

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD

vs.

ANDREW A. KORSAK

Respondent

Docket No. CG S&R 01-0023

Case No. PA00002294

DECISION AND ORDER

BEFORE:

ARCHIE R. BOGGS
Administrative Law Judge
Eighth Coast Guard District

APPEARANCES:

FOR THE COAST GUARD
LTJG Erin G. Cantwell and
LT Michael J. Simbulan
United States Coast Guard
Marine Safety Office Honolulu
433 Ala Moana Boulevard, Room 1
Honolulu, Hawaii 96813-4909

FOR THE RESPONDENT
Richard Gronna, Esq.
820 Miliani Street, Suite 812
Honolulu, Hawaii 96813

PRELIMINARY STATEMENT

The United States Coast Guard (Coast Guard) initiated this administrative action seeking revocation of Merchant Mariner's License number 782176 and Merchant Mariner's Document number [REDACTED] both issued to respondent Andrew A. Korsak.

This action is brought pursuant to the legal authority contained in 46 U.S.C. § 7704, 46 C.F.R. Parts 5 and 16, and 49 C.F.R. Part 40.

In a complaint dated December 29, 2000, as amended and incorporated by reference on February 5, 2001, the Coast Guard charged respondent with being a user of a dangerous drug in violation of 46 U.S.C. § 7704(c) after he tested positive for cocaine following a post accident drug test.

Respondent filed an answer to the complaint in which he admitted to the jurisdictional allegations, and, with respect to the factual allegations, he:

- (1) admitted he took a Post Accident drug test on December 4, 2000;
- (2) admitted, at the hearing, that the urine specimen was collected at Pier 1 in Hilo, Hawaii;¹
- (3) admitted he signed a DOT Federal Drug Testing Custody & Control Form;
- (4) admitted the urine specimen was tested by LabOne, Inc.;¹
- (5) affirmatively asserted that there was insufficient information to answer whether the urine specimen subsequently tested positive for Cocaine; and
- (6) affirmatively asserted that there was insufficient information to answer whether the Medical Review Officer, Dr. Paul Teynor of Intermountain MRO Services, Inc., determined the test to be positive for cocaine following an interview conducted with respondent on or about December 8, 2000.

¹ This factual allegation was amended on February 5, 2001.

A hearing was held in this matter on 26 February 2001 in Honolulu, Hawaii. The hearing was conducted in accordance with the Administrative Procedure Act, as amended and codified at 5 U.S.C. §§ 551-559, and Coast Guard procedural regulations located at 33 C.F.R. Part 20.

Lieutenant (junior grade) Erin G. Cantwell and Lieutenant Michael J. Simbulan entered appearances on behalf of the Coast Guard. The respondent was represented by professional counsel, Richard Gronna, Esq., who requested a continuance to enable Mr. Korsak, who had enrolled in a drug rehabilitation program, an opportunity to satisfy the requirements of cure as enunciated in Appeal Decision 2535 (SWEENEY). Respondent's motion for continuance was taken under advisement, and the hearing proceeded as scheduled.

The Coast Guard introduced the testimony of three (3) witnesses:

- 1) Timothy Holman, owner of Safe Tech, who collected Respondent's urine specimen 4 December 2000 and who shipped the specimen to LabOne in Lenexa, Kansas, for testing;
- 2) John Joseph Skuban, Jr., certifying scientist and custodian of record for LabOne, who testified that the specimen was received in tact, the specimen was tested in accordance with applicable regulations, and the specimen tested positive for cocaine; and
- 3) Dr. Paul Teynor, Medical Review Officer for Intermountain MRO Services, Inc., who served as the MRO for the specimen.

The Coast Guard also introduced three (3) exhibits, which were admitted into evidence:

IO Exhibit 1 - the collector's copy of the Federal Drug Testing Custody and Control Form for Mr. Korsak's specimen.

IO Exhibit 2 - a curriculum vitae for John J. Skuban, Jr.

IO Exhibit 3 - a laboratory report and litigation packet for the specimen.

The Respondent testified in his own behalf and he introduced two (2) exhibits, which were admitted into evidence:

Respondent's Exhibit A - a typical plastic specimen cup, which is used to collect urine specimens.

Respondent's Exhibit B - a Federal Drug Testing Custody and Control Form

The Coast Guard and the Respondent stipulated to the following:

- 1) There is no acceptable medical reason for the positive drug test result for cocaine; and
- 2) The respondent is currently undergoing rehabilitation.

The Coast Guard has established the allegations in the Complaint by a preponderance of the reliable and credible evidence. Respondent's license and document are both subject to revocation. The Respondent's motion for continuance is denied.

RULINGS ON COAST GUARD PROPOSED FINDINGS OF FACT²ACCEPTED AND INCORPORATED

1. Respondent is currently the valid holder of the following United States Coast Guard credentials: Merchant Mariner's Document No. [REDACTED] and License No. 782176. The license expires on April 25, 2002. Respondent was the valid holder of the aforementioned license and document on or about December 4, 2000. Respondent's license and document is currently in the possession of the Coast Guard.

ACCEPTED AND INCORPORATED

2. A copy of the test results from a post-accident drug test taken by the Respondent on December 4, 2000 has been submitted as CG Exhibit 1. The results indicate that the Respondent tested positive for cocaine. Furthermore, the testimony from Mr. Tim Holman (collector), and Mr. John Skuban (certifying scientist for LabOne) established that the test results were accurate and valid.

ACCEPTED AND INCORPORATED

3. While testifying, the Respondent stated that as part of his drug rehabilitation program he has admitted to being a user of cocaine.

ACCEPTED AND INCORPORATED

4. Aggravating these facts, the Coast Guard recognizes the following:
 - a. In November of 1992, the Respondent tested positive for cocaine. Subsequently, he went through cure and his License and MMD were reinstated.
 - b. In both instances where the Respondent failed a drug test, the Respondent tested positive for cocaine.

ACCEPTED AND INCORPORATED

5. Mitigating these facts, the Coast Guard recognizes the following:
 - a. The Respondent admitted he has a drug problem.
 - b. Prior to the hearing, the Respondent entered a bona fide substance abuse treatment facility, and enrolled in a rehabilitation program.

RULING: ACCEPTED AND INCORPORATED

² During the hearing, the parties were instructed to file post-hearing briefs, including proposed findings of fact and conclusions of law. The Coast Guard filed enumerated proposed findings of fact together with conclusions of law on April 24, 2001. The respondent, however, elected not to file any post-hearing submissions. As such, rulings were made only on the Coast Guard's enumerated proposed findings of fact.

OPINION

The law governing Coast Guard suspension and revocation proceedings involving drugs is well settled. Section 7704(c) of Title 46 of the United States Code specifically provides:

If it is shown that a holder has been a user of, or addicted to, a dangerous drug, the license, certificate of registry, or merchant mariner's document shall be revoked unless the holder provides satisfactory proof that the holder is cured.

In other words, absent proof of cure by a Respondent who has been found to be a user of, or addicted to, a dangerous drug, the "Administrative Law Judge is without discretion to issue an order less than revocation." Appeal Decision 2535 (SWEENEY).

However, in cases where the respondent has "demonstrated substantial involvement in the cure process by proof of enrollment in an accepted rehabilitation program," a judge may grant a continuance enabling the respondent to establish cure. Decision of the Vice Commandant on Review No. 18 (CLAY). The decision to grant a continuance and provide the respondent an opportunity to establish cure is solely the discretion of the presiding judge. Appeal Decision No. 2557 (FRANCIS).

The evidence adduced at the hearing in this case established that respondent had previously avoided a hearing and gone through the cure process after testing positive for cocaine, albeit some nine years ago in 1992. Based upon this prior drug related offense and in accordance with 46 C.F.R. § 5.201, the Coast Guard did not offer respondent a second opportunity to seek cure. Section 5.201 of the Code of Federal Regulations allows a merchant mariner to voluntarily deposit his license or document

and enter into a written agreement with the Coast Guard for return of said credentials if, among other things

- (1) [The merchant mariner] is enrolled in a drug abuse rehabilitation program;
[and]

* * *

- (4) [The merchant mariner] has not voluntarily deposited or surrendered a license, certificate, or document, or had a license, certificate, or document revoked for a drug related offense on a prior occasion.

46 C.F.R. § 5.201(a), (b)(1), and (b)(3) establishes that the Coast Guard will only allow each merchant mariner one opportunity, in cases involving use or addition to a dangerous drug, to establish cure. Thus, to grant a continuance in this case for the sole purpose of allowing respondent a second opportunity to establish cure would be directly inconsistent with 46 U.S.C. § 7704 and its underlying regulations set forth in 46 C.F.R. § 5.201. Therefore, respondent's motion for continuance for the sole purpose of establishing cure is hereby **DENIED**.

ULTIMATE FINDINGS

1. Respondent Andrew A. Korsak and the subject matter of this hearing are within the jurisdiction of the United States Coast Guard in accordance with Title 46, United States Code 7704.
2. At all relevant times on December 4, 2000, respondent Korsak was the holder of Merchant Mariner's License Number 782176 and Merchant Mariner's Document No. [REDACTED], which are both currently in the possession of the Coast Guard.

3. Respondent Korsak admits that he submitted to a post-accident drug test, the urine specimen was collected at Pier 1 in Hilo, Hawaii, and LabOne tested the urine specimen.
4. Respondent's urine specimen, which was tested in accordance with applicable drug testing regulations codified at 46 C.F.R. Part 16 and 49 C.F.R. Part 40, tested positive for cocaine.
5. The parties have stipulated that there is no medically acceptable reason for the positive test result for cocaine and have also stipulated that Respondent is currently enrolled in a bona fide drug rehabilitation program.
6. The Respondent previously underwent the cure process following a positive test result for cocaine in November 1992, and his license and document were reinstated.

CONCLUSION

The Coast Guard has established through his own admission that Respondent, Andrew A. Korsak, holder of merchant mariner's license number 782176 and merchant mariner's document number *[REDACTED]* tested positive for cocaine following a post accident drug test in Hilo, Hawaii on December 4, 2001. This constitutes a violation of 46 U.S.C. § 7704(c) for which revocation is the only appropriate order.

ORDER

License Number 782176 and Merchant Mariner's Document Number *[REDACTED]*, and all other licenses, documents, or certificates issued to you by the United States Coast Guard is hereby revoked.

Delivery of this Decision and Order on you or your counsel will constitute service and will serve as notice to you of your right to appeal, the procedures for which are set forth in Attachment A and made part of this Order.

Absent an appeal taken by either party, this decision shall become the final action of the Coast Guard 30 days after the date of issuance as provided in 33 C.F.R. § 20.1101.

ARCHIE R. BOGGS
Administrative Law Judge

Dated 1 June 2001
New Orleans, Louisiana

[REDACTED]