

The Use of Conditional Waivers for Suspended Discharges: A Rehabilitation Tool for Reserve Component Commanders

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“Judge, I have a Soldier that tested positive for marijuana during our February battle assembly. He is a good kid; he has two tours in Iraq and is a local police officer. I really want to recover this guy. What are my options?” This is a situation many judge advocates have faced in the Reserve Component. There is a Soldier that clearly committed misconduct, and the command clearly wants to retain him.

However, unlike an active component case, punishment under the Uniform Code of Military Justice would not be appropriate because the Soldier was almost certainly not in a military status when he ingested the marijuana.¹ Therefore, the command is left with adverse administrative actions to deal with the situation.² For the Reserve Component, civilian conduct can form the basis of an involuntary separation and can be considered when determining a Soldier’s characterization of service.³ While the initiation of an enlisted separation action is mandatory for abuse of illegal drugs, there is no requirement that the command actually separate the Soldier.⁴ The Army views abuse of illegal drugs as serious misconduct and requires commanders to “process” for separation “all Soldiers” who “test positive for illegal drug use.”⁵ Hence, the command must flag and process for separation even this highly regarded Soldier.⁶

In most cases, the command will want to be viewed as taking action on drug offenses and send the message that drug use is not tolerated. But, how can it accomplish these goals without actually separating the highly deserving Soldier? Fortunately, there is another option. The Soldier’s commander may initiate an administrative separation action, but support a conditional waiver that suspends the separation for up to twelve months on the condition the Soldier waives his right to an administrative separation board.⁷ This course of action meets the goals of the command, and is likely in the best interests of the Army.

Conditional waivers are available when the Soldier has a right to an administrative separation board.⁸ This right accrues when the Soldier has more than six years of creditable service or when the Soldier could be separated with an under other than honorable conditions characterization of service.⁹ For serious misconduct like abuse of an illegal drug, the characterization of service will “normally be under other than honorable conditions.”¹⁰ Therefore, it is highly likely that a conditional waiver for a suspended discharge will be an option for any Soldier being separated for illegal drug use.¹¹

Essentially, a conditional waiver for a suspended discharge places a Soldier on probation for twelve months to see if he can avoid any further incidents of misconduct.¹² During the probationary period, the Soldier remains flagged with a nontransferable flag because, although the separation is suspended, the Soldier is still pending involuntary separation.¹³ As a result of the non-transferrable flag, any favorable action regarding the Soldier during the period of suspension is prohibited.¹⁴ This includes actions such as reenlistment, appearance before a promotion board, promotion, receipt of awards, attendance at schools, and the payment of bonuses.¹⁵ At the conclusion of the probationary period, the command has the ability to remit execution of the approved separation provided the Soldier has not committed any additional incidents of misconduct.¹⁶

If the Soldier does commit new incidents of misconduct or otherwise fails to meet appropriate standards of performance, the command may initiate a new separation action, or it can advise the Soldier in writing that the command is considering vacating the suspended separation.¹⁷ In either case, the Soldier has time to consult with counsel and

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¹ See UCMJ, art. 2 (2012).

² *Id.*

³ U.S. DEP’T OF ARMY, REG. 135-178, ARMY NATIONAL GUARD AND ARMY RESERVE ENLISTED ADMINISTRATIVE SEPARATIONS, paras.12-1, 12-2, 2-8(c), 2-10(e) (18 Mar. 2014) [hereinafter AR 135-178].

⁴ *Id.* para. 12-1(d).

⁵ *Id.*

⁶ *Id.* See also U.S. DEP’T OF ARMY, REG. 600-8-2, SUSPENSION OF FAVORABLE PERSONNEL ACTIONS (FLAG) paras. 1-4(j), 2-1(d) (23 Oct. 2012) [hereinafter AR 600-8-2].

⁷ See AR 135-178, *supra* note 3, para. 2-5(a).

⁸ *Id.* para. 3-16.

⁹ *Id.* paras. 3-5(a)(7), 2-9(c)(3).

¹⁰ *Id.* para. 12-1(d).

¹¹ *Id.*

¹² *Id.* paras. 2-5, 2-6.

¹³ See AR 600-8-2, *supra* note 6, para. 2-2(d).

¹⁴ *Id.* para. 3-1(a).

¹⁵ *Id.* para. 3-1.

¹⁶ See AR 135-178, *supra* note 3, para. 2-6.

¹⁷ *Id.*

respond to the proposed action.¹⁸ Failure to respond waives the Soldier's rights.¹⁹ For the suspended discharge, the separation authority must consider any response by the Soldier and either vacate the suspension, thereby allowing the Soldier to be discharged, or continue with the period of suspension.²⁰

In the traditional case, a conditional waiver waives the Soldier's right to an administrative separation board so long as the characterization of service upon separation is higher than the least favorable characterization authorized for the basis of the separation listed in the notification memorandum.²¹ This would mean only an honorable discharge or general under honorable conditions discharge would be available to a commander considering a conventional conditional waiver.²² However, in the case of a conditional waiver for a suspended discharge, a commander may arguably also approve a Soldier for discharge under other than honorable conditions.²³ This is the case because the command would be providing a benefit (i.e., the suspended discharge) in exchange for the Soldier's waiver of his right to a board, which is analogous to the command offering a better discharge than the least favorable available for the basis of separation.²⁴ In this case, the highly deserving Soldier would submit a conditional waiver waiving his right to a board so long as he receives either an honorable, general under honorable conditions, or an under other than honorable conditions discharge, which is suspended for twelve months.²⁵ When considering what characterization of service to recommend, commanders may consider conduct by a reserve Soldier in his civilian capacity.²⁶

The separation authority does not change with the submission of a conditional waiver.²⁷ Once the conditional waiver has been submitted, each commander in the Soldier's chain of command will submit a recommendation to the Separation Authority regarding whether to approve or disapprove the conditional waiver.²⁸ If the conditional waiver is approved by the separation authority, then the separation authority will assign a characterization of service and suspend its execution.²⁹ If the conditional waiver is disapproved, the case will be referred to a hearing before an administrative separation board, unless there is a subsequent unconditional waiver of a right to a hearing before a board.³⁰ While the conditional waiver is pending, there is no requirement to

delay the board proceedings.³¹ However, once a board has made its findings and recommendations, the convening authority may not approve the conditional waiver.³²

A conditional waiver for a suspended discharge provides the command an important tool to retain the most deserving Soldiers by placing them on probation for up to a twelve month period.³³ This allows the Soldier to remain in the Army Reserve while he shows he has learned from his mistakes.³⁴ While not appropriate in all cases, this procedure supports the Army Reserve's substantial investment in Soldiers and is a reasonable effort at rehabilitation prior to discharging the Soldier.³⁵

¹⁸ *Id.* paras. 2-6, 3-16(b).

¹⁹ *Id.* para. 2-6.

²⁰ *Id.*

²¹ *Id.* para. 3-16.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* paras. 2-8(c), 2-10(e).

²⁷ *Id.* paras. 2-5.

²⁸ *Id.* paras. 3-8, 3-9, 3-14, 3-15.

²⁹ *Id.* para. 3-10(f).

³⁰ *Id.* paras. 3-5(a)(7), 3-11(a).

³¹ *Id.* para. 3-16.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* para. 2-2(a).