

Ask the Lawyer: Commanders Cannot Demand Urinalysis Testing on a Whim

By Mathew B. Tully

Q:

Can my commander demand a urinalysis sample on the spot?

A:

There are times when commanders can order troops to provide urine samples for a drug test, and there are times when they cannot.

First, to be clear, commands are allowed to perform inspections of whole or parts of a unit to ensure it is secure, fit for duty, in good order and disciplined. Random drug testing falls under this category. The Defense Department requires service members to be subjected to a random drug test every one or two years, depending on whether they are in the reserves. Evidence of a crime found during a lawful inspection can be seized and used in a court-martial or disciplinary proceedings.

However, an inspection would be unlawful if its sole purpose was to gather evidence to support criminal charges, such as wrongful consumption of a controlled substance in violation of Article 112a of the Uniform Code of Military Justice.

Commands cannot use an inspection to circumvent the search requirements of the Military Rules of Evidence for the sake of gathering evidence against an individual. Usually, if a commander suspects a service member of using illicit drugs, the commander needs probable cause to order that person to submit to a search (e.g., a drug test).

Under MRE Rule 315, probable cause exists when “there is a reasonable belief that the ... evidence sought is located in the ... person to be searched.”

A commander who got a tip that a service member was seen smoking marijuana six months ago would not have reason to believe evidence of illicit drug use (e.g. metabolites) could be obtained through a drug test. As such, probable cause may be lacking. It would be different if an informant claimed to have witnessed a service member smoking pot yesterday.

Ultimately, the commander must have a “substantial basis” for determining probable cause when ordering a drug test, and this means having more than just hearsay evidence.

When probable cause is lacking, a commander can ask a service member to take a drug test, but the member can refuse to participate in consent searches.

Troops who refuse to a consent search still can be required to take a command-directed urinalysis if, for example, a commander believes a service member who is behaving oddly is

under the influence of a drug at the time.

Results from command-directed tests can be used only for administrative actions, such as separation.

Mathew B. Tully is an Iraq War veteran and founding partner of the law firm Tully Rinckey PLLC. Email questions to askthelawyer@militarytimes.com

. The information in this column is not intended as legal advice.