

Ask the Lawyer: Same Crime, Different Punishments

By Mathew B. TullyQ. Someone I know was found guilty of wrongfully using marijuana, but he was allowed to stay in the military. Does that mean I will not receive a bad-conduct or dishonorable discharge if I'm convicted of the same charge?

A.

Just because someone you know managed to remain enlisted — despite being convicted of an offense for which a punitive or administrative discharge is a possibility — doesn't mean the same outcome is guaranteed for you. Violations of the Uniform Code of Military Justice don't occur in a vacuum; much more goes into sentencing considerations than the nature and circumstances of the crime committed. Even if two service members committed the same crime at the same time, it is unlikely they would share the same extenuating, mitigating or aggravating circumstances. Courts rarely compare sentences to determine the appropriateness of one. But when they do, they'll examine whether the cases are "closely related" and whether "highly disparate" sentences are founded on a "rational basis," the U.S. Air Force Court of Criminal Appeals noted in *U.S. v. Austin T. Gage*. This case, decided this year, involved an airman first class who, along with another airman first class and a senior airman, sneaked into an air base building believed to be haunted. The two airmen first class were convicted of unlawful entry. One was sentenced to a bad-conduct discharge and 30 days' confinement while the other was sentenced to hard labor without confinement for 30 days and reduction to E-1. The airman who received the punitive discharge filed an appeal, claiming his sentence was inappropriately severe. The appellate court found that the airmen's cases were closely related and their sentences were highly disparate. The government tried to explain the disparity by saying the appellant instigated the offense, but the court said testimony to support this assertion was "fuzzy at best." The government also noted the appellant's poor duty history, including prior nonjudicial punishment, but the court said it could not compare his evidence of rehabilitation potential with that of the other airman. Lastly, the government noted that the panel knew the other airman did not receive a punitive discharge, but the court declined to speculate on the panel's conclusions. Ultimately, the court approved the appellant's 30-day confinement sentence but not his punitive discharge. Cases involving low-level drug possession and use charges often are processed by administrative separation boards rather than courts-martial. A board will rule whether a service member should be retained or separated and the characterization of the separation. The sentence comparison theory is also applicable to administration separation board proceedings. Troops accused of any military crime should contact a military law attorney. In the event of a conviction, an attorney can raise mitigating factors to help secure a more lenient sentence or challenge any irrational, highly disparate sentence.