UNITED STATES OF AMERICA
DEPARTMENT OF HOMELAND SECURITY
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	:	DECISION OF THE
	:	VICE COMMANDANT
vs.	:	
	:	ON APPEAL
MERCHANT MARINER LICENSE	:	
	:	NO. 2667
	:	
Issued to: AUBREY ADAM THOMPSON, JR.	:	

This appeal is taken in accordance with 46 USC § 7701 *et seq.*, 46 C.F.R. Part 5, and the procedures in 33 C.F.R. Part 20.

By a Decision and Order (hereinafter "D&O") dated October 13, 2004, an Administrative Law Judge (hereinafter "ALJ") of the United States Coast Guard at New Orleans, Louisiana, dismissed a Complaint brought by Coast Guard Marine Safety Office Morgan City, Louisiana (hereinafter "MSO Morgan City") against the merchant mariner license of Mr. Aubrey A. Thompson, Jr., (hereinafter "Respondent") after finding not proved two charges: 1) that Respondent was a user of or was addicted to the use of dangerous drugs and 2) that Respondent committed an act of misconduct.

PROCEDURAL HISTORY

On May 21, 2004, the Coast Guard filed a Complaint against Respondent's mariner credential alleging both use of, or addiction to the use of, dangerous drugs and misconduct. The Complaint was properly served on the Respondent on May 21, 2004, and was filed with the ALJ Docketing Center on June 16, 2004. Respondent filed his Answer to the Complaint on June 16, 2004, admitting all jurisdictional allegations and denying all factual allegations.

The hearing was held on August 17, 2004, at MSO Morgan City, Louisiana. [D&O at 2] Respondent appeared pro se. During the hearing, the Coast Guard introduced four exhibits into the record, but did not call any witnesses. Respondent introduced two exhibits into evidence and testified on his own behalf.

The ALJ issued the D&O, dismissing both charges in the Coast Guard's Complaint, on October 13, 2004. [D&O at 16] Thereafter, on October 25, 2004, the Coast Guard filed its notice of appeal in the matter. The Coast Guard perfected its appeal by filing its Appellate Brief on December 13, 2004. Therefore, this appeal is properly before me.

APPEARANCE: Respondent appeared *pro se*. The Coast Guard was represented by Lieutenant Commander Ron Patrick and Chief Warrant Officer Jason Boyer of MSO Morgan City, Louisiana.

FACTS

In February of 2000, Respondent was the holder of a Coast Guard issued merchant mariner license authorizing him to serve as master aboard steam or motor vessels of not more than 100 gross registered tons upon inland waters. [I.O. Exhibit 3] Respondent's license was issued on November 1, 1995, and was to expire on November 1, 2000. [Id.]

On February 22, 2000, Respondent submitted to a post-accident Department of Transportation drug test. [Transcript (hereinafter "Tr.") at 14; I.O. Exhibit 1] The test results were positive for marijuana. [Id.] Respondent's employer, Caillou Island Towing, then informed the Coast Guard of the positive drug test result. [Tr. at 14]

On April 2, 2001, Respondent submitted an application to renew his Merchant Mariner License to the Coast Guard Regional Exam Center (hereinafter "REC") in New Orleans,

Louisiana[1]. [Tr. at 15; I.O. Exhibit 3] On his license renewal application, Respondent indicated that he had never been convicted of violating a dangerous drug law of the United States, District of Columbia, or of any state or territory of the United States. [I.O. Exhibit 3] Respondent also indicated that he had never been a user of or addicted to a dangerous drug (including marijuana). [Id.] On April 5, 2001, the REC denied Respondent's application for a renewed license, citing Respondent's prior conviction for possession of marijuana in 1999. [I.O. Exhibit 4] Despite this written denial, Respondent was mistakenly issued a renewed license by REC New Orleans on May 1, 2001. [Tr. at 17-18, 23, 37, 49; I.O. Exhibit 2]

The Coast Guard then issued a Complaint to Respondent on May 21, 2004, alleging use of, or addiction to the use of, dangerous drugs based on the positive drug test result of February 22, 2000. [I.O. Exhibit 1] The Complaint also alleged misconduct based on Respondent's false statement that he had never been a user of, or addicted to, a dangerous drug on his application for renewal of his merchant mariner license. [Id.] The subsequent hearing and D&O dismissing both charges resulted in the Coast Guard's appeal which is now properly before me.

BASES OF APPEAL

The Coast Guard appeals the decisions of the ALJ dismissing the Coast Guard's administrative action against Respondent. Although the Coast Guard does not contest the ALJ's dismissal of its misconduct charge, it does appeal the ALJ's decision to dismiss the use of, or addiction to the use of, dangerous drugs charge. On appeal, the Coast Guard argues that the ALJ erred in holding that the record contained substantial evidence to support a conclusion that Respondent proved cure.

[1] Because 46 C.F.R. § 10.209(e) allows mariners to apply for renewal of their licenses up to 12 months after the credential expires, Respondent committed no error in applying for renewal of his mariner license (which was valid

OPINION

A mariner credential issued by the Coast Guard must be revoked if it is shown that the holder has been a user of dangerous drugs. 46 U.S.C. § 7704(c). Pursuant to Coast Guard regulation, if a mariner fails a drug test, he is presumed to be a user of dangerous drugs. 46 C.F.R. § 16.201(b); Appeal Decisions 2584 (SHAKESPEARE) and 2529 (WILLIAMS).

In this case, the record shows that Respondent admitted that he failed a post-accident drug test administered on February 22, 2000. [Tr. at 17-18] In so doing, Respondent did not argue that the test was either improperly conducted or analyzed. As such, the ALJ was correct to conclude that Respondent was a user of dangerous drugs. Accordingly, the ALJ properly turned her attention to the issue of cure.

In Coast Guard suspension and revocation proceedings, the burden of establishing "cure" is on the Respondent. *See* Appeal Decisions 2638 (PASQUARELLA) and 2526 (WILCOX). Prior Commandant Decisions on Appeal make clear that to establish cure under 46 U.S.C. § 7704(c), a mariner must: (1) successfully complete a bona fide drug abuse rehabilitation program, and (2) demonstrate a complete non-association with drugs for a minimum of one year following the successful completion of the drug abuse program. *See* Appeal Decisions 2638 (PASQUARELLA) and 2546 (SWEENEY). In addition, pursuant to 46 C.F.R. § 16.201(f), "[b]efore an individual who has failed a required chemical test…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." Finally, because a mariner is not authorized to sail under the authority of his or her credential until all of the requirements of cure are satisfied, the Coast Guard must retain a mariner's credential during

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for 5 years upon issuance) after the credential's expiration date.

the cure process. *See* Appeal Decisions 2638 (PASQUARELLA) and 2634 (BARETTA); Commandant Decision on Review #18 (CLAY).

The ALJ's D&O spends considerable time discussing the issue of cure. Therein, although the ALJ properly states the elements of cure delineated in *Sweeney*, she nonetheless concludes that the third element of cure established by Appeal Decision 2638 (PASQUARELLA)—requiring a mariner to obtain a "return to work" letter from an MRO as part of the cure process—was not required in this case because the record did not contain evidence to indicate either that the testing of Respondent was conducted in accordance with the requirements set forth at 46 C.F.R. Part 16, or that Respondent's urine sample was collected and analyzed in accordance with the procedures set forth in 49 C.F.R. Part 40. After a thorough review of the record, I believe that the ALJ erred in so concluding.

As is stated above, the Coast Guard charged Respondent with use of, or addiction to the use of, dangerous drugs based upon the fact that Respondent failed a post-accident drug test administered to him on February 22, 2000. The record shows, as I have already stated, that Respondent does not deny providing a urine sample on that date or that a sample was required due to an accident. [Tr. at 17-19] In addition, Respondent does not contend either that his urine sample was collected or analyzed improperly or that his sample was certified as positive in error. [*Id.*] In her D&O, the ALJ found, based on Respondent's admissions in this regard, that Respondent was a user of dangerous drugs. [*See* D&O at 9] As such, Respondent is "an individual who failed a required chemical test for dangerous drugs" and, pursuant to 46 C.F.R. § 16.201(f), is required to obtain a "return to work letter" from an MRO as part of the cure process. Accordingly, the ALJ's conclusion that the third element of cure set out in *Pasquarella*—requiring the mariner to obtain a "return to work" letter from a MRO as part of the

cure process—does not apply to this case is in error and, because Respondent did not provide such a letter, the ALJ's conclusion that Respondent demonstrated cure is in error.

That being said, even if the ALJ's conclusions with regard to the application of the *Pasquarella* case were correct, her ultimate findings with respect to cure would, nonetheless, also be in error. Addressing the *Sweeney* elements of cure, the ALJ stated as follows:

> ...Having concluded that the two-prong test of SWEENEY applies to this case, the evidence of record shows cure. As a result of his conviction, Respondent completed a drug rehabilitation program and was subject to drug testing for approximately two and a half years. Respondent was also subject to random drug tests between November 13, 2000 and November 13, 2001 from his marine employer, and Respondent did not refuse or fail any of those tests.

[D&O at 12-13]

Decision on Appeal 2535 (SWEENEY) expressly states that the first two elements of cure involve the following:

1. The respondent must have successfully completed a bona fide 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, such as the Joint Commission on Accreditation of Health Care Organizations (JCAHO).

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 the year.

The record shows, as the ALJ notes, that Respondent completed some type of drug rehabilitation program in February, 2001. [Respondent's Exhibit 1] The record is silent as to what, exactly, the rehabilitation program entailed and, moreover, shows that it was not undertaken in response to the drug charge at issue here. Even if the drug rehabilitation program were found to comply with the first element of *Sweeney*, Respondent did not submit any evidence to show that he had

successfully completed a one-year non-association with drugs *after* completion of the rehabilitation program. Therefore, Respondent has failed to satisfy the requirements for cure set forth in *Sweeney*.

CONCLUSION

Under 33 C.F.R. § 20.1004, I am authorized to affirm, modify, or reverse the decision of the ALJ or to remand the case for further proceedings. Given my conclusion that the ALJ erred in finding that Respondent demonstrated cure, the Coast Guard's appeal is granted.

ORDER

The order of the ALJ, dated October 13, 2004, at New Orleans, Louisiana, with respect to the drug use charge, is REVERSED and REMANDED for further proceedings consistent with this opinion. Respondent shall be directed to immediately deposit his merchant mariner license at Coast Guard Marine Safety Office Morgan City, Louisiana.

Signed at Washington, D.C. this 10th of August, 2007.

V. S. CREA
Vice Admiral, U.S. Coast Guard
Vice Commandant