

ADMINISTRATIVE DEMOTIONS

Administrative Demotions for Off-Base DUIs

This legal opinion is provided in response to your request for an authoritative opinion as to whether commanders have the legal authority to administratively demote enlisted members who commit off-base driving under the influence (DUI) offenses when civilian authorities have retained jurisdiction, or when a commander determines, under the circumstances, a request for jurisdiction is not in the best interest of the Air Force. In our opinion, commanders have the legal authority to administratively demote an enlisted member who commits an off-base DUI offense. AFPC/JA concurs with this opinion.

Background

Your offices requested clarification on whether administrative demotions are appropriate in cases where a DUI occurs off-base and the civilian authorities have denied a request for jurisdiction. The request for clarification is based on the language of AFI 36-2502, paragraph 6.1, *Airman Promotion/Demotion Programs*, 31 December 2009, which provides that administrative demotions should not be used when it is more appropriate to take actions specified by the UCMJ. A prior version of the instruction, AFR 39-30, *Administrative Demotion of Airmen*, 18 November 1991, stated not to use administrative demotion *in lieu* of UCMJ action. (Emphasis added). Based on this change in language, the interplay between AFI 36-2502 and AFI 51-201, and a belief that administrative demotion under these circumstances is fundamentally unfair, your offices have advised commanders within your command that it is inappropriate to administratively demote an enlisted member who commits an off-base DUI offense when jurisdiction is retained by civilian authorities.

Discussion

Pursuant to AFI 51-201, *Administration of Military Justice*, paragraphs 2.6.1 and 2.6.2, Air Force authorities must determine whether the exercise of jurisdiction is in the best interests of the Air Force. If jurisdiction is in the best interest of the Air Force, the SJA will request jurisdiction from the appropriate civilian authorities. In some instances, however, civilian authorities deny Air Force requests for jurisdiction.

AFI 36-2502, paragraph 6.1, states administrative demotions should not be used when it is more appropriate to take actions specified by the UCMJ. Furthermore, in paragraph 6.1.5, the AFI states that when appropriate, commanders should give Airmen an opportunity to overcome their deficiencies before demotion action is initiated. The AFI goes on to list in paragraph 6.3 all the potential reasons for which an administrative demotion may be appropriate. These reasons include paragraph 6.3.4, which states: "Airmen may be demoted who don't fulfill Airman, noncommissioned officer (NCO), or SNCO responsibilities under AFI 36-2618, *The Enlisted Force Structure*, Chapters 3 through 5."

AFI 36-2618, Chapters 3 through 5, gives the various responsibilities for each level of Airman. At every level, Airmen are instructed to maintain the highest level of personal readiness to meet mission requirements. This includes resolving readiness issues that may involve the excessive or irresponsible consumption of alcohol. Airmen are also instructed to exhibit professional behavior and respect for authority; on and off-duty.

In interpreting the earlier version of the administrative demotion regulation, OpJAGAF 1989/94, 21 November 1989, provides:

AFR 39-30 provides that '[t]his regulation will not be used in lieu of Uniform Code of Military Justice (UCMJ) action.' The member believes this provision gives him a right not to be demoted administratively if he committed an offense under the UCMJ for which he could be court-martialed. Such is not the intent of the regulation. The regulation explains how demotions may be effected but does not grant rights to members to stop demotion processing by claiming that what they did was so serious they should be court-martialed. The contested provision cautions commanders that they should not merely demote an individual when UCMJ action is also warranted. In some situations both actions of demotion and courts-martial would be appropriate; in other cases only one or the other may be appropriate. The provision is meant to instruct commanders who might be leaning toward 'easier' treatment of their member that Air Force policy is to treat criminally those actions which are criminal offenses under the UCMJ, in addition to any administrative action taken. Here, it was determined that the evidence would not support a courts-martial; however, it was determined that it would support a demotion.

In addition to the above, the OpJAGAF 1989/94 opinion also addressed the issue of a member's claim to a right of rehabilitation. It stated that the regulation states no more than that a commander "should" is defined commonly as "ought to, but not necessarily will." They found that some actions are so egregious that they demonstrate the kind of conduct requiring demotion action without an opportunity for rehabilitation. In their opinion, the commander has the discretion to take action solely on proof of misconduct, without offering rehabilitation.

In an opinion issued by the Air Force Board for Correction of Military Records (AFBCMR) in 2005, Docket Number: BC-2004-03563, the AFBCMR reviewed a case where a Technical Sergeant was administratively reduced to a Senior Airman after his second off-base DUI conviction. He appealed to the AFBCMR stating he felt the two stripe demotion was excessive when coupled with all the other punishments he received on- and off-base. AFPC/JA provided an advisory opinion finding nothing improper or unfair and recommended against the requested relief. After receiving the advisory opinion, the applicant furnished a response stating he felt that the reduction in rank was in violation of double jeopardy. The AFBCMR reviewed the entire record and determined there was no evidence to support a finding that the administrative reduction in rank after the civilian conviction was erroneous. The AFBCMR found that the demotion action was processed properly in accordance with the governing instruction and was not an abuse of discretionary authority.

In another advisory opinion provided by AFPC/JA in 2006 to the AFBCMR, that office reviewed a request to the AFBCMR from an enlisted member to have his rank restored. The member was administratively demoted after he was offered and turned down an Article 15 based on an off-base DUI. The member's demotion was based on his failure to fulfill his duties as an NCO. AFPC/JA found no evidence that the applicant's administrative demotion was improper.

Based on the above outlined regulations, instructions, and prior opinions issued by this office, AFPC/JA, and the AFBCMR, a commander has the authority to initiate an administrative demotion for an off-base DUI when civilian authorities retain jurisdiction. In this situation, UCMJ action is not possible without SecAF approval. A request for SecAF approval is not a necessary prerequisite for an administrative demotion to be appropriate. Likewise, a commander is not required to offer rehabilitation as a prerequisite. AFI 36-2502, paragraph 6.1.5, requires rehabilitation when appropriate (the same language used in AFR 39-30). A commander has the authority to determine actions are so egregious that they demonstrate the kind of conduct requiring demotion action without an opportunity for rehabilitation. Finally, there is nothing to indicate that the "more appropriate" language in AFI 36-2502, paragraph 6.1, was intended to be more restrictive than AFR 39-30 "in lieu of" language it replaced. The intent remains the same: commanders should not use administrative demotion when the circumstances indicate UCMJ action would be more appropriate. Because requests pursuant to AFI 51-201, paragraph 2.6.3, will only be granted in the most unusual cases, a commander is within his/her authority to determine UCMJ action is not more appropriate in off-base DUI cases when civilian authorities retain jurisdiction, or when a commander determines, under the circumstances, a request for jurisdiction is not in the best interest of the Air Force.

Conclusion

For the reasons stated above, we are of the opinion that AFI 36-2502 gives a commander the legal authority to administratively demote an enlisted member who commits an off-base DUI offense when civilian authorities retain jurisdiction.