

**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD**

UNITED STATES COAST GUARD

V

DOCKET NO. 01-0734

THOMAS HASTINGS
_____ /

INTERIM DECISION AND ORDER

This proceeding is brought pursuant to the authority contained in 46 USC §§ 7703, 7704; 5 USC §§ 551-559; 46 CFR Parts 5 and 16, and 49 CFR Part 40.

Respondent, Thomas Hastings, was charged, by the Coast Guard, with being a user of a dangerous drug having taken a pre-employment drug test. He was also charged with misconduct because on October 9, 2001 he failed to join his vessel and report and perform his required duties aboard the CSX PACIFIC (D612085).

Respondent answered the complaint and admitted all jurisdictional and factual allegations including all conclusions of law respecting the two charged violations. He demanded, however, a hearing on the sanction to be imposed.

Subsequently on February 11, 2002 in Honolulu, Hawaii a hearing was held in which Respondent was afforded the opportunity requested to determine the sanction in this matter.

At the hearing this judge, based solely upon the answer to the complaint found the two alleged violations to have been proven by the Coast Guard.

Sanction

Respondent strongly asserted he is not a user of dangerous drugs and thus any sanction, which accepts that finding, is erroneous. He particularly argues that he indeed admitted to the positive outcome of the drug test because he had in fact experimented with or taken for one time only some cocaine. He points out that the coincidental drug testing and the taking of the drug was just that and unfortunate.

He further explains that he had been diagnosed with prostate cancer and was recently discharged from the hospital after surgery. He was despondent and some friends

encouraged him to take the drug that one time to “pick up his spirits” and perhaps ease some after surgery pain he was experiencing.

The Coast Guard does not seriously dispute these facts. In any event, Respondent has raised an important factual and legal issue, which goes to the heart of the presumption a person is a *drug user*.

For some time now, the Coast Guard has brought cases charging a mariner is a user of a dangerous drug under 46 USC § 7704[c] based solely upon the results of chemical testing by urinalysis. 46 CFR § 16.201[b] which provides that one who fails a chemical test for drugs under that part will be *presumed* to be a user of dangerous drugs. In turn, 46 CFR § 16.105 defines "fail a chemical test for dangerous drugs" to mean that a Medical Review Officer (MRO) reports as "positive" the results of a chemical test conducted under 49 CFR § 40. In other words, 46 CFR Part 16 establishes a regulatory presumption on which the Coast Guard may rely, provided the Coast Guard can satisfactorily show that a 49 CFR § 40 chemical test of a merchant mariner's sample or specimen was reported positive by a MRO. This *presumption*, however, does not dispense with the obligation to establish the *presumption* by the same standard of proof, *i.e.*, the elements of the case must be proven by a preponderance of the evidence. The elements of a case of presumptive use are these.

First, the Respondent was the person who was tested for dangerous drugs.

Second, the Respondent failed the test.

Third, the test was conducted in accordance with 46 CFR Part 16.

Proof of these three elements establishes a *prima facie* case of use of a dangerous drug (*i.e.*, presumption of drug use), which then shifts the burden of going forward with the evidence to the Respondent to rebut the presumption. If the rebuttal fails then an Administrative Law Judge may find the charge proved solely on the basis of the presumption. See, CDOA 2592 (Mason), CDOA 2584 (Shakespeare), and CDOA 2560 (Clifton).

To rebut the presumption, Respondent must produce reliable, substantial and probative evidence of any of the following:

- (1) that calls into question any of the elements of the *prima facie* case,
- (2) that shows an alternative medical explanation for the positive test result,
- (3) that demonstrates the use was not wrongful or knowing, or
- (4) that respondent is (or was) not a user or addicted to a dangerous drug, or has been a user or been addicted but is now cured by showing he is no longer a *user or addicted to a dangerous drug*¹. This includes proof that the Respondent has

¹ See 46 USC § 7704(c), which requires a showing that a holder of a license or document has been a user of or addicted to a dangerous drug in order to revoke the license or document. The provision is a re-enactment of 46 USC § 239(b) as part of a 1983 overhaul of subtitle II of Title 46. The purpose of this was to consolidate, systematize and simplify the language of the statute and secondarily to make selective

successfully completed a drug abuse rehabilitation program and that he had not had any association with drugs for at least one year. See, CDOA 2535 (Sweeney) and *Commandant v. Wright*, NTSB Order No. EM-186 (12/30/99)².

Proof that a person has not been a *user or addicted to a dangerous drug* must be shown by reliable, substantial and probative evidence, such as, competent medical evaluation or other expert testimony coupled with proof of rehabilitation. CDOA 2552 (Ferris). Such expert evidence can come from the Medical Review Officer who is required by 46 CFR § 16.370(d) to determine whether an individual is drug-free and the risk of

substantive changes to the retained laws. See, H.R. No. 98-338, 98th Congress, 1st session, reprinted in 1983 *U.S. Code and Administrative News* p. 924.

The history of this section reveals that in June, 1954 while hearings were being held on what was to become 46 USC § 239(b) then Secretary of the Department of Health Education and Welfare (HEW), Nelson Rockefeller, wrote to the Senate Committee expressing his concern over the vagueness of the term *user* and the improper use of *cured*. He pointed out:

Because of the psychiatric elements involved in drug addiction, a person who has completed a course of treatment for narcotic addiction and is found no longer to be an addict may not, medically, be considered “cured”. The most that could be said in such a case would be that the individual is no longer an addict. We would suggest, therefore, that the phrase “no longer addicted to narcotic drug” be substituted for the word “cured.”

He also proposed the following definition of *user*

The term “drug user” means any person who habitually uses any habit-forming narcotic drug so as to endanger the public morals, health, safety or welfare, or who is so far addicted to the use of such habit-forming narcotic drugs as to have lost the power of self-control with reference to his addiction. .

The Senate committee report responds:

Although your committee does not believe it necessary to amend the bill in the manner suggested it expressly states ***that it has employed the term “cured” and “user” in precisely the same sense as recommended by the Department of Health, Education and Welfare.*** (emphasis supplied)

Senate Report No. 1648, June 28, 1954 (To accompany H.R. 8538), pp 2558-2560.

² Evidence of this may include enrollment in a bona fide rehabilitation program designed to eliminate physical and psychological dependence. This usually means a program certified by a government agency, such as a drug/alcohol abuse administration, or a program certified by an accepted independent professional association, such as the Joint Commission on Accreditation of Health Care Organizations. Complete disassociation with drugs usually requires a higher level of monitoring than mere testimony from a family physician, such as participation in an active drug abuse-monitoring program, which incorporates random, unannounced testing during the one year. These *Sweeney* (CDOA 2535) criteria are not inflexible requirements, but are guidelines subject to evaluation in the context of determining the adequacy of proof of cure in a given case. *Commandant v. Wright*, NTSB Order No. EM-186, note 12 at p. 8.

subsequent use of dangerous drugs by that person is sufficiently low to justify return to work. Or, from a Substance Abuse Professional (SAP) meeting the qualifications and standards in revised 49 CFR Part 40 rules effective August 1, 2001. See 65 Federal Register No. 244, pp. 79461-79510. Also see 49 CFR § 40.281. Any of these experts must be able to demonstrate a thorough knowledge of a person's daily activity, and physical and mental conditions. For example, the SAP would be expected to perform a drug and alcohol assessment and a one on one interview including a surprise observed drug test conforming to DOT drug testing rules.

If this evidence is sufficient to rebut the original presumption, then the burden of presenting evidence returns to the Coast Guard to show that the respondent is a "user" of dangerous drugs other than by reliance on the presumption of a positive test result. The Coast Guard at all times retains the burden of proof. See CDOA 2560 (Clifton).

Where the Coast Guard fails to sustain the ultimate burden of showing the respondent is a "user of", or "addicted to" dangerous drugs, the allegation asserting such a claim will be dismissed as not proven. But, if the Coast Guard is able to show a lesser-included violation of misconduct by use of a dangerous drug, an appropriate sanction may be imposed. In this instance, proof respondent poses a risk to safety at sea would be an important element in determining the sanction.

Here Respondent claims he is not a user and that any competent Medical Review Officer or other Substance Abuse Professional will be able to examine him accordingly and determine he is fit to serve on board a vessel and the his likelihood of use of dangerous drugs is absent or so small to be non-existent.

Unfortunately, at the hearing Respondent had no such person to testify on his behalf. Accordingly, he was given the opportunity to obtain that testimony and evidence. The Coast Guard had no objection to this procedure and indeed encouraged it.

Interim Order

This hearing is therefore adjourned³ until April 1, 2002 in which Respondent shall be afforded the opportunity to present such evidence as will show that he is not a user of dangerous drugs. That evidence must come from a Medical Review Officer or other certified Substance Abuse Professional.

IT IS SO ORDERED.

Dated: February 19, 2002

Edwin M Bladen

³ Because of the assignment system utilized by the Administrative Law Judge Docketing Center this judge will not likely be available to hear this matter on April 1, 2002. I am informed by the Coast Guard that a Coast Guard hearing is presently scheduled for that date and the Senior Investigating Officer in charge of these matters for the Marine Safety Office in Honolulu Hawaii has no objection to including this matter for hearing on that day before another judge.