

UNITED STATES OF AMERICA
U.S. DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

UNITED STATES COAST GUARD

Complainant

vs.

WILLIAM BENNETT,

Respondent.

Docket Number CG S&R 01-0671
PA No. 01001857

DECISION AND ORDER

Issued: August 22, 2002

Issued by: Peter A. Fitzpatrick, Administrative Law Judge

APPEARANCES

FOR THE COAST GUARD

LT Louis Luba
LT Timothy W. Pavidonis
LT Andrea Katsenes
LTJG Joshua Pennington
United States Coast Guard
Marine Safety Office
20 Risho Avenue
East Providence, Rhode Island 02914-1208

FOR THE RESPONDENT

John E. Bennett, Esq.
Town Landing No. 2
333 R Commercial Street
Provincetown, MA 02656

I.

PRELIMINARY STATEMENT

This case began on October 2, 2001 when the Coast Guard filed a Complaint against the Respondent, William Bennett, under the statutory authority contained in 46 U.S.C. § 7704(c) and the Coast Guard regulation codified at 46 C.F.R. 5.35. Mr. Bennett is the holder of Coast Guard issued license number 788197 and merchant mariner's document number [REDACTED]. The Coast Guard alleged that Mr. Bennett tested positive for marijuana metabolite on a random drug test administered on August 21, 2001. The Investigating Officer sought the revocation of Mr. Bennett's Coast Guard License and Document under 46 U.S.C. § 7704.

On October 7, 2001, Respondent's counsel notified the Coast Guard Administrative Law Judge Docketing Center that he represented William Bennett and requested copies of recent appeal decisions. By letter dated October 10, 2001 he was directed to the website where those decisions are available. On October 12, 2001, Mr. Bennett requested an extension of time to file an Answer and that motion was granted by Order of the Chief Administrative Law Judge on October 17. The deadline was extended until December 1, 2001. The Answer was submitted on November 28, 2001. It admitted all jurisdictional allegations but denied the factual allegations and offered seven affirmative defenses. Also, the Respondent requested settlement discussions and his counsel recommended a delay of the hearing since "the likelihood of settlement is good and would eliminate the necessity of a hearing."

On November 28, 2001 the case was assigned to this Judge and the hearing was set for April 25, 2002. Next, on March 1, 2002 the Coast Guard filed a Motion to Strike and a Motion for Discovery and Disclosure.

A pre-hearing conference was conducted on March 20, 2002 and an Order containing the rulings on various motions was issued the following day. The exact location of the hearing was set and the Coast Guard's Motion for Discovery and Disclosure was granted. Also, Respondent's counsel request that a different laboratory test the urine sample involved was granted. On March 22, 2002 an Order and Subpoena were issued directing Clinical Reference Laboratory, Lenexa, KS, the original drug testing laboratory, to send the sample to Quest Diagnostics, Inc., another laboratory certified to conduct United States Department of Transportation drug testing.

The Coast Guard and Respondent's counsel filed their witness and exhibit lists on March 25, 2002. On March 29, 2002, Quest Diagnostics transmitted the results of the second drug test which was positive for marijuana metabolite. Later, on April 4, 2002 the Respondent filed a motion for Subpoena and Order seeking to compel Quest Diagnostics to produce all documentation. The Coast Guard provided Respondent's counsel with the requested information. Three days before the hearing, on April 22, 2002 Mr. Bennett filed Respondent's Motion to Disqualify the Administrative Law Judge and/or the Commandant.

The hearing commenced as scheduled on April 25, 2002 and the Investigating Officers, the Respondent, and his counsel were present. During the hearing, the Coast Guard sponsored three witnesses and eight exhibits which were admitted on the record. The Respondent did not testify or sponsor any witnesses other than an affidavit from his attorney. Respondent offered seven exhibits. The exhibits and witnesses are identified in Appendices A and B.

At the beginning of the hearing, the Motion to Disqualify the Administrative Law Judge and/or the Commandant of the Coast Guard was addressed. In pertinent part, that motion asserts:

Given the fact that the Administrative Law Judge and the Commandant are both Coast Guard personnel and have taken oaths of allegiance to the Coast Guard, both are incapable of providing the Respondent with a fair and impartial hearing in light of the particular issues in this case involving the enforceability of Coast Guard regulations of the legality of same.

That motion was denied because “. . . bias is a matter which must be shown specifically. . . . [Y]ou have to show a personal bias against the particular respondent involved in the particular case.” (Transcript, hereinafter Tr., 19).

After the Coast Guard presented its case in chief and the exhibits were admitted, Respondent’s counsel asked to be heard on a motion in which he stated, “. . . the Administrative Law Judge should disallow consideration of the test results and expert testimony and dismiss the case for lack of evidence and order the original licenses and document of respondent be returned to him forthwith.” (Tr. 229-30). That motion was denied and it was held that the Investigating Officers had established a prima facie case of drug use by the Respondent. (Tr. 236-37).¹

At the conclusion of the hearing, the undersigned ruled that concurrent post hearing submissions on the three main issues of the case should be filed by May 30, 2002. The Coast Guard filed a Motion for Continuance of those pleadings on May 10th since the transcript was not ready. That Motion was granted by Order issued May 14, 2002. When the transcript was received, an Order was issued extending the filing date until July 31, 2002. The Coast Guard filed their Closing Brief and Proposed Findings of Fact and Conclusions of Law on July 5, 2002.

¹ The Coast Guard asserts in their Closing Brief on page 15 that “. . . the court at the conclusion of the hearing declared the singular charge against the respondent of Use of a Dangerous Drug in violation of 46 U.S.C. §7704(c) PROVED.” Although it was determined that, “It does establish a prima fascia case,” (sic) it was not stated that the case was “PROVED.” (Tr. 236). The determination as to whether the case was proved was reserved pending a review of the record after the hearing.

The Respondent, William Bennett notified this office on July 12th that his brother and attorney in this case died and requested a continuance until July 31st. The request was granted and the deadline was extended until August 21, 2002. On August 2, 2002 Mr. Bennett's pleading entitled Respondent's Proposed Findings of Fact and Conclusions of Law was submitted. This case is now ripe for decision.

II.

STATUTES AND REGULATIONS INVOLVED

A. Procedural Matters

1. This proceeding is governed by the Administrative Procedure Act , which is incorporated into these proceedings under 46 U.S.C. 7702, which reads:

§ 7702. Administrative procedure

- (a) Sections 551-559 of title 5 apply to each hearing under this chapter about suspending or revoking a license, certificate of registry, or merchant mariner's document.

2. 46 U.S.C.§§ 7701-7705 sets out the general procedures governing the suspension and revocation of merchant mariners' licenses and documents. 46 U.S.C. § 7704 provides in pertinent part:

§ 7704. Dangerous drugs as grounds for revocation

- (c) 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.

3. The regulations governing the performance of chemical tests for dangerous drugs adopted by the United States Department of Transportation are codified at 49 C.F.R. § 40. Specifically, the specimen collection procedures are set out at 49 C.F.R. § 40, subpart E.

4. The Coast Guard regulations governing chemical testing for dangerous drugs are codified at 46 C.F.R. § 16. As pertinent here, 46 C.F.R. § 16.201(b) provides that:

Subpart B – Required Chemical Testing

§ 16.201 Application.

- (b) If an individual fails a chemical test for dangerous drugs under this part, the individual will be presumed to be a user of dangerous drugs.

5. The role of the Medical Review Officer in authorizing the re-employment of a mariner aboard a vessel who failed a required chemical test for dangerous drugs is set out at 46 C.F.R. 16.201(e) and (f) as follows:

- (e) An individual who has failed a required chemical test for dangerous drugs may not be re-employed aboard a vessel until the requirements of paragraph (f) of this section and 46 C.F.R. Part 5, if applicable, have been satisfied.

- (f) Before an individual who has failed a required chemical test for dangerous drugs may return to work aboard a vessel, the MRO must determine that the individual is drug-free and the risk of subsequent use of dangerous drugs by that person is sufficiently low to justify his or her return to work. In addition the individual must agree to be subject to increased unannounced testing—

- (1) For a minimum of six (6) tests in the first year after the individual returns to work as required in 49 C.F.R. part 40; and

- (2) For any additional period as determined by the MRO up to a total of 60 months.

6. The Coast Guard Rules of Practice which apply to this proceeding are codified at 33 C.F.R. § 20.

III.

FINDINGS OF FACT

A. Jurisdictional Allegations Admitted by the Respondent in the Answer

1. The Respondent's address is [REDACTED], East Sandwich, MA 02537-1315, telephone [REDACTED].
2. Respondent holds license number 788197 and merchant mariner's document number [REDACTED].

B. Factual Allegations Admitted by the Respondent in the Answer

1. On August 21, 2001 Respondent took a random drug test.
2. A urine specimen was collected by Marie Weber of Outer Cape Health Service, 49 Harry Kemp Way, Provincetown, MA 02657.
3. The Respondent signed a Federal Drug Testing Custody and Control Form.

C. Factual Allegations Not Admitted by the Respondent in the Answer

4. The urine specimen was collected and analyzed by Clinical Reference Laboratory, 8433 Quivira, Lenexa, Kansas 66315 using procedures approved by the Department of Transportation.
5. That specimen subsequently tested positive for Marijuana Metabolite. The Answer stated that "Respondent lacks sufficient knowledge or information to admit or deny the allegations contained in paragraphs 4 and 5."

D. Uncontested Facts

1. The conduct of the Collector and the procedures followed at Outer Cape Health Service were proper and in accord with the Department of Transportation regulations at 49 CRF 40. (Tr. 64-65).
2. The chain of custody of Mr. Bennett's sample was intact and no specimen contamination was involved. (No. 3, Respondent's Proposed Findings of Fact *supra* at 27). (Tr. 54-55, 62-65).
3. The identity and integrity of the specimen were verified on a Federal Drug Testing Custody and Control Form (DTCCF) in accordance with the procedures in 49 C.F.R. Part 40. This form assigned the specimen identification number of [REDACTED] to Respondent's urine sample. Respondent did not challenge the identity integrity of the specimen. (Exhibit 2).
4. Respondent's urine sample was sent to Clinical Reference Laboratory in Lenexa, Kansas and was tested on August 22, 2001 in accordance with the procedures enumerated in 49 C.F.R. Part 40. (No. 5, Respondent's Proposed Findings of Fact, *supra* at 28).
5. The test results were positive for marijuana metabolite on both the initial screening (immunoassay) and the gas chromatograph/mass spectrometer tests. (Exhibit 2).

E. Other Facts

1. The concentration of THC in the Respondent's urine found on the confirmatory test at Clinical Reference Laboratory was 54 ng/ml. The Federal cut off level on that test is 15 ng/ml. (Exhibit 2).
2. These results were sent to the Medical Review Officer, Dr. Susan Green, who reviewed the test and interviewed the Respondent on August 28, 2001. Dr. Green concluded that there was no medical explanation for the positive test for marijuana. She signed the DTCCF verifying that determination on August 28, 2001. (Exhibit 3).

3. At the request of counsel, the Court ordered a second test of Mr. William Bennett's sample. A split urine specimen was set to Quest Diagnostics on March 22, 2002. That test was conducted in accord with the Department of Transportation regulations and showed the concentration of THC in the Respondent's urine to be 61.54 ng/ml. (Exhibit 8).

IV.

RULINGS ON PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

These rulings and the proposals are set out in Appendix C.

V.

OPINION

A. General.

1. The Coast Guard has jurisdiction over Respondent and this matter pursuant to 46 U.S.C. 7704, which states that "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." Although Respondent's license has expired in the interim, I ruled that "... the respondent was operating under the authority of his document at the time that this drug test was rendered." (Tr. 10). The Coast Guard has the burden of proving the allegations of the complaint by a preponderance of the evidence. 33 C.F.R. § 20.701. See also Appeal Decision No. 2603 (HACKSTAFF) (1998); Dept. of Labor v. Greenwich Collieries, 512 U.S. 267 (1994); Steadman v. SEC, 450 U.S. 91, 100-103 (1981). It is now well established that the Investigating Officer must prove three elements to meet this burden in a case involving the use of a dangerous drug where a chemical drug test is conducted. As set out in Appeal Decision 2583 (WRIGHT) (p. 4) (1997) they are:

To meet this burden, as applied to the specification at hand, the Investigating Officer must prove three elements: 1) that the respondent was the individual that was tested for dangerous drugs; 2) that the respondent failed the test; and 3) that the test was conducted in accordance with 46 C.F.R Part 16. Appeal Decisions 2379 (DRUM), 2279 (LEWIS).

See also Appeal Decision Nos. 2584 (SHAKESPEARE) (1997); 2632 (WHITE) (2002).

Moreover, this proceeding is conducted under the Rules of Practice codified at 33 C.F.R. Part 20.

B. Use of or Addiction to the Use of Dangerous Drugs

1. The first witness scheduled to be called was Marie Weber, the specimen Collector at Outer Cape Health Services who would have testified as to the specific collection procedures followed on August 21, 2001 during Williams Bennett's urine collection. However, Respondent's counsel urged that he filed a stipulation acknowledging that the collection was done in accordance with DOT regulations. That stipulation (Exhibit A) states in pertinent part:

Now comes the Respondent, William Bennett, and stipulates that Marie Weber is professionally qualified as a collector of urine samples pursuant to 49 CFR Part 40 and that she followed the required procedures during the collection of Mr. Bennett's urine, the chain of custody was proper during her control of it, and Mr. Bennett's urine was not contaminated during the period beginning at the time it was collected by Marie Weber through the time she shipped the sample to Clinical Reference Laboratories.

Thus, there is no question on this record that the Respondent was the individual who provided the urine sample involved here, that it was properly collected in accord with the applicable regulations, and it was shipped intact to the testing laboratory.

2. Dr. Stanley Kammerer, Vice President and Director of Toxicology at Clinical Reference Laboratory described the "litigation package" offered, the laboratory's drug testing

procedures, and the lab's conclusion that a positive drug test for marijuana metabolite was involved. He testified that the sample was received in a sealed plastic bag and the seals on the sample bottle were examined for evidence of tampering. (Tr. 79-80). Next, the identification number on the seals (No. [REDACTED]) was compared with the number on the accompanying copies of the drug testing forms to assure a match. (Tr. 80). Also, an internal accession number was assigned to the sample (No. 41940147) by the laboratory. (Tr. 80).

Once the laboratory personnel were satisfied that the sample was acceptable for testing, a portion (aliquot) was poured into a test tube and inserted into the initial screening instrument. (Tr. 88). This test is performed to quickly separate the sample into preliminary positives and negatives. (Tr. 88). The cutoff level on this initial screening test was 50 ng/ml. (Tr. 89). The Respondent's sample tested at 90 ng/ml on this initial test and thus that result was positive. (Tr. 90). Next, another aliquot was poured from the original sample and a second test was conducted to confirm and qualify the drug in question. (Tr. 103).

This so-called GC/MS test identifies the components of various drugs by a separation technique and determines the amounts of those unique characteristics. (Tr. 100-04). The cut off level on this test was 15 ng/ml. (Tr. 110, 117-18, Exhibit 2). The Respondent's sample tested at 54 ng/ml. (Tr. 106, 117, Exhibit 2). This result too was positive for marijuana metabolite. (Tr. 117). That determination was verified by the Certifying Scientist (Allision) on the DTCCF on August 24, 2001. (Tr. 85, Exhibit 2).

Dr. Kammerer's testimony is supported by the laboratory's litigation package which includes the documentation associated with the testing of Mr. Bennett's urine sample. He was a very credible witness. No cross examination was conducted by Respondent's counsel.

Accordingly, I have concluded that the testing of Mr. Bennett's urine sample here by Clinical Reference Laboratory was proper and in accord with the DOT regulations.

3. The laboratory sent Mr. Bennett's testing results to the Medical Review Officer, Dr. Susan Green. At the hearing Respondent's counsel objected to this witness as follows:

I've already agreed to stipulate that this witness performed all of her duties in connection with 49-40 as an MRO with respect to the respondent, it was all done properly, that the forms are proper, she signed them properly. We have no problem with any of the forms or documents that this witness dealt with in connection with her performance of her duties as the MRO in this particular case and accordingly, I object to spending the time to introduce off of these documents.

(Tr. 127-28).

The objection was overruled. Dr. Green testified that the laboratory results were "faxed" to her office directly from the laboratory. (Tr. 129). Although the laboratory does maintain a website and the laboratory results can be obtained from that source, she testified that the procedure was difficult to access and that most of the lab results were forwarded by facsimile. (Tr. 133, 143-44). There was only a remote chance that the results here were obtained via secure encryption from the website. (Tr. 133, 143-44).

The Doctor interviewed Mr. William Bennett by telephone and, among other things, inquired whether he was taking any drug which could have caused the positive test result. (Tr. 134-38). She concluded that he did not have a valid medical reason for the presence of marijuana metabolite in his system and concluded that the test result was positive. (Tr. 137-38). Dr. Green advised the Respondent of her determination and conveyed that result by letter to his employer, Cape Code Whale Watch, on August 28, 2001. (Exhibit 6).

The evidence here is convincing that the Medical Review Officer properly performed her duties and accurately concluded that Mr. Bennett's test results were positive for marijuana metabolite.

4. Later, at the pre-hearing conference in this case on March 20, 2002 Respondent's counsel requested that another laboratory perform a second confirmatory test on the Respondent's sample. I granted that motion even though the DOT rules require the employee to request a second test from the Medical Review Officer on the split sample within 72 hours of notification of a positive result. See 49 C.F.R. 40.171. No such request of the MRO had been made here. I ordered Clinical Reference Laboratory to send a portion of Respondent's sample to Quest Diagnostics, another drug testing laboratory certified by the federal government to engage in urine chemical testing. Counsel and the Coast Guard agreed to that selection. Importantly, the regulations provide that the second laboratory conduct the test "without regard to the cutoff concentration of 40.87." (49 C.F.R. 40.177(b)). Thus, the second laboratory is required to simply reconfirm the presence of the illicit drug metabolite in the split sample.
5. Dr. Louis Jambor, the Director of the laboratory at Quest, testified that the results of this GC/MS test revealed the presence of marijuana metabolite in the Respondent's system at a concentration of 61 ng/ml. When asked to explain the difference between the result of 54 ng/ml on the Clinical Reference Laboratory test and the 61 NG/ml at his laboratory, the Doctor stated ". . . that difference of seven nanograms is an extremely small difference. To me, they are essentially the same numbers." (TR 208). If the sample is not mixed properly, there can be ". . . a slight difference in the concentration at the top of the sample as to the bottom of the sample. . . ." (Tr. 208-09). Dr. Jambor also testified that the chain of custody

was well-maintained and the testing instrument was properly tuned. (Tr. 198-200). Dr. Jambor's testimony is supported by the detailed litigation package which he sponsored and which was admitted as Exhibit 8.

Reviewing the results of chemical tests at both laboratories, there is no doubt on this record that Mr. William Bennett had a prohibited concentration of marijuana metabolite in his system on the day (August 21, 2001) his urine was collected at Outer Cape Health Service. Accordingly at the hearing on April 25, 2002 it was announced that the Coast Guard had successfully raised the presumption of drug usage against the Respondent in accord with the regulation.² (Tr. 236-38).

VI.

OTHER ISSUES RAISED AT THE HEARING

1. Respondent asserts that the DOT rules codified at 49 C.F.R. Part 40 and the Coast Guard regulations at 46 C.F.R. Part 16 conflict in regard to the roles of the Substance Abuse Professional (SAP) and the Medical Review Officer (MRO). Specifically, Mr. Bennett asserts that the DOT rules allow an SAP to make a "fitness for duty" determination and allow the mariner to return to work. 49 C.F.R. 40.307. The Coast Guard regulations require that determination to be made by a Medical Review Officer only.

It is relevant to note here however that the DOT drug testing regulations specifically refer to the function of the MRO along with the SAP in the return to duty process. 49 C.F.R. 40.305(c) as follows:

² The reference on page 236 of the transcript to 46 C.F.R. part 5 should have been 46 C.F.R. 16.201.

40.305 How does the return-to-duty process conclude

x x x

- (c) As a SAP or MRO, you must not make a “fitness for duty” determination as part of this re-evaluation unless required to do so under an applicable DOT agency regulation. It is the employer, rather than you, who must decide whether to put the employee back to work in a safety-sensitive position.

Also, under 49 C.F.R. 307(c) the DOT regulations recognize that the Substance Abuse Professional is the sole determiner of the number and frequency of follow up drug tests for a mariner who has failed an initial test “. . . unless otherwise directed by the appropriate DOT agency regulation.”³ The Coast Guard has decided that the MRO is the professional responsible for making the determination that the mariner is a low risk to return to drug use and is fit to return to work. The MRO too is the one responsible for the follow up requirements.

Moreover, the recent amendment to the Coast Guard rules require the MRO to be qualified under the DOT rules as Substance Abuse Professionals. The DOT rules define a SAP as follows (49 C.F.R. 40.3):

Substance Abuse Professional (SAP). A person who evaluates employees who have violated a DOT drug and alcohol regulation and makes recommendations concerning education, treatment, follow-up testing, and aftercare.

Where the MRO is performing SAP functions, as in the return to duty area, the Coast Guard regulations require the MRO to meet the SAP training requirements. See 49 C.F.R. 40.203.

³ As pointed out by the Investigating Officer, other provisions of the DOT regulations refer to DOT agency regulations beyond those specifically set out in these rules. See 49 C.F.R. 40.285(a) and 49 C.F.R. 40.307(c).

Nothing in the DOT regulations prohibits a DOT agency like the Coast Guard from supplementing the requirements of the drug and alcohol testing programs with rules designed to meet specific needs in the industry it regulates. When these new changes were proposed, the Coast Guard announced that it was “. . . not proposing to change the current dual role of the MRO in the return-to-duty decision process.” 66 Fed. Reg. at 21503 (April 30, 2001).

Moreover, the Secretary of Transportation has delegated to the Commandant of the Coast Guard the authority to:

(uu) Carry out the functions and exercise the authorities vested in the Secretary by subtitle II of Title 46, United States Code, "Vessels and Seaman" as amended through Public Law 105-394, 112 Stat. 3627, . . .

(49 C.F.R. 1.46 uu).

That authority specifically includes “Part 7101 to end, without exception.” 46 U.S.C. 7101(i), and requires the testing of individuals for use of dangerous drugs who apply for or hold a license.

In sum, the use of MRO’s to perform SAP return to duty functions is a legitimate exercise of the Coast Guard’s regulatory authority. It does not conflict with the DOT rules at 49 C.F.R. 40.

2. The next issue raised at the hearing is whether the Vice Commandant’s Decision on Appeal No. 2535 (SWEENEY) (1992) which sets out the so called “cure” requirements for a mariner who has failed a chemical test for dangerous drugs conflicts with the amended DOT regulations assigning that determination to the Substance Abuse Professional under 49 C.F.R. 40.291-313. The dual role of the MRO as both MRO and SAP under the Coast Guard regulations is discussed above and will not be repeated here. The Congressional mandate

governing mariners who have failed a chemical test for dangerous drugs is set out at 46 U.S.C. § 7704(c). That provision reads as follows:

§ 7704. Dangerous drugs as grounds for revocation

(c) 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.

The statute does not define cure and the Commandant in the exercise of his delegated authority from the Secretary of the Department of Transportation under 49 C.F.R. 1.45⁴ and 1.46 has interpreted that term as it applies to license and merchant mariner document holders. In SWEENEY the Commandant announced (pp. 7-8):

x x x

A sound, reasonable basis upon which to craft a viable definition of cure exists in 46 CFR §5.901(d). Using that regulation as a foundation, I consider the following factors to satisfy the definition of cure where drug use is an issue:

1. The Respondent must have successfully completed a bonafide drug abuse rehabilitation program designed to eliminate physical and psychological dependence. This is interpreted to mean a program certified by a governmental agency, such as a state drug/alcohol abuse administration, or in the alternative, certified by an accepted independent professional association...

2. The Respondent must have successfully demonstrated a complete non-association with drugs for a minimum period of one year following successful completion of the rehabilitation program. This includes participation in an active drug abuse monitoring program which incorporates random, unannounced testing during that year.

Appeal Decision No. 2535 (SWEENEY).

⁴ The term "Administrator" used in 49 C.F.R. 1.45 includes the Commandant of the Coast Guard. See 49 C.F.R. 1.2.

That decision set the standard which has been followed in later decisions and affirmed by the National Transportation Safety Board. See NTSB Order EM-186 (WRIGHT) (1999). See also Appeal Decision No. 2626 (DRESSER) (2001); Appeal Decision No. 2632 (WHITE) (2002).

That is the standard which is applicable to this case and it has not been altered or superceded by the recently amended DOT drug testing regulations.

3. Another issue raised at the hearing involves the question of whether the judge can order a sanction of less than revocation when the Respondent has been charged with use of a dangerous drug. The governing statute 46 U.S.C. § 7704(c) mandates that if a mariner has been shown to be the user of a dangerous drug, the license or document must be revoked unless the holder is cured. As pointed out by the Investigating Officer (Closing Brief, p 10-11) this issue has been raised in a number of cases. See NTSB Order No. EM-186 (WRIGHT); Appeal Decision Nos. 2632 (WHITE); 2626 (DRESSER); 2555 (LAVALLAIS); 2529 (WILLIAMS); 2527 (GEORGE); 2526 (WILCOX); 2476 (BLAKE).

Recently in Appeal Decision 2626 (DRESSER) (2001) the Vice Commandant held:

The Appellant produced no evidence that he was *cured*. The only sanction authorized by Congress is revocation of Appellant's license and document. 46 U.S.C. § 7704(c). The sanction is remedial in nature and reasonably related to the purpose of maintaining standards for competence and conduct essential to the promotion of safety as sea. 46 C.F.R. § 5.5.

(Appeal Decision 2626 (DRESSER) at p. 19).

The Complaint here was brought under 46 U.S.C. § 7704(c) and involves "Use or Addiction to the Use of Dangerous Drugs." The DRESSER decision and the cases cited above are the controlling precedents. Accordingly, unless the Respondent has shown that he is cured of his use of marijuana, his license must be revoked.

The evidence submitted by the Respondent on this issue includes the affidavit of John E. Bennett, Respondent's Attorney, asserting that William Bennett successfully completed a program of rehabilitation and has been certified by his SAP as ". . . ready for drug re-testing to return to safety-sensitive duties." (Exhibits B and E). Also, a letter dated February 5, 2002 from Dennis Asselin, Outpatient Clinician, and Leslie J. Linder, Outpatient Director, ADCARE Outpatient Services, to Attorney Bennett notifying him that the Respondent began substance abuse treatment at ADCARE on January 28, 2002, was submitted. (Exhibit C). The letter indicates that the program consists of six weekly group meetings and at least three individual sessions. Two "urine tox screens" were to be administered. (Exhibit C). Another letter from the same individuals, dated April 11, 2002, stated that William Bennett completed treatment at ADCARE and that "[i]t is likely at this time that he will be able to remain drug free." (Exhibit D). Finally, in a letter dated April 17, 2002 to LT Kallen, Jason Nirenberg, LICSW, SAP at Substance Abuse Assessment Services, New Bedford, MA, stated that William Bennett:

. . . has completed a certified treatment program for substance abuse. Please note that Mr. William Bennett will be required to have a follow-up testing program. He has met the SAP requirement and is ready for drug retesting to return to safety sensitive duties.

(Exhibit E).

A Substance Abuse Assessment Report is attached to the letter indicating that Mr. Bennett is fit to return to duty with the following comment:

Mr. Bennett has completed a certified treatment program for substance abuse. He will be required to have 6 follow-up tests over the next 12 months. These follow-up tests will be independent of any random testing program.

Turning now to the SWEENEY requirements for cure, it is clear that Mr. Bennett has not met those standards. First, he has not been certified by the Medical Review Officer (Dr. Green) as drug free and that his risk of subsequent use is sufficiently low to justify his return to work. No such determination has been made by Dr. Green. Second, even if the Respondent completed a bonafide drug rehabilitation program by a qualified agency, he has not “demonstrated a complete non-association with drugs for a minimum period of one year following successful completion of the rehabilitation program.” (SWEENEY). The ADCARE program was completed on April 11, 2002. The hearing in this case was conducted two weeks later on April 25, 2002. It could not have been shown that Mr. Bennett has been drug-free for one year following completion of the ADCARE program. There is no evidence of an active drug abuse monitoring program which incorporates random, unannounced tests over the one year period. Accordingly, he cannot be considered “cured” within the meaning of 46 U.S.C. § 7704(c) and (SWEENEY) *infra*. His license and merchant mariner’s document must be revoked.

VII.

ORDER

For all of the foregoing reasons, **IT IS ORDERED THAT** license number 788197 and merchant mariner’s document number [REDACTED] are hereby **REVOKED**.

PETER A. FITZPATRICK
Administrative Law Judge
United States Coast Guard

Done and Dated on August 22, 2002 at
Norfolk, Virginia

APPENDIX A

Exhibits

Investigating Officers' Exhibits

1. Deposit Agreement
2. Litigation Package from Clinical Reference Laboratory
3. Federal Drug Testing Custody and Control Form, MRO's Copy
4. Federal Drug Testing Custody and Control Form, Laboratory Copy
5. Clinical Reference Laboratory test results
6. Notification Letter from Newport Alliance to Cape Code Whale Watch, dated August 28, 2001
7. Letter from Newport Alliance to Coast Guard
8. Split Sample Litigation Package from Quest Diagnostics, Inc.

Respondent's Exhibits

- A. Stipulation
- B. Affidavit of Respondent's Counsel, John Bennett, Esq.
- C. ADCARE letter dated February 5, 2002
- D. ADCARE letter dated April 11, 2002
- E. Jason Nirenberg letter to LT Kallen dated April 17, 2002
- F. LTJG Pennington letter to John Bennett dated April 15, 2002
- G. ALCOAST 020/99 message – NOT ADMITTED
- H. ALCOAST 026/99 message – NOT ADMITTED
- I. Summary of DOT Website

APPENDIX B

Witnesses

Investigating Officers' Witnesses

1. Stanley C. Kammerer, M.D., Vice President and Director of Toxicology, Clinical Reference Laboratory
2. Susan Green, M.D., Medical Review Officer, Newport Alliance
3. Louis G. Jambor, Ph.D., Director, Forensic Testing Lab, Quest Diagnostics

Respondent's Witnesses

There were no witnesses for the Respondent, other than an affidavit from his attorney

APPENDIX C

RULINGS ON PROPOSED FACTS AND CONCLUSIONS OF LAW

A. COAST GUARD'S PROPOSED FINDINGS OF FACT

1. The Respondent, William Bennett, is the holder of a Coast Guard issued License No. 788197 and Merchant Mariner's Document No. [REDACTED]. (Transcript (Tr). 12, l. 11., Investigating Officer Exhibit (IO Ex.) 1).

ACCEPTED AND INCORPORATED.

2. Mariners who hold Coast Guard issued licenses are subject to Random Chemical Testing under 46 C.F.R. Part 16 conducted in accordance with 49 C.F.R. Part 40.

ACCEPTED AND INCORPORATED.

3. On August 21, 2001, Respondent was subject to random chemical testing for dangerous drugs pursuant to 46 C.F.R. §16.230. On that date, the Respondent was selected for random testing by the Newport Alliance, the testing consortium to which Respondent's employer, Cape Code Whale Watch belongs. For this test, Respondent provided a urine specimen in accordance with the collection procedures required in 49 C.F.R. §40.25. The collection procedures were properly followed with the chain-of-custody intact and no specimen contamination resulted therefrom. [By stipulation of Respondent, Exhibit A, Tr. 54-55, and 62-65.]

ACCEPTED AND INCORPORATED.

4. The identity and integrity of the specimen were verified on a federal drug testing custody and control form in accordance with the procedures in 49 C.F.R. Part 40. This form assigned the specimen identification number of [REDACTED] to Respondent's urine sample. The Respondent did not challenge the identity and integrity of the specimen. [IO Ex. 2].

ACCEPTED AND INCORPORATED.

5. Respondent's urine specimen was sent to Clinical Reference Laboratory in Lenexa, Kansas and was tested on August 22, 2001 in accordance with the procedures enumerated in 49 C.F.R. Part 40. That test resulted in a positive test for marijuana metabolites (cannabinoids (THC)) in both the initial (immunoassay) and confirmation (gas chromatograph/mass spectrometer ("GC/MS")) tests. See 49 C.F.R. §49.29 (e)-(f). Respondent's urine specimen had a THC concentration of 54 ng/ml in the confirmatory test. [IO Ex. 2, 5]

ACCEPTED AND INCORPORATED.

6. At Respondent's request and pursuant to this Court's order dated March 22, 2002, a split urine specimen was sent by Clinical Reference Laboratory to Quest Diagnostics Lab in Van Nuys, California for an independent test. The split sample was tested by Quest Diagnostics on in accordance with the procedures enumerated in 49 C.F.R. Part 40, on which also showed a positive result for marijuana metabolites based upon a gas chromatograph/mass spectrometer test. Respondent's urine specimen had a THC concentration of 61.54 ng/ml in the independent gc/ms test. [IO Ex. 8.]

ACCEPTED AND INCORPORATED.

7. The difference in the GC/MS test results between the initial (test 54 ng/ml) conducted by Clinical Reference Laboratory and the split specimen retest (61.54 ng/ml) conducted by Quest Diagnostics Inc. is consistent with aging of the specimen and acceptable variation of the testing equipment. [Testimony of Dr. Louis G. Jambour, Tr.208-09, 219]

ACCEPTED AND INCORPORATED.

8. In accordance with the procedures listed in 46 C.F.R. Part 16 and 49 C.F.R. Part 40, Respondent's positive test results were forwarded to the Newport Alliance for Medical Review Officer for review of the positive results. [IO Ex. 3.] After having reviewed the test results and having discussed the same with the Respondent on August 28, 2002, Dr. Susan Green, the Medical Review Officer ("MRO") found no medical explanation for the positive test for marijuana, or for evidence that the positive test could have resulted from a legally prescribed medication. [Testimony of Dr. Green, Tr. 137]

ACCEPTED AND INCORPORATED except that the date should be August 28, 2001.

9. That the Coast Guard presented a prima facie case of drug use by the Respondent.

ACCEPTED AND INCORPORATED.

10. That the Respondent failed to provide reliable evidence that called into question the Coast Guard's prima facie case of drug use.

ACCEPTED AND INCORPORATED.

B. COAST GUARD'S PROPOSED CONCLUSIONS OF LAW

1. That 46 United States Code (U.S.C.) §7701 provides for the conduct of Suspension and Revocation proceedings.

ACCEPTED AND INCORPORATED.

2. That 46 U.S.C. §7704 (c) provides that, "[I]f it has been 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.”

ACCEPTED AND INCORPORATED.

3. That the investigating officer has the burden of proof in Suspension and Revocation proceedings. 46 C.F.R. §5.539. That in order to establish a *prima facie* case of use of a dangerous drug, the Coast Guard must establish (1) that the respondent was the individual who was tested for dangerous drugs, (2) that the respondent failed the test, and (3) that the test was conducted in accordance with 46 C.F.R. Part 16. CDOA No. 2560 (CLIFTON).

ACCEPTED AND INCORPORATED.

4. That once the Coast Guard presents a *prima facie* case of use of a dangerous drug as grounds for revocation, the burden shifts to the Respondent to show that his positive test was not a result of his use of a Dangerous Drug. [CDOA 2567, Appeal Decision 2546 (SWEENEY), *aff'd* NTSB Order No. EM-176]. Respondent failed to rebut the presumption of use of a dangerous drug: Respondent failed to produce evidence, “(1) that calls into question any of the elements of the *prime facie* case, (2) that indicates an alternative medical explanation for the positive test result, or (3) that indicates the use was not wrongful or knowing.” CDOA No. 2560 (CLIFTON).

ACCEPTED AND INCORPORATED.

5. The Administrative Law Judge determines how much weight to assign particular evidence. Although strict adherence to the rules of evidence observed in courts is not required, the Federal Rules of Evidence provide guidance in determining what evidence is admissible and may be considered reliable and probative. CDOA Nos. 2382 (BRUCE), 2522 (JENKINS) and 2506 (SYVERSTEN).

ACCEPTED AND INCORPORATED.

6. That Respondent failed to present any evidence to demonstrate that his positive test was not a result of his use of a Dangerous Drug.

ACCEPTED AND INCORPORATED.

7. That the presumption of Use of a Dangerous Drug by the Respondent, established through the Coast Guard's presentation of a *prima facie* case of drug use has not been successfully rebutted. The Respondent's exhibits are unsubstantiated by testimony or other means of authentication, are unreliable, and should not be given weight in considering this matter.

ACCEPTED AND INCORPORATED.

8. That 49 CFR Part 40 imposes return to duty requirements for all individuals in safety sensitive positions to meet prior to returning to duty.

ACCEPTED AND INCORPORATED.

9. That the Coat Guard chemical testing regulations located in 46 CFR Part 16 are in compliance with and complimentary to the procedures for Department of Transportation workplace and alcohol testing programs set forth in 49 CFR Part 40.

ACCEPTED AND INCORPORATED.

10. That, after a mariner has been found to have violated a DOT drug and alcohol regulation, prior to returning to duty, the mariner must meet the return to duty provisions under both 49 CFR Part 40, and the requirements under 46 CFR Part 16. Therefore, in order for a mariner to return to duty, a Medical Review Officer must determine the mariner to be “drug free and the risk of subsequent use of a dangerous drugs by that person is sufficiently low to justify his or her return to work.” 46 CFR §16.201(e) and (f) (2001).

ACCEPTED AND INCORPORATED.

11. Commandant’s Decisions on Appeal are binding upon Administrative Law Judges in this forum, unless they are “modified or rejected by competent authority”. 46 CFR §5.65 (2001). To date, the requirements set forth in SWEENEY have been consistently upheld. NTSB Order EM-186 (WRIGHT); Appeal Decision No. 2546 (SWEENEY) aff’d sub nom. NTSB Order EM-176. SWEENEY is the appropriate method to interpret the requirements to prove “cure” as set forth in 46 U.S.C. §7704(c).

ACCEPTED AND INCORPORATED.

12. As set forth in the plain language of this statute, unless a mariner can make a sufficient showing of demonstrating cure, the only sanction that can be imposed for a violation of 46 U.S.C. §7704(c) is revocation

ACCEPTED AND INCORPORATED.

13. Upon finding the charge of violation of 46 U.S.C. §7704(c) proved, an Administrative Law Judge does not have the authority to impose any sanction less than outright revocation of a mariner’s documents and license, unless the Respondent can sufficiently demonstrate “cure” as defined by SWEENEY. The SWEENEY definition of “cure” requires 1.) sufficiently demonstrating the Respondent has successfully completed a bonafide drug abuse rehabilitation program, and 2.) the Respondent demonstrates a complete non-association with drugs for a minimum of one year following successful completion of the rehabilitation program, which includes participation in an active drug abuse monitoring program incorporating random, unannounced urine testing during that one year period.

ACCEPTED AND INCORPORATED.

14. That under Title 46 U.S.C. §7704(c), the Coast Guard has proved all elements of a *prima facie* case of use of a dangerous drug by a licensed mariner, to which the Respondent has offered no reliable evidence to rebut the presumption of use of a dangerous drug. The Coast Guard requests a Decision of “proved” in this matter and an Order for revocation of all credentials issued to Mr. Bennett as he has failed to prove “cure” as set forth under SWEENEY.

ACCEPTED AND INCORPORATED.

On August 2, 2002 the Respondent submitted Respondent’s Proposed Findings of Fact and Conclusions of Law. My rulings on those proposals are as follows:

C. RESPONDENT’S PROPOSED FINDINGS OF FACT⁵

1. The Respondent, William Bennett, is the holder of a Coast Guard license No. 788197 and Merchant Mariners Document No. [REDACTED]. (Transcript (Tr). 12, 1.11., Investigating Officer Exhibit (IO ex.) 1).

ACCEPTED AND INCORPORATED.

2. Mariners who hold Coast Guard issued licenses are subject to random chemical testing under 46 CFR Part 16 conducted in accordance with 49 C.F.R. Part 40.

ACCEPTED AND INCORPORATED.

3. On August 21, 1002 Respondent was subject to random chemical testing for dangerous drugs pursuant to 46 CFR § 16.230. On that date was selected for random testing by the Newport Alliance, the testing consortium to which Respondents employer, Cape Cod Whale Watch, belongs. For this test Respondent provided a urine specimen in accordance with the collection procedures required in 49 CFR §40.25. The collection procedures were properly followed with chain-of-custody intact and no specimen contamination resulted there from. [Bt stipulation of Respondent, Exhibit A, Tr. 54-55, and 62-65.]

ACCEPTED AND INCORPORATED except that the year should be 2001.

4. The identity and integrity of the specimen were verified on a federal drug testing custody and control form in accordance with the procedures in 49 C.F.R. Part 40. This form assigned the specimen identification number of [REDACTED] to Respondent’s urine

⁵ Respondent’s Proposed Findings of Fact and Conclusions of Law are reproduced verbatim as filed by the Respondent.

sample. Respondent did not challenge the identity integrity of the specimen. [IO Ex. 2.]

ACCEPTED AND INCORPORATED.

5. Respondents urine sample was sent to Clinical Reference Laboratory in Lenexa, Kansas and was tested on August 22, 2001 in accordance with the procedures enumerated in 49 CFR Part 40. That test resulted in a positive test for marijuana metabolites in the initial (immunoassay) 54 ng with a cutoff level of 50 ng.

ACCEPTED AND INCORPORATED except that the cutoff level on the confirmatory gas chromatograph/mass spectrometer (GC/MS) test was 15 ng/ml, not 50 ng/ml. The test results show that the concentration of marijuana metabolite in the Respondent's urine was 54 ng/ml.

6. The difference in the GC/MS 54 ng and 61.54 in confirmatory test is inconsistent with aging as a specimen cannot gain metabolites but should loose metabolites through retardation.

REJECTED. See Opinion.

7. In the testimony of Dr. Susan Green (M.R.O.) the witness testified that sending results of drug tests via The World Wide Web was "very safe". Dr. Green has no credentials in the field of computer operating systems, or computer security systems; and therefore, would not know if they were very safe, safe or unsafe.

REJECTED. Dr. Green testified that her office "almost always used faxes to receive the laboratory results and that was probably the case here." (Tr. 143-44, 151-53).

8. Attached to Respondent's motion to dismiss (Exhibit K) D.O.T. laboratory process states in part, the new rule also permits transmission of laboratory results to the M.R.O. electronically, eliminating the need for transmission of paper document for negative results. (D.O.T. website)

ACCEPTED AND INCORPORATED.

9. The testimony of Dr. Susan Green, M.R.O. included the statement that the positive test results from Clinical Reference Laboratory were received by either facsimile or over the World Wide Web. In either situation, the transmission must be considered to have been sent electronically and therefore in violation of the D.O.T. regulations and may be in violation of federal confidentiality rules (42 C.F.R. Part 2).

REJECTED.

10. The Coast Guard has only shown a positive test result which on it's own does not constitute use of a dangerous drug. The positive test result could have been the result of human error,

mechanical error, passive inhalation (second-hand smoke) or the respondents use of hemp oil seed, or any combination thereof. (Affidavit of William Bennett).

REJECTED.

11. The Coast Guard failed to notify Merchant Mariners (and commercial fisherman) that the use of hempseed oil could result in a positive drug screen or “false positive”.

REJECTED.

12. The Coast Guard did notify its own active duty personnel and reservists and ordered the use of hempseed oil prohibited. Alcoast (ban on hempseed oil products).

ACCEPTED AND INCORPORATED.

13. The Coast Guard has proved that a person could receive a positive drug test result without have ever taken a dangerous a drug. Alcoast ban on hempseed oil products

REJECTED. The Commandant of the Coast Guard has banned the ingestion of hemp seed oil or products made with hemp seed oil for uniformed members of the Coast Guard. The ban does not apply to the merchant marine. (Exhibit I)

14. The Coast Guard failed to provide proof of use of a dangerous drug and offered no evidence as to the time, place, or date such offense occurred, as required by 46 CFR 5.35.

REJECTED.

- 14a. Coast Guard bears burden of proof (33 C.F.R. 20.02).

ACCEPTED AND INCORPORATED.

15. The Coast Guard offered testimony that was scientific and technical from witnesses who are not experts. In order to accept such testimony from any person who is not an expert is unfair to respondent.

REJECTED. Dr. Kammerer, Dr. Green, and Dr. Jambor testified as fact witnesses, not expert witnesses.

16. The Coast Guard failed to present a *prima facie* case against Respondent because a positive drug test result is inadequate to establish drug use or presumption of use since there exists other valid reasons for a positive result other than drug use. Alcoast (ban of hempseed products).

REJECTED.

17. The Respondent used hempseed oil (affidavit of William Bennett) because he had ample reason to believe it was good for him. Alcoast (ban of hempseed oil products).

REJECTED. There is no evidence on the record in this case that the Respondent used hemp seed oil products. Mr. William Bennett, the Respondent, did not testify nor was any other evidence introduced into the record to show such usage.

18. The Respondent has suffered damages as a result of complaint. Loss of job, loss of reputation, loss of income.

REJECTED. There is no evidence on the record to substantiate this assertion.

19. The Coast Guard bears burden of proof 33 CFR 20.702.

ACCEPTED AND INCORPORATED.

20. The Coast Guard failed to produce evidence establishing the frequency of error and the margin of error in the testing process with respect to the novel scientific procedure U.S. vs. CAMPBELL 50 MJ154 (1999) supplemented on reconsideration MJ386 (2000) U.S. vs. HARPER 22 MJ157 (CMA 1986).

REJECTED.

21. Under our case law, where scientific evidence provides the sole basis to prove the wrongful use of a controlled substance, "Expert testimony interpreting the tests or some other lawful substitute in the record is required to provide a rational basis upon which the fact finder may draw an inference that (the controlled substance) was (wrongfully) used. U.S. vs. MURPHY 23 MJ310, 312 (CMA 1987). The Coast Guard failed to establish that the testing methodology is reliable in terms of detecting the presence and quantifying the concentrations of the drug or metabolite in the sample.

REJECTED. See Opinion.

22. In hearing a disciplinary proceeding where scientific evidence provides the sole basis to prove the wrongful use of a controlled substance an administrative law judge must appropriately balance disciplinary considerations with the rights of licensed mariners and evolving legal standards concerning admissibility of scientific evidence. In the instant case, a finding that the allegations are proved will have a devastating affect upon the Respondent, his wife, his children, and his reputation in the maritime community as well as his reputation in his residential community. Given the unique aspects of drug prosecution where the only evidence is a failed random drug test in Coast Guard disciplinary actions and the serious consequences of a positive urinalysis the Administrative Law Judge must ensure a careful and thorough Daubert-type analysis in such cases.

REJECTED. See Opinion.

23. The Coast Guard has rested its case based solely on scientific evidence, the Respondent timely objected to the admission of the test results and the admission of the testimony based upon insufficient foundation, and the Administrative Law Judge should disallow consideration of the test results and testimony and dismiss the case for lack of evidence and order the original licenses and document of the Respondent returned to him forthwith, as this is the most just, speedy, and economical outcome.

REJECTED.

24. That the testimony of Dr. Louis G. Jambour included statements that there was an acceptable variation of 20 percent +/- due to machine calibration for GC/MS and since no testing procedures are 100 percent accurate 100 percent of the time. Respondent avers that if the variation of initial immunoassay test were only ten percent +/-, Respondent could have had a result less than cutoff had the test been conducted on a different machine. (54 ng with cutoff of 50 ng) and no compliant could have been issued.)

REJECTED. The reading of 54 ng/ml reflects the concentration of marijuana metabolite on the confirmatory GC/MS test at Clinical Reference Laboratory. The cutoff level on the GC/MS test is 15 ng/ml. See Exhibit 4.

25. That the Coast Guard failed to provide a preponderance of evidence.

REJECTED.

D. RESPONDENT'S PROPOSED CONCLUSIONS OF LAW

- I. The Coast Guard alleged and purported rules conforming to 49 CFR 40 found at 46 CFR 16 and 46 CFR Part 5 in fact do not conform and are inconsistent with 49 CFR 40, 46 USC 7704© and are inconsistent within themselves as to revocation, return to duty, and SWEENY. Three Department of Transportation agencies (F.T.A., F.R.A., F.A.A.) have issued "conforming rules". These rules amend their drug and alcohol testing rules to make them consistent with the new part 40. For example, they delete reference to the return to duty process, which duplicate provision of the new part 40. The other D.O.T. agencies with drug and alcohol testing programs (Federal Motor Carrier Safety Administration Research and Special Programs Administration and Coast Guard) expect to issue conforming rules soon. Meanwhile, to the extent that there is inconsistency or overlap between the new part 40 and the existing rules of these agencies, The Department intends that part 40's provisions prevail. Conforming rules must be fully consistent with D.O.T. rules (from D.O.T. website).

REJECTED.

- II. The Respondent avers that by promulgating the final rule (49 CFR 40) the Secretary of Transportation took out of the hands of Administrative Law Judges the ability and responsibility of making determinations as to when and if, and on what terms, a "cure" has taken place, and delegated that determination to specialists trained in such matters,

specifically S.A.P.'s and M.R.O.'s and professionals conducting rehabilitation programs approved by the Department of Health and Human Services. The definition of "cure" as that term is used in 46 U.S.C. 7704(C) set forth in 1992 in U.S. vs. SWEENY No. 2535 was rendered obsolete and moot by the promulgation by the Secretary of Transportation in Final Rule 49 CFR part 40 and the return to duty provisions thereof, as of August 1, 2001.

REJECTED.

III. The Administrative Law Judge does have the authority to impose a sanction of less than revocation because Respondent has completed a rehabilitation in accordance with 49 CFR 40 successfully and is a qualified person with a disability and may not be discriminated against. The regulations contained in 49 CFR Part 5 discriminate against the Respondent in that they treat licensed mariners in safety sensitive positions more harshly than unlicensed mariners holding safety sensitive positions in the transportation industry. Such discrimination violates the Americans with Disabilities Act of 1990 (ADA) 42 Section 12101-12213 (West 1995) 42 USCA Section 12114 (West 1995). Imposing the regulations contained in 46 CFR Part 5 upon this Respondent violates the regulations promulgated by the Secretary of Transportation 49 CFR 40 return to duty provisions for which the Coast Guard was mandated to conform it's rules and prevail where in conflict with the agencies Rules B) violates the status of the U.S. ADA which prevail over any regulation C. Deny the Respondent the equal protection of the laws and due process of law guaranteed to the Respondent by the Amendments to the Constitution of the United States violates the intent of Congress where it enacted Public Law 46 USC 7704(C) and 49 CFR 40 which establishes the prevailing and controlling definition of "cure" as of August 1, 2001 (also see H.R. 8538 83rd Congress June 16, 1954). The Administrative Law Judge when the finding is proved may order admonition, suspension, with or without probation or revocation 64FR28053 Section 5.567. The return to duty provision must be adhered to (from D.O.T. website).

REJECTED.

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing DECISION AND ORDER upon the following parties to this proceeding at the address indicated by federal express:

LTJG Joshua Pennington
Marine Safety Office Providence
20 Risho Avenue
East Providence, RI 02914-1208
Telephone: 401-435-2399

William Bennett
[REDACTED]
East Sandwich, MA 02537-1315
Telephone: [REDACTED]

Lucinda H. Shinault, CLA
Legal Assistant to the Administrative Law Judge

Done and Dated on August , 2002 at
Norfolk, Virginia