

OpJAGAF 2018-35, 20 August 2018, Administrative Record Served to Respondent for Administrative Discharge

TOPIC

The administrative record served on the Respondent did not contain evidence of the positive drug test upon which the Show Cause Notification is based. To pursue an involuntary administrative discharge under paragraph 3.6.3 for Drug Abuse, the record must contain evidence of the “illegal, wrongful, or improper use” of drugs.

TEXT OF THE DECISION

We have reviewed the below case and for the following reasons, we find it is not legally sufficient to support the recommendation to discharge Respondent with an under honorable conditions (general) service characterization, pursuant to AFI 36-3206_AFGM2017-01, *Administrative Discharge Procedures for Commissioned Officers*, 9 June 2004 (incorporating through interim change 7, 2 July 2013), paragraph 3.6.3, for Drug Abuse.

BACKGROUND

On 13 March 2016, Respondent was randomly selected for a urinalysis test. Respondent’s sample tested positive for marijuana (THC) at 510 ng/mL, well above the DoD cutoff of 15 ng/mL.

On 19 April 2016, Respondent was offered nonjudicial punishment proceedings for wrongfully using marijuana. In his response, Respondent stated that he was at a friend’s house and mistakenly consumed brownies that contained marijuana. To support his defense, Respondent provided a sworn affidavit from his long-time friend, who explained that she had purchased marijuana brownies to help alleviate her fear of flying. Respondent’s friend defends him by stating that Respondent ate her brownies without knowing that they contained marijuana. Despite spending the evening together, she did not tell Respondent about the brownies and did not witness Respondent eating the brownies. Respondent’s friend states that she was not even aware that Respondent had eaten the brownies until after he left the next day and she discovered some missing. Respondent was offered the opportunity to take a polygraph to support his assertion that he innocently ingested marijuana and declined. Respondent explained that he feared the stress he was under could lead to a false positive result for deception.

On 2 May 2016, NAF/CC determined Respondent committed the offense as alleged and imposed punishment consisting of a reprimand and forfeitures in the amount of \$1950.00 per month for 2 months, with the second month suspended. Respondent appealed. On 24 May 2016, MAJCOM/CC denied Respondent’s appeal.

On 13 June 2016, the Show Cause Authority (SCA) notified Respondent that involuntary administrative discharge proceedings were being initiated against him based on the misconduct outlined above. The show cause memorandum cites paragraph 3.6.3, *Drug Abuse*, as the basis for separation.

GUIDANCE

DoDI 1010.16, *Technical Procedures for the Military Personnel Drug Abuse Testing Program (MPDATP)*

AFI 36-3206_AFGM2017-01, *Administrative Discharge Procedures for Commissioned Officers*, 9 June 2004 (incorporating through interim change 7, 2 July 2013)

DISCUSSION

The administrative record served on the Respondent in this case does not contain evidence of the positive drug test upon which the Show Cause Notification is based. To pursue an involuntary administrative discharge under paragraph 3.6.3 for Drug Abuse, the record must contain evidence of the “illegal, wrongful, or improper use” of drugs.¹ In addition, if a positive drug test is the only evidence presented in the case, the drug test must provide evidence of a metabolite concentration level consistent with the Department of Defense confirmation cutoff levels (ng/mL) in DoDI 1010.16, Appendix to Enclosure 4, Table 1-2.²

CONCLUSION

Based on the foregoing, we conclude it is not legally sufficient to support the recommendation to discharge Respondent with an under honorable conditions (general) service characterization. If such evidence exists and was not served on the Respondent, we recommend the SCA serve the evidence on Respondent in the form of a notification addendum.

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¹ AFI 36-3206_AFGM2017-01, paragraph 3.9.1.

² “...to support the inference of wrongful use of drugs, the prosecution's expert testimony must show: (1) that the metabolite is not naturally produced by the body or any substance other than the drug in question; (2) that the cutoff level and reported concentration are high enough to reasonably discount the possibility of unknowing ingestion and to indicate a reasonable likelihood that the user at some time would have experienced the physical and psychological effects of the drug; and (3) that the testing methodology reliably detected the presence and reliably quantified the concentration of the drug or metabolite in the sample.” *United States v. Campbell*, 50 MJ 154 (CAAF 1999)