the Boy Scouts. These phrases were included in the public accommodation statute to cover the broadest amount of entities within the District of Columbia. The original public accommodation provision of the Human Rights Act of 1977 focused on the goods and services industry. However, in 1987, the District of Columbia City Council amended the Act to include larger clubs and institutions that have traditionally been distinctly private. At first blush, the amendment to the Act appears to only cover private institutions such as the Cosmos Club but in fact the amendment covers additional private institutions *See Infra*. At the public hearing for the amendment of the public accommodation provision, D.C. Commission on Human Rights Chairperson Dayle Walden Hall testified that “it is well documented that the private membership organization is an integral part of the executive life . . .contacts are formed . . . membership in these organizations is essential to advance in today’s business world. The exclusion of women and minorities from membership in these organizations is denying them the opportunity to participate fully in the business and professional life of this city.” *Testimony of Dayle Walden Hall, Chairperson, Commission on Human Rights for the Human Rights Act of 1977 Amendment Act of 1987, Friday, June 26, 1987*

at p.2²⁹ Additional review of the legislative history of the 1987 amendment indicates that the City Council intended to broaden the statute and enable the Commission to go as far as the Supreme Court decision in *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987) and apply the public accommodations provision to other private membership organizations. In that case, the Supreme Court found that the Rotary Club was not distinctly private given, *inter alia*, its size and unselective recruiting techniques and therefore the organization was not worthy of Constitutional protection. Councilmember James Nathanson (Ward 3) who sponsored the amendment stated, “I think its also important to point out that this bill does not have the intent of defining all circumstances under which a club could be found not in its nature distinctly private. The *Rotary Club* case just decided by the Supreme Court suggest that the Human Rights Commission could go even further and use other tests.” James Nathanson (Ward 3); Sixteenth Legislative Meeting; Room 500, District Building, Tuesday, July 14, 1987; Legislative Mark-Up to Bill 7157 at p. 109. Thus, based on the legislative history of the 1987 amendment to the public accommodation provision of the Act, the Commission finds that it has the authority to determine which membership organization is considered a public accommodation using guidelines set out in Supreme Court decisions such as *Rotary*.³⁰

In *Rotary*, the Duarte chapter of the organization admitted three women as active members, which was in violation of the organization’s charter. The Duarte chapter

²⁹ Because the initial focus of the amendment was to cover institutions such as the Cosmos Club, statements before the Council centered on denial of membership into those institutions. But as mentioned throughout this section of the opinion, the amendment covers more.

³⁰ The amendment to the public accommodation provision is the last line which states “ A place of accommodation, institution, or club shall not be considered in its nature distinctly private if the place of accommodation, institution, or club: (A) has 350 or more members; (B) serves meals on a regular basis;

charter was revoked and when it was appealed to the international organization, the decision was upheld. As a result, the Duarte chapter and two of the female members filed suit in California Superior Court alleging that Rotary International's actions violated the states public accommodation anti-discrimination statute known as the Unruh Act. The Superior Court found that the charter excluding women as active members did not violate the Unruh Act. The California Supreme Court reversed the decision finding that the Rotary Club is a public accommodation subject to the provisions of the Unruh Act. The U.S Supreme Court affirmed the decision. Among the reasons that the Court found that the Rotary club was a public accommodation was that the organization was not sufficiently personal or private as to warrant constitutional protection from the Court. Relying on factors announced in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), the Court had to consider size, purpose, selectivity, and whether others were excluded in determining whether a membership organization was distinctly private or a place of public accommodation. The Supreme Court found that local Rotary Clubs ranged in size from 20 to 900 members, with no limitations on how many members could belong to one club. Additionally, the typical club loses ten percent of its membership every year. As a result, recruitment is a large focus of the organization and clubs are encouraged to "establish and maintain membership growth." *Rotary, supra* at 547. The Court also found among the Rotary's literature that the purpose of Rotary "is to produce an inclusive, not exclusive, membership, making possible the recognition of all useful local occupations, and enabling the club to be a true cross section of the business and professional life of the community. *Id.* at 546.

and (C) regularly receives payment for dues, fees, use of space, facilities, services, meals, or beverages directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business.

Thus, in using the analysis of *Rotary* and *Roberts*, the Commission finds that the Boy Scouts of America is a public accommodation within the meaning of the Human Rights Act. The record is complete with evidence indicating the large size of the organization, its purpose and non-selectivity of its membership. The Boy Scouts of America is the largest youth organization in America. Finding Number 149. Since 1910, the BSA has had over 93 million members. Finding Number 150. As of December 31, 1996, the BSA membership was approximately 4, 400,000 youth and 1,200,000 million adult members which includes 3,540 professionals. Finding Number 151. The Boy Scouts assert that any boy who meets the age requirement and is willing to subscribe to religious principles can be a Scout. The Boy Scouts charter sets out the obligation to serve boys. Neither the charter nor the bylaws permits the exclusion of any boy. The National Council and Executive Board have always taken the position that Scouting should be made available for all boys who meet the entrance age requirements. Finding Number 167. It is a major priority of the Boy Scouts at all levels to encourage and to expand membership of both youth and adults. The Boy Scouts believe that “local councils have an opportunity to help fulfill the Scouting mission that all boys and young adults have the opportunity to be part of the Boy Scouts of America. Finding Number 168. The BSA identifies increasing membership as the first function of a scouting district. Finding Number 169.

In addition to the enormous size and non-selectivity of its membership, the Commission finds other factors which underscore the public nature of the Boy Scouts. First, the organization is chartered by an Act of Congress. The Act requires the BSA to report to Congress each year on the status of the organization. The BSA delivers its

annual “Report to the Nation” to the President of the United States. Congress has passed laws authorizing the military to provide free transportation to the Boy Scouts for attendance at jamborees and to loan equipment for use by the Boy Scouts free of charge. The BSA is required by its charter to operate through other agencies or organizations. Many of those organizations are governmental. As of 1990, approximately three times as many registered youth were in units sponsored by public schools than in units sponsored by other organizations. In the District of Columbia, sponsors include the U.S. Park Police, the Metropolitan Police Department, Banneker High School and Malcolm X Elementary School. Thus the Commission finds that the Boy Scouts are a place of public accommodation under the Act.

The Boy Scouts contend that they do not meet the definition of a place of public accommodation under the Act because it does not meet the three-prong test. Specifically, the Scouts argue that they do not serve meals on a regular basis. The Commission disagrees with that assertion. As previously mentioned, the amendment to the public accommodations provision of the Act was not restricted to what is specifically enumerated. The legislative history reveals the opposite. Councilmember James Nathanson stated “This bill simply defines what is to be considered no longer distinctly private. Other factors that might cause a place of accommodation or institution or club to be considered other than distinctly private may still come into play. This bill is not meant to be exclusive of other considerations.” James Nathanson (Ward 3); Sixteenth Legislative Meeting; Room 500, District Building, Tuesday, July 14, 1987; Legislative

Mark-Up to bill 7157 at p. 109-110. Thus, the Council intended the Act to be applied to other situations besides what was enumerated.³¹

The Commission also finds that other jurisdictions with similar statutes have found that membership organizations like the Boy Scouts are a place of public accommodation. See *U.S. Power Squadrons v. State Human Rights Appeal Bd.*, 452 N.E. 2d 1199 (N.Y. 1983) (N.Y. public conveyance law applied to a boating safety organization with 70,000 members nationwide), *Quinnipac Council BSA v. Commission on Human Rights and Opportunities*, 528 A.2d 352 (Conn. 1987) (Boy Scouts are a public accommodation under Connecticut Law).

IV. *Hurley* and *Dale* Cases and Expressive Association

Citing, *Dale v. Boy Scouts of America and Monmouth Council*, 2000 U.S. Lexis 4487 (2000) and *Hurley et al. v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), the Boy Scouts argue that the District's public accommodation provision can not apply to them because it will violate their First Amendment right of expressive association. Specifically, the BSA asserts that admitting complainants as adult leaders is inconsistent with the values it seeks to instill with its youth. Those are the values that can be found in the Scout Oath and Law. Adult leaders instill these values by spending time with the youth members, instructing and engaging them in activities like camping, archery, and fishing. *Dale, supra*. The BSA further argues that numerous

³¹ This finding is underscored by the fact Councilmember Nathanson stated that the Commission on Human Rights may use as guidelines, the factors announced in the *Rotary* Case.

position statements provides their view that homosexuals are inappropriate leaders for scouting.

In reviewing *Dale* and *Hurley*, the Commission finds that those cases are distinguishable from the present case. In *Dale*, the Respondent, James Dale, became a scout and advanced to the rank of Eagle Scout. Sometime in 1989, Mr. Dale applied for an adult membership in the BSA. The Scouts approved the application for the position of assistant scoutmaster. Shortly thereafter, Mr. Dale enrolled at Rutgers University where he acknowledged to himself and friends that he was gay. He became a “leader” of the gay community by becoming co-president of the Rutgers’ Lesbian/Gay Alliance. In 1990, he attended a seminar addressing the psychological and health needs of lesbian and gay teenagers. At the seminar, a newspaper reporter interviewed him about his advocacy of homosexual teenagers need for gay role models. After the publication of the article, which included his picture, the BSA revoked Mr. Dale’s membership. Mr. Dale filed a complaint against the BSA alleging that the Boy Scouts violated New Jersey’s public accommodations law. The trial court found for the Boy Scouts. On appeal, Mr. Dale won at the New Jersey Appellate Division and New Jersey Supreme Court. The New Jersey Supreme Court found that the Boy Scouts expressed a belief in moral values and uses its activities to encourage the development of its members, but the Court also found that the shared goal of the Boy Scout members was not to preserve the view that homosexuality is immoral. Therefore, the Court held that inclusion of Mr. Dale as a Scout leader would not significantly burden the BSA’s ability to carry out its programs. The BSA appealed to the Supreme Court, which held that the application of the New Jersey law violated the Boy Scout’s First Amendment rights. The Court recognized the

right of individuals engaged in activities protected by the First Amendment such as the right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious and cultural ends. The Court stated “this right is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas.” *Dale, supra*. The Court further stated “Government actions that may unconstitutionally burden this freedom may take many forms, one of which is the ‘intrusion into the internal structure or affairs of an association’” *Dale, supra*, citing *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). The Court further stated “The forced inclusion of an unwanted person in a group infringes the group’s freedom of expressive association if the presence of that person affects in a significant way the group’s ability to advocate public or private viewpoints.” *Ibid*.

In order to determine whether a group is protected by the First Amendment’s expressive association rights, the *Dale* Court established a four-part analysis to determine whether forced inclusion violated a group’s First Amendment right. The analysis included; (1) whether the group engages in “expressive association”, (2) whether the forced inclusion of an individual would significantly affect the group’s ability to advocate public and private viewpoints, (3) whether the presence of an individual would significantly burden the group’s desire not to promote a particular viewpoint, and (4) whether the group’s First Amendment right to expressive association is outweighed by the state’s interest in eliminating discrimination within public accommodations. Using this analysis, the Court found that the Boy Scout is an expressive association. This finding was based on the fact that the mission of the BSA is to instill values listed in the Scout Oath and Law in young people. Next, the Court found that Mr. Dale’s inclusion in

the BSA would affect the Boys Scouts ability to advocate public or private viewpoints. The Court found that the BSA's numerous statements regarding their position that homosexuality is inconsistent with their values is evidence that homosexuality is inconsistent with Scouting. Third, the Court found Mr. Dale's activities as a leader of the gay community would promote homosexuality in the BSA. Finally, the Court found that New Jersey's interest of eradicating discrimination within an expressive association severely intruded the BSA's rights.

Using the *Dale* analysis, the Commission finds that applying the Human Rights Act's public accommodation provision to the BSA will not infringe upon its First Amendment right of expressive association. First, the Commission concedes that the Boy Scouts are an expressive association. Clearly, the mission of the organization is "to serve others by helping to instill values in young people and, in other ways, to prepare them to make ethical choices over their lifetime in achieving the full potential. The values we strive to instill are based on those found in the Scout Oath and Law." As Justice O'Connor stated in her concurring opinion in *Roberts*, "it seems indisputable that an association that seeks to transmit such a system of values engages in expressive activity." *Roberts, supra.* at 636. She further stated "even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement."

Second, the Commission finds that admitting Complainants as adult leaders would not significantly affect the Boy Scout's ability to advocate its public or private viewpoints. Unlike the record in *Dale*, the present case has significant evidence to

indicate that BSA's exclusionary policy may not be the Boys Scout's viewpoint. Granted the Scout Oath and Law does not mention sexuality or sexual orientation. The terms "morally straight" and "clean" are not self-defining. The record in both *Dale* and in this case indicate that different people would have different meanings to those terms. However, the Supreme Court in *Dale* relied on the various position statements on how homosexuality is inconsistent with BSA values as evidence of the organization's viewpoint. A review of the history of the exclusionary policy and the position statements shed a different light. There is no evidence in the record that indicates that BSA's National Executive Board ever adopted a resolution on a policy excluding homosexuals in the organization. Finding Number 76.³² The first statement of such a policy occurred with the drafting of two position statements in 1978. Findings Numbers 77-79. There is nothing in the record since the inception of the Boy Scouts in 1910 that such a policy existed prior to 1978. Although the BSA claims that such a policy existed, the only evidence they could present is affidavits of long time scouts who claim of such a policy existed. These affidavits were generated in response to the *Curran v. Mount Diablo Council of Boy Scouts* case. As previously indicated in the findings, these affidavits were a mere attempt to document a policy for which no evidence exists. See Finding Number 80. The Commission also finds that these first position statements never mentioned that the exclusionary policy was a historical policy. The Commission also finds that the policies focused on employment discrimination issues and that the BSA would obey the laws of any statute within the United States. Clearly, at this point, the BSA did not have a firm exclusionary policy based on a long historical philosophy. Nor had it determined

³² The BSA asserts that if there is any discussion on such a policy with the board, the information is privileged due to the attorney-client privilege.

the parameters with in which it would later exclude adult leaders who are gay. The Commission also finds that the various position statements never reached the “rank and file” youth or leaders. It appears that the position statements were generated in response to the need to provide talking points for those individuals who would have contact with the media. These individuals would discuss a policy that had no record of ever being approved by any national board or executive. Finding Number 104-110.³³ The policy appears to be no more than a private statement of a few BSA executives, a view that is not actual expression the BSA engages in. (Instill values through the Scout Oath and Law) *See Dale*, (Stevens dissent). Further, the 1993 statements are not based on any expressive activity or any moral view, but rather an exclusionary membership policy. The Commission also finds that the policy was never *publicly* expressed in various BSA literature—unlike, as an example, the Scout Oath and Law.³⁴ There is evidence in the record to support this belief. Testimony from Scout leaders and long time Scouters Charles Wolfe, William Kirkner, Daniel Press, and David Geller all stated that they had never heard of or were aware of the exclusionary policy. Complainants Geller and Pool also never heard of such a policy. Findings 48, 56, 104-110. In its supplemental brief, the BSA argues that an editorial in a 1992 *Scouting Magazine* which is received by all adult volunteer members discusses the Boy Scout’s views on homosexuality in an editorial. Hence, the BSA leads us to believe that the policy is known to everyone.³⁵ The editorial does not explain the BSA’s exclusionary policy or whether it applies to “known” homosexuals, “all” homosexuals, or “avowed” homosexuals. It merely discusses “long

³³ In the dissenting opinion in *Dale*, Justice Stevens states that BSA’s continued adoption of the policy through various litigation is not by itself considered sufficient to prevail on a right to associate claim.

³⁴ It did appear in the 1996 Scout Executive Reference Manual. It is unclear how widely this publication is distributed.

traditional American values.” While the Commission notes that this magazine editorial discusses the values, it never discusses the Scout Oath or Law and how either would apply to homosexual status. The editorial begins by stating that the BSA is being attacked by special interests groups and it refers to the *Curran* case. The Commission finds that the editorial was a response to ongoing litigation in the *Curran* case which like various other litigation on this issue challenges a policy that is not widely known among the association’s membership.

Third, the Commission finds that admitting the Complainants as adult volunteers would not significantly burden BSA in its desire not to promote “homosexual conduct.” In *Dale*, the Court found that Mr. Dale was an advocate of gay rights and a leader of the gay community. The record in that proceeding revealed that Mr. Dale was co-president of a campus gay and lesbian alliance. He advocated for health and psychological needs for gay teenagers. His advocacy triggered a newspaper article about his work as a gay activist. In reviewing those findings, the Court found that Mr. Dale’s presence in the Boy Scouts would, at the very least, force the BSA to send a message that Boy Scouts accepts homosexuals. *See Dale, supra.* citing *Hurley, supra.* In *Hurley*, the Supreme Court held that applying Massachusetts’ public accommodation law to require organizers of a private St. Patrick’s Day parade to include a gay Irish-American group violated the parade organizers’ first amendment rights. The Court wrote: “petitioners disclaim any intent to exclude homosexuals as such, and no individual member of GLIB (the Irish-American gay group) claims to have been excluded from parading as a member of any group that the Council has approved to march. Instead, the disagreement goes to the admission of GLIB as its own parade unit carrying its own banner.” *Hurley* at 572. The

³⁵ It is unclear from the record that adult volunteers routinely read this magazine.

Hurley Court reasoned that the presence of the organized marchers behind a GLIB banner would suggest their view that people of their sexual orientation would have as much claim to unqualified social acceptance as heterosexuals. The Court explained that the forced presence of GLIB in the parade violated the parade organizers' autonomy to choose the content of their own message under the first amendment. In the present case, Complainants Geller and Pool are not sending a message as the gay Irish contingent wanted to do in *Hurley* nor are they activists sending a message like Mr. Dale. There is no evidence in the record that Mr. Geller is a gay activist. His filing of the present complaint is only to seek a wrong that has been done to him and not to advocate a "gay" position. He has not expressed his views about homosexuality to the public. He is a member of a family that has a long tradition of Scouting. He fulfilled every requirement for lifelong membership in the organization, achieving Scouting highest honors. He became an Eagle Scout. He was elected to the Order of the Arrow. There is nothing in the record to suggest that once Mr. Geller becomes an adult leader, he would use that position to advocate homosexuality. In fact, the policy of the BSA is that adult leaders are not to discuss sex or sexual practices with youth, but that such discussion should be left with parents or clergy. Findings 195 and 199. Like Mr. Geller, there is no evidence in the record that would suggest that Mr. Pool would advocate homosexuality as a BSA adult leader. Mr. Pool rose through the ranks of scouts to become an Eagle Scout. He also was elected into the Order of the Arrow. He participated as an Assistant Scoutmaster. He became actively involved with the Philmont Ranch and wrote a chapter of the "Land Chapter" of the Philmont Field guide. He was recommended to be Chief Ranger at Philmont. Further, the Commission finds that Mr. Pool was not a gay activist.

He has not advocated any issues concerning homosexuality. However, the BSA contends that Mr. Pool's filing of this instant complaint through the recommendation of Bart Church a member of the gay activist group Queer Nation, suggests that this particular litigation is an activist movement. Coupled with statements on his adult application such as member of the Smithsonian Gay and Lesbian Issues Group, counselor at Whitman-Walker Clinic and affiliated with SMYAL, the BSA believes that Mr. Pool is seeking to challenge the exclusionary policy as a gay agenda. The Commission disagrees. As previously discussed in the findings, Mr. Pool saw an article in the *Washington Blade* about the BSA's exclusionary policy. That article mentioned that Queer Nation was looking for individuals to challenge the policy. Three months later, he runs into Bart Church, an acquaintance, who referred Mr. Pool to the ACLU. If Mr. Pool was a gay activist, he would have immediately contacted the ACLU to become a plaintiff. Instead, Mr. Pool meets with ACLU after being advised by Mr. Church. The record does not indicate as to whether this referral was part of the search for plaintiffs.³⁶ There is no evidence that Mr. Pool was a member of Queer Nation or that he adhered to their principles. Further, there is no evidence that Mr. Pool advocated ideas announced by Queer Nation. All the record reveals is that Mr. Pool was upset about the exclusionary policy. Accordingly, the Commission finds that Mr. Pool like Mr. Geller are individuals who would not send messages about homosexuality or its lifestyle.

Fourth, the Commission finds that the District of Columbia has a compelling interest, over First Amendment rights, in eliminating discrimination in public accommodations. Section 1-2511 of the Act states that "Every individual shall have an

³⁶ The Commission finds that it does not matter if Mr. Pool was a tester because testers have standing to challenge discriminatory policies.

equal opportunity to participate fully in the economic, cultural and intellectual life of the District and to have an equal opportunity to participate in all aspects of life including but not limited to . . . places of public accommodation.” Evidence in the record indicates that adult scout leaders enjoy enormous benefits by associating with the BSA. Scout leaders gain leadership training, contacts and skills useful in business. (Tr. at 526-27) Scouters list their membership on their resumes. Hence, Complainants Geller and Pool will never have the chance to enjoy these benefits, as other Scouters, due to the exclusionary policy. Therefore, the District of Columbia has a compelling interest to ensure that all of its citizens enjoy all of the benefits that can be obtained through a place of public accommodation. This is the rationale of the amendment to the public accommodations provision. *See above.* In order to succeed, the Complainants must establish that the public accommodations statute would not materially interfere with the ideas that the organization sought to express. *Dale, supra.* citing *Roberts* at 626. Because Mr. Geller and Mr. Pool are not advocating any particular message, their inclusion into an adult leader position would not infringe upon BSA’s core message.³⁷ *See Hurley, Supra.* Therefore, the Commission finds that the First Amendment expressive association right cannot shield BSA from the public accommodations provision of the Human Rights Act.

Recently, an intermediate appellate court in Illinois has made similar findings. *See Chicago Area Council Boy Scouts v. The City of Chicago Commission on Human Rights*, Docket Number 1-99-3018 (May 1, 2001). In that employment discrimination case, the Court distinguished *Dale* from its own case on the basis that the complainant was seeking a non-message position within the organization. The Illinois court focused on the

³⁷ The Commission finds that BSA’s core message is instilling values in young people.

Supreme Court's findings of Mr. Dale's gay rights advocacy and his ability to be able to carry a message if admitted into the Boy Scouts. In the Illinois case, the court found that the complainant was not an advocate like Mr. Dale and nor was he seeking a position where he would be in a position to send a message. As in the present case, Mr. Geller and Mr. Pool are non-messengers. They merely have the status of being gay. Their inclusion within the BSA will not infringe on any message the BSA has about instilling values into youth. And because they are not messengers as the attempted gay parade unit in *Hurley*, Mr. Pool and Mr. Geller inclusion in the BSA would not fringe upon BSA's public or private viewpoints about homosexuality.

V. BSA's Other Defenses

A. Views of Sponsoring Religious Groups

The Boy Scouts advance the argument that allowing homosexuals as adult leaders is contrary to principles of some of the sponsoring religious organizations. See Findings of Fact 131-135. In addition, the BSA asserts that forced inclusion of homosexuals may cause the sponsoring religious organizations to drop its sponsorship of troops. The BSA states that although the membership organization is not a religious sect, it is religious, and while the local Council is not a house of worship, it is a religious organization. (Exhibit C-1300) Further, the BSA asserts that the Scouting movement since its inception in 1910 has been to instill values of the Scout Oath and Law in youth. The Scout Oath and Law begin and end with God. When reciting the Oath, a boy begins by pledging his duty to God, even before his duty to his country and his family. "A Scout is Reverent" is the last point of the Scout Law. (Exhibit R-1) The BSA further asserts that promising to do

one's duty to God is a condition of membership for both youth and adult leaders. The membership requirements for youth and volunteer adult leaders are prominently displayed on the application forms for each program or position, and are set forth in the Boy Scouts' *Rules and Regulations*. The Commission finds these arguments as pretext for discrimination. In addition, the Commission finds the BSA's non-sectarian in nature. Substantial evidence in the record affirms this finding. First, in Clause 1 of the Scouting Declaration of Religious Principles contained in the BSA By-Laws state that the organization recognizes the religious element in the training of the member but *it is absolutely nonsectarian in its attitude toward that religious training.* (emphasis added) Clause 3 of the Religious Principles states that in no case where a troop is connected or sponsored by a church or other distinctively religious organization members of other denominations be required to take part or observe a religious ceremony of the sponsoring church. The advancement guidelines state that a youth does not need to be a member of a religious organization for enrollment in Scouting. (C-1300) Clearly, the BSA has stated that religious membership is not required to be a member of the Scouting movement. It is a non-sectarian organization.

Second, the fact that a troop is sponsored by a religious organization does not necessarily mean that the troop's program has any religious content. Most units sponsored by a religious organization are fully open to those of any belief. (Ex. C313, C700, C731, Tr. at 1276, 1288-99)

Third, although the BSA requires Scouts and Scout leaders to affirm a belief in God, the adult leaders are instructed to avoid telling scouts what their religious beliefs or practices should be.

The BSA has always left religious training up to parents and religious leaders (Exhibit C715) It is absolutely contrary to BSA's By-Laws, literature and principles for the BSA to pick and choose among the moral views of different religions or among the faithful within particular religions. (Tr. 327-28, 333-35, 550-53, Hill Dep. at 65) A Scout is told repeatedly to follow his parents and his religious leaders in being faithful to his own religion and that the failure to respect religious beliefs of others is contrary to the principles of Scouting as faithlessness in one's own religious beliefs. (Exhibit C700, Cahn deposition at 76.)

The Commission finds that BSA's expressed positions on the morality of homosexuality fails to support the BSA's adoption of a general exclusion of homosexuals. In addition, evidence in the record indicates that many religious denominations that sponsor scout troops encourage the full participation of homosexuals in their congregations. See Findings of Fact 136-140.

In addition to religious sponsor organizations, the BSA asserts that its Religious Emblems program provides Scouts with an award for the successful completion of a program of religious endeavor. However, the Commission finds that this program does not support BSA's policy of excluding homosexuals. The evidence in the record indicates that although the BSA allows Scouts to wear the religious emblems, the emblems are not Scouting awards. The awards are sponsored and administered by the various religious organizations that sponsor troops and not by the BSA. Furthermore, religious emblems are not required. Although it can be used for the advancement of a Cub Scout, it has no part in the advancement of a Boy Scout. The Commission also finds that the religious emblem program states and teaches nothing about the morality of

homosexuality. As an example, the Unitarian Universalist Church, which holds strong views that discrimination against homosexuals is wrong, includes information about its view as part of its Religious Emblems program.

Finally, the Commission found no evidence that if the exclusionary policy was lifted, religious sponsors would pull out of Scouting, particularly in light of the adult leader selection process that depends upon the initial approval of parents at the troop level. As the Complainants stated in their brief the Boy Scouts are not entitled to perpetuate discrimination based upon the premise that others who support them would like them to do so. (Complainants' Post-Hearing Brief at 148). Testimony from Father Hummel, one of the Boy Scouts' witnesses, testified that if the BSA policy was changed, he suspected that "so long as we were able to maintain our right to choose our leaders as a Catholic institution, that we could certainly make an accommodation in that regard." (Tr. at 1463) Rev. Turner of the Southern Baptist Convention testified that even with the strong views held by some Baptists on homosexuality, there would be a clear distinction between requiring Baptist Scout troops to have homosexual leaders, and a decision that merely prevented the BSA and councils from forcing a policy of discrimination on troops, or at the district, council or national level. (Tr. 1425-28) Testimonies from representatives of the Methodist and the African Methodist Episcopal Church testified that their respective denominations do not have general policies excluding homosexuals. See Findings of Fact 135, 138, and Tr. at 1268-70, 1279-84, 1428-29) The evidence discussed above underscores the view that the exclusion of homosexuals is not basic to the program of Scouting. Hence, the BSA's argument on this issue is pretext for discrimination.

B. Role Modeling

The Boy Scouts assert through the testimony of their expert, Dr. Rekers, that homosexuals are excluded from Scouting because they are inappropriate role models. He believes that having an openly gay Scout Leader in a Troop would legitimize the value of homosexual behavior and convey a moral value that would subsequently legitimize this form of sexual behavior. Dr. Rekers testified that youth members of the BSA are in a developmental stage where their attitudes, behaviors (including sexual behaviors) values, self concepts and identity are particularly susceptible to influence. Dr. Rekers testified that his knowledge in this area is based on personal experience as a father of five children, from his attendance at Troop meetings, his observation of scout activities in two troops, speaking to parents, scoutmasters and older and younger scouts. He also testified that the research indicates that children identify with older people and incorporate their values by observation and by imitation of what older people do. The Commission finds this testimony problematic, in part, because Dr. Rekers failed to identify what research he relied upon and who conducted the studies. Dr. Rekers also testified that moral values affect behavior in children and adolescents. He referred to research that demonstrates that moral values regarding sexual conduct have a very strong influence on both children and adolescents. Dr. Rekers further testified that young scouts learn and are susceptible to influence in a variety of ways and if they identify with the adult scout leader, they can absorb attitudes, behaviors, values and other ideas. Again the Commission notes that Dr. Rekers did not identify the research and who conducted the studies.

Dr. Savin-Williams, expert for the Complainants, testified that modeling may have some influence on some aspects of behavior but not in terms of basic values and beliefs and that for modeling to work, it requires a lot of repetition and practice, particularly if the message being reinforced is counter to the values or behaviors and the way the child has been raised. Dr. Savin-Williams further testified that peers have much less influence than was once believed. He states that parents and biology have the greatest influence on the adolescent then peers, siblings, and relatives.

The Commission finds that the testimony of both experts in regard to modeling behavior cancel each other out. Neither expert presented convincing evidence based on their individual research that their findings are more reliable and dispositive on the issue than the other. In fact, a review of the testimony revealed that both were in agreement on many of the key issues such as that homosexual orientation is a very complex human experience that develops through many routes, (Tr. 1504) and that the book by Bell, Weinberg and Hammersmith on sexual preference is the standard of the field. (Tr. 1509-1510) The Commission does note and accepts the American Psychological Association's resolution in support of the American Psychiatric Association's 1973 removal of homosexuality from their list of mental disorders. In 1973, the American Psychiatric Association stated that homosexuality per se implies no impairment in judgment, stability, or general social and vocational capabilities. Thus, the mere status of being homosexual, as with the complainants in this case, does not imply that a gay scout leader cannot perform the tasks and duties as required. It also implies that such leaders can uphold the mission of the BSA by instilling the values outlined in the Scout Oath and

Law.³⁸ Thus, the Commission finds that there is not sufficient evidence in the record that indicates that gay adult scout leaders would be an inappropriate role model. Any such argument is found to be pretext for discrimination.

CONCLUSION

Based on the foregoing, the Commission finds that the parties have standing to bring this claim before the Commission and finds that the Boy Scouts of America and the National Capital Area Council are places of public accommodation whose first amendment expressive association right has not been infringed. Therefore, the Commission finds that the BSA and NCAC have violated the Human Rights Act of 1977 by denying the Complainant's membership in the organization because of their sexual orientation.

DAMAGES

When a respondent has been found to have engaged in a discriminatory practice which is unlawful under the Human Rights Act of 1977, the Commission is charged with the responsibility of issuing a decision and order requiring the respondent to:

Cease and desist from such unlawful discriminatory practice, and to take . . . affirmative action . . . [and order] . . . the payment of compensatory damages to the person aggrieved by such practice, the payment of reasonable attorney fees; and the payment of hearing costs . . . See §1-1553, D.C. Code.

Section 1-2553(a)(6) of the Act authorizes the Commission to develop guidelines with respect to damages and attorney fees. The most recent guidelines were promulgated

³⁸ In conjunction with the two-tier adult supervision as well as the fact sex is not discussed with the youth.

by the Commission on March 19, 1999 as the “Guidelines for Payment of Compensatory Damages, Civil Penalties, and Attorney’s Fees.”³⁹ According to §211.1 of the Guidelines:

The natural and unavoidable consequence of any unlawful discriminatory act or practice are personal embarrassment, humiliation, and indignity, and the prevailing complainant shall be entitled to such damages as are proved by competent evidence as defines in §213 (now §214).

Section 213.4 (now 214.4) of the Guidelines states:

Any award of damages or other compensation under . . . §211 of these guidelines shall be made only under reliable and probative evidence that will permit the Commission to ascertain a reasonable basis for assessing the amount of the damages or other compensation.

The Courts have consistently followed these guidelines, holding that damages for humiliation, embarrassment, and indignity occur naturally from a finding of discrimination. *See Doe v. D.C. Comm’n on Human Rights*, 624 A.2d 440, 447 (D.C. 1993). In *Truitt Management, Inc. v. D.C. Comm’n on Human Rights*, 646 A.2d 1001 (D.C. 1974), the Court determined that the Commission must ascertain the amount of compensatory damages by reliable evidence, and that such awards are sustainable as long as the Commission did not abuse its discretion in making such determinations. In making this holding, the Court borrowed “the standard of review of jury awards for damages,” *Id.* Under this standard, the Court will determine if the Commission’s damage award was not “well beyond the reasonable range” *Id.* (quoting *Louison v. Crockett*, 546 A.2d 400, 404 (D.C. 1988)). The award of damages for humiliation, embarrassment, and indignity is based on harm suffered by an individual. Such harm suffered are intangibles.

³⁹ These rules replace the Guidelines promulgated on December 14, 1984 and which were in effect at the time of the filing of the complaint. The difference between the older and newer guidelines is the addition of civil penalties and the time frame to file attorney’s fees. Because this complaint was certified to the Commission before the new guidelines were promulgated, the Commission will not consider the possibility of awarding civil penalties.

Thus, the amount of damages may be inferred from the surrounding circumstances and can be established by testimony. *See Seaton v. Sky Realty*, 491 F.2d 634 (7th Cir. 1974).

In reviewing the record in this matter, the Commission concludes that the Complainants have established through competent testimony that they were subjected to humiliation, embarrassment and indignity for the revocation of their Boy Scout membership because of their sexual orientation. Mr. Geller and Mr. Pool both were active members of the Scouting movement since their pre-teen years. Mr. Geller comes from a family steeped in Scouting tradition. Both Complainants obtained the highest rank in scouting. Mr. Pool was recommended to be Chief Ranger at Philmont. Mr. Geller continued to registered as an adult member until the revocation of his membership. Scouting was an integral part of their lives. They lived and taught by the Scout Oath and Law. It became a shock to them after so many years in the organization when they were told that they were no longer wanted because of their status of being a homosexual. These individuals displayed no homosexual conduct during their membership years. The Commission finds that each complainant shall be entitled to \$50,000 each.

ORDER

Having found that the Respondent's unlawfully discriminated against the complainants by subjecting them to disparate treatment by revoking their membership in a place of public accommodation on the basis of sexual orientation (homosexual), in violation of the Human Rights Act of 1977, the Commission HEREBY ORDERS:

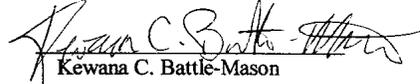
1. that the respondents shall cease and desist from revoking memberships of individuals solely because of their status as homosexuals,

2. that the respondents admit Roland Pool as an adult member of their organization
3. that the respondents reinstate Michael Geller as a full active adult member of their organization,
4. that the respondents shall pay Roland Pool \$50,000 in compensatory damages for the embarrassment, humiliation and indignity suffered,
5. that the respondents shall pay Michael Geller \$50,000 in compensatory damages for the embarrassment, humiliation and indignity suffered,
6. that the respondents shall pay the complainants' attorneys fees,
7. that the complainants shall file their Attorney's Fees petition no earlier than 20 days nor later than 30 days after the issuance of this Final Decision and Order, and
8. that the respondents shall pay the District of Columbia Commission on Human Rights costs to adjudicate this complaint.

For the Commission

6-18-01

Date


Kewana C. Battle-Mason
Commissioner

6-18-01

Date


Daniel Wedderburn
Commissioner

Date

Mark Chichester
Commissioner

For the Commission

I join with my fellow commissioners in the result reached in the above final decision and order, but with a different slant on their analysis in Part IV of whether there would be a significant burden to the BSA's desire not to promote homosexuality. In that part, I offer this concurring opinion.

My colleagues relied heavily on their conclusion that the Complainants herein were not activists or leaders in the gay community; and, therefore, determined that admitting them to BSA as leaders would not burden BSA's freedom of expressive association in a significant way. My sense is that that distinction is not so simple to make as it appears at first blush.

I conclude, as did Commissioners Battle-Mason and Wedderburn, that the BSA's professed desire not to promote homosexuality would not be significantly burdened, given the distinction between leadership and activism in the gay community articulated by the *Dale* Court, and the less than activist posture that the complainants assumed in this case. I would caution, however, that because one's sexual orientation, unlike what is typical in the case of race or gender, for example, is unascertainable without a profession to such orientation or the most direct intrusion into one's private affairs, there may be a limited number of instances in which communicating sexual orientation becomes essentially political and, therefore, activist in itself. In this case, given the manner in which the Complainants' sexual orientation was made known to BSA, the facts bring them short of that categorization.

6/20/01
Date



Mark Howard Chichester
Commissioner