

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.

He managed my expectations and explained the process very thoroughly

"Matt Hughes was excellent as my attorney. He managed my expectations and explained the process very thoroughly," L.H. on Senior Associate Matt Hughes, Esq.

Prior results do not guarantee similar outcomes.

“He took on this case with vigor and ZERO FEAR of the government!”

"LITERALLY THE BEST MONEY I EVER SPENT!!!! The USAF charged my son with Article 92, Violate General Order and Article 128, Simple Assault. I spoke to many attorneys who said to me, "Your son will be convicted of the Simple Assault because putting lotion on someone's face is considered an assault as it is an unwanted touch." They all wanted me to work on a plea deal with the government that ended with my son being discharged, spending time in the brig and having a federal conviction for the rest of his life. Knowing that this just didn't warrant a federal conviction, bad conduct discharge and time in the brig, I was on a search to find an attorney who would look at this case for what it was: a couple of 19-21 year-old immature young men horse playing. I was looking for someone who would say something different; someone who would be able to look at the case from more than one view. When I spoke to Mr. Rinckey, I thought I was going to get the same ole speech, but to my surprise, I IMMEDIATELY felt at ease and I knew right then that he was going to be my attorney (not sure if he knew it at this time). He took on this case with vigor and ZERO FEAR of the government! He wanted them to know that this was NOT going to go away with any plea deal! And he went to work! Then, LITERALLY 2 DAYS BEFORE trail the government added an additional charge, which was Article 134, Unlawful Entry. Mr. Rinckey stayed focused, developed a plan, and off to trail we went. He was so prepared, calm and at ease. I remember him saying to me, "I am ready to try this case." And yesterday – 14 APR 2016 – my son was found NOT GUILTY on ALL CHARGES AND SPECIFICATIONS!!! Yesss!!! You know, it's always hard to find money for an attorney, but I learned one thing with this case. Although I thought we couldn't afford an attorney, the truth of the matter was that we couldn't afford NOT TO HAVE an attorney. I only wish I had found Mr. Rinckey sooner, but that's okay. I have found my ATTORNEY for life," Y.W. on Founding Partner on Greg Rinckey, Esq.

Prior results do not guarantee similar outcomes.

“I would recommend your firm to anyone who needs legal help”

"I would like to say how pleased I was with the way your firm handled my case! From the initial intake to my phone consultation with Mr. Rinckey, I felt comfortable and confident. My case was assigned to Ms. Ozbek. I could not have been more pleased with her finished letter to the BCNR. I would recommend your firm to anyone who needs legal help," S.M. on Senior Counsel Ferah Ozbek.

Prior results do not guarantee similar outcomes.

“He attacked my matter with the determination, attentiveness and professionalism that I would expect”

"Attorney Anthony Kuhn was able to negotiate the dismissal of involuntary administrative separation proceedings against me and arrange for me to voluntarily retire. After a second

GOMOR was permanently filed in my personnel file, the Army informed me that I was facing involuntary separation. After missing my window to rebut the proceedings, I called Anthony Kuhn for assistance and he assured me that he would do everything in his power to negotiate a dismissal and voluntary retirement. He attacked my matter with the determination, attentiveness and professionalism that I would expect from a seasoned attorney and fellow combative Veteran. He made it clear from the start that he was personally vested in my matter. As a Sergeant Major and former client, I enthusiastically and unequivocally recommend Attorney and Veteran Anthony Kuhn to any fellow service member or Veteran with a pending Military Law matter," P.W. on Attorney Anthony Kuhn

. Prior results do not guarantee similar outcomes.

“Mr. Greiner's professional demeanor, intelligence, and attention to detail certainly made the difference”

"Anyone facing a life altering dilemma has two choices: give up or carry on. Mr. Greiner not only helped me carry on, but professionally fought for my wellbeing above and beyond what was required of him. He represented me in my Defense Office of Hearings and Appeals (DOHA) court hearing recently. Not only did Mr. Greiner take over my case on short notice, but quickly gathered and reviewed all necessary documentation and information. In addition he arranged to meet with me in person and go over all the facts. He provided me with sound professional advice on moving forward in resolving my case."I am an industrial security professional with over 15 years of experience in handling security matters for the government. My security clearance provides me the access required, and without it I would be unable to continue in my career. As a single mother of two children that is a frightening thought."Mr. Greiner's professional demeanor, intelligence, and attention to detail certainly made the difference in the final ruling of my case. I was particularly impressed with his ability to deflect opposing counsel's arguments or mitigate them altogether. His years of experience and expertise shined through not only in court, but also during follow up communications with additional documentation requested by the administrative judge. He was a pleasure to work with and I highly recommend him, and have, to those seeking legal navigation in security clearance matters. My security clearance was granted thanks to his efforts. In closing Mr. Greiner is not only an asset to Tully Rinckey law firm, but a leader in his field that exceeded my expectations," J.L. on Attorney Gregory F. Greiner, Esq.

Prior results do not guarantee similar outcomes.

“You reassured me that we were a team”

"'Thank You.' The words seem so very simple, but they carry with them all my appreciation! Thank you so much for everything! I have and always will remember what you've done for me and how you've touched my professional career. I was very uncertain if I would be able to keep my security clearance to remain employed, but with your expertise and knowledge you helped me overcome a difficult battle. You reassured me that we were a team and that you would be with me every step of the way. What looked so dim became a bright light at the end of the Statement of Reasons you walked me through. I highly recommend Mr. Gregory Greiner to anyone who is looking for a true fighter in winning employment cases as complex as mine. P.S. Tully Rinckey does not leave you hanging, they work to win your case. Try them," V.H. on Attorney Gregory F. Greiner, Esq.

Prior results do not guarantee similar outcomes.

“You are an outstanding legal representative”

"Thank you for your superior legal services. Congratulations on winning my case against DOL! You are an outstanding legal representative! K.M. on Partner Rachelle Young, Esq.

Prior results do not guarantee similar outcomes.

Your advice has been spot on at every stage

"We really cannot thank you enough for your assistance in this situation. Your advice has been spot on at every stage, and your work in putting together our son's submittal was very impressive. I know that we would not have achieved this outcome without your help. You also have great skills in managing overly anxious parents!" C.L. on Founding Partner Mathew B. Tully, Esq.

Prior results do not guarantee similar outcomes

“Great Customer Service” – C.R.

"Great customer service, thoroughly explained all aspects of my case. Thank you." - C.R.

“Great Service” – E.S.

I want to thank you all for the great service rendered [to] myself and family. - E.S. on Client Relations Attorney Derrick Hogan

“High Regard” – R.E.M.

“Your firm held my best interests with high regard... I thank you for your efforts.” - R.E.M.

“Prompt and Efficient” – K.B.

“Prompt and efficient in processing claim, all correspondence handled in prompt and efficient manner.” – K.B.

“Impressed” – W.W.

“As a retired heavy user of attorneys, I'm impressed with your concerns and your efforts to stay in touch with your clients. Its damned good management aligned with top notch expertise.” – W.W.

“Excellent Service” – J.R.

“Excellent service, very professional, and understanding and considerate of clients needs. Attorney was very approachable and there was a very good comfort level.” – J.R.

“Professional and Informative” – J.H.

“Professional and informative... I was pleased with the handling of the case. I was treated as a person, and kept abreast of all aspects of the case. Thank you all.” – J.H.

“Thanks So Much” – J.D.

“Without your firm, I would not have known of my claim. Thanks so much!” – J.D.

“Gets Results” – F.P.

“Most certainly – The firm gets results!” – F.P.

“Outstanding” – M.P.

“Results are outstanding.” – M.P.

“Quite Satisfied” – R.W.

“I am quite satisfied with the services your office has provided.” – R.W.

“Exceptional Legal Services” – A.S.

“Your firm, Tully Rinckey, has provided and continues to provide me with prompt, keen, exceptional legal services. After the initial consult, I felt relieved that I had the representation from Tully Rinckey... I have found a new found hope with Tully Rinckey...” – A.S.

“Absolute Best” – R.H.

“My attorney was the absolute best I could ever have hoped for. A pure professional in every sense of the word. She was very mindful of my financial expenditure and still was able to represent me very well in my court case.” – R.H.

“Outstanding Service” – A.R.

“Outstanding service, true professional.” – A.R.

“Top Notch” – V.W.

“My attorney was top notch. Very pleasant and helpful.” – V.W.

“Very Thankful” – C.P.

“Very thankful for the help and guidance I received from your law firm. Because of your law firm I was able to return to work with all my back benefits.” – C.P.

“Ideal Choice” – D.H.

“My attorney knew exactly the approach to take and was the ideal choice. She was extremely responsive. She was clear, balanced, and open to our views and feelings. She made it clear she was there for us and ready to answer questions.” – D.H.

“Very Satisfied” – D.D.

“I was very satisfied with the services provided which were completed in a very timely and professional manner.” – D.D.

“Excellent” – B.M.

“Your firm provides excellent & free service to federal workers and NG/USAR members.” – B.M.

“Team of Experts” – T.W.

“Nice having a team of experts in the field of military rights. Anyone who has an issue regarding their civilian employment or the military I refer to you.” – T.W.