

## URINALYSIS

### Use of ADAPT Urinalysis Results in UCMJ Actions

This is to answer your question as to whether a member is afforded the protections against actions under the Uniform Code of Military Justice (UCMJ) as discussed in AFI 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program*, and 42 U.S.C. § 290dd-2, for undisclosed drug use if (1) the member self-identifies solely for an alcohol abuse problem and (2) a routine urinalysis administered as part of the AFI 44-121 program reveals that the member has used illicit drugs.

The member in question presented himself to Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program providers where he self-identified seeking treatment **solely for alcohol abuse**. As part of his entry into the program, the member signed an Active Duty Client Consent Form and an ADAPT Program Patient's Informed Consent Form, both of which explained the limits on confidentiality within the program. Thereafter, the member was administered a routine urinalysis (UA) at the direction of one of the program providers. The results of the initial UA evidenced that the member either had been or was presently using illicit drugs. A subsequent routine program UA also revealed that the member either had been or was presently using illicit drugs.

Due to the nature of the member's official duties, the ADAPT program provider informed the member's commander of the results for the safety and welfare of the member and those within his unit. The commander then informed the Air Force Office of Special Investigations (OSI) of the results, and a law enforcement investigation ensued. OSI is presently requesting access to the UA results.

Based upon the facts and circumstances of this particular case, it is our opinion that OSI can properly obtain the UA results by making an appropriate official use request for the relevant release of those records consistent with the provisions of DoD 5400.11-R, *Department of Defense Privacy Program*, paragraph C4.2.1, and DoD 6025.18-R, *DoD Health Information Privacy Regulation*, paragraph C7.6.1.2.3.

AFI 44-121 states in paragraph 3.7.1.2. that “[a]n AF member may voluntarily disclose evidence of personal drug use or possession to the unit commander, first sergeant, substance use/misuse evaluator, or a military medical professional.” The AFI goes on to state in paragraphs 3.7.1.2.2 and 3.7.1.2.3., that “CCs will grant limited protection for members who reveal this information with the intention of entering drug treatment,” and “CCs may not use voluntary disclosure against a member in an action under the UCMJ or when weighing characterization of service in a separation.”<sup>1</sup>

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<sup>1</sup> 42 U.S.C. § 290dd-2 also provides for confidentiality of records maintained in connection with a DoD substance abuse treatment program. Despite the fact that 42 U.S.C. § 290dd-2(e) states that “[t]he prohibitions of this section do not apply to any interchange of records – (1) within the Uniformed Services...” the drafters of AFI 44-121 expressly adopted its protections, in line with the applicable DoDI, by referencing the statute as an authority.

In this case, the member did not self-identify for any drug use, but rather self-identified only for alcohol abuse/use. The limited purpose and intent of AFI 44-121 is to provide a regulated “safe-haven” for members who have the honesty and integrity to come forward, to either, inter alia, commanders or medical providers, and self-identify as requiring drug or alcohol abuse treatment and/or rehabilitation. Members are afforded specific protections for either drug or alcohol abuse self-identification because protections apply to each. The umbrella of protection does not extend, however, beyond the **specific** substance abuse issue that is disclosed upon entry into the treatment program. See *U.S. v. Avery*, 40 M.J. 325 (C.M.A. 1994). If it did, that would imply “de facto immunity” for every member in the ADAPT program as to any subsequent continued substance abuse, which would turn the intent of the instruction, and by reference, the federal statute, on its head by potentially encouraging continued substance abuse of any nature whatsoever. For clarification on this matter, we turn to the relevant language set forth in DoDI 1010.01, *Military Personnel Drug Abuse Testing Program (MTDATP)*, and AFI 90-507, *Military Drug Demand Reduction Program*.

DoDI 1010.01, Enc. 2, paragraph 1, section h., part (1), states that “[u]rinalysis results may be used as evidence in disciplinary actions under the UCMJ, and in administrative actions (including separation from military service), except when: (a) A Service member voluntarily submits to a DoD treatment and rehabilitation program (before receipt of an order to appear for a urinalysis) or that urinalysis is administered as an integral part of the rehabilitation program....”

AFI 90-507 states that “[m]embers may not be disciplined under the UCMJ when they legitimately self-identify for **drug abuse** and enter the ADAPT Program...Urinalysis tests of individuals following entry into the ADAPT Program are for valid medical purposes. Individuals in the ADAPT Program may also be disciplined under the UCMJ when independent evidence of drug use is obtained.” (Emphasis added). AFI 90-507, Table 7.1. *Actions Authorized by Positive Drug Test Results*, Note 5. Note 6 goes on to state that “[u]rine specimens obtained from an examination for a valid medical purpose may be used for any purpose.”

Reading the applicable language of DoDI 1010.01, Enc. 2, paragraph 1, section h., part (1), in conjunction with AFI 90-507, it is clear that UA results obtained through the ADAPT program evidencing drug use can be used as evidence in disciplinary actions and under the UCMJ when a member (1) has **not** legitimately self-identified for **drug use** and (2) has **not** voluntarily entered the ADAPT program **specifically for drug use**.

Your situation is similar to the case in *U.S. v. Avery*. In *Avery*, the military judge ruled that the accused had not self-identified his drug problem for purposes of the then-existing AFR 30-2 treatment program and was, therefore, not entitled to protection from prosecution. The accused in that matter had self-identified only for **alcohol abuse**, and his wife later informed the accused’s commander about his drug abuse. Three days after the accused’s wife contacted his commander, the first sergeant informed the accused that an anonymous caller had reported him as a drug user. The first sergeant then asked the accused if he would volunteer to take a urinalysis test. The accused agreed and executed a consensual UA form. The UA later tested positive for cocaine, which was the independent evidence used against him at a general court-martial.

Similarly, in *U.S. v. Yarbrough*, the military judge admitted appellant's substance abuse records, which were maintained by the mental health clinic in connection with his substance abuse evaluation, as government evidence during the sentencing phase of his court-martial. After the appellant admitted to extensive drug use to OSI and had charges preferred against him by his commander, he referred himself to an Air Force mental health clinic for a substance abuse evaluation. At appellant's court-martial, trial counsel offered appellant's written confession and his medical records with respect to his substance abuse evaluation as part of the government's sentencing case-in-chief. The Air Force Court of Criminal Appeals determined that because the appellant's case was not one of self-identification, that the information concerning his personal substance abuse could be used against him in a court-martial. In other words, this information qualified as independent evidence, and the decision was affirmed by the Court of Appeals for the Armed Forces.

For the foregoing reasons, it is our opinion that a member is not afforded the protections of AFI 44-121 and 42 U.S.C. § 290dd-2, for undisclosed drug use if (1) the member self-identifies **solely for an alcohol abuse problem** and (2) a routine urinalysis administered as part of the ADAPT program reveals that the member has used illicit drugs. Therefore, the UA results disclosing the member's drug use qualify as independent evidence and can be properly obtained by OSI through appropriate official use request channels.