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
	:	NO. 2669
MERCHANT MARINER LICENSE	:	
Issued to: HOWARD LYNCH, III	:	

This appeal is taken in accordance with 46 USC § 7701 *et seq.*, 46 CFR Part 5, and 33 CFR Part 20.

By a Decision and Order (hereinafter "D&O") dated February 16, 2005, an Administrative Law Judge (hereinafter "ALJ") of the United States Coast Guard at Norfolk, Virginia, revoked the merchant mariner license of Mr. Howard Lynch, III, (hereinafter "Respondent") upon finding proved a charge of use of, or addiction to the use of, dangerous drugs.

The specification found proved alleged that Respondent tested positive for marijuana metabolite as part of a random drug screening conducted on October 3, 2002.

PROCEDURAL HISTORY

On October 17, 2002, the Coast Guard issued a Complaint against Respondent alleging misconduct based upon Respondent's failure to pass a random drug test. On October 30, 2002, the Coast Guard and Respondent entered into a Settlement Agreement,

in accordance with 33 C.F.R § 20.502, which was ratified by a Consent Order signed by the ALJ on December 12, 2002.

Via the Settlement Agreement, Respondent admitted all jurisdictional and factual allegations contained within the Coast Guard's Complaint and agreed, among other things, to deposit his merchant mariner license with the Coast Guard, to participate in a random, unannounced drug testing program and to not perform any function requiring a Coast Guard issued mariner license. In addition, the terms of the Settlement Agreement made clear that Respondent's mariner license could automatically be revoked—for the original drug charge—if Respondent failed to comply with the terms of the Settlement Agreement and neglected to request a hearing before an ALJ within 10 days of receiving a Notification of Failure to Comply. On November 6, 2002, Respondent deposited his license, in good faith, with the Coast Guard in accordance with the terms of the Settlement Agreement.

On August 25, 2004, the Coast Guard filed a "Notice of Failure to Complete Settlement Agreement" with the Coast Guard ALJ Docketing Center, alleging that Respondent had, in violation of the agreement, operated a vessel in a manner that required a Coast Guard license and, prior to such vessel operation, had failed to comply with the Agreement's chemical testing requirements. Within the 10-day time period allowed by the Settlement Agreement, Respondent requested a hearing before an ALJ, contending that he had, in fact, fully complied with the terms of the Settlement Agreement. In so doing, Respondent prevented the automatic revocation of his mariner license as set out within the Settlement Agreement.

The hearing in this matter was convened in Baltimore, Maryland, on October 8, 2004. Respondent was represented by counsel. At the beginning of the hearing, the ALJ made clear that the sole issue to be litigated at the hearing was whether Respondent complied with the Settlement Agreement. [Transcript (hereinafter "Tr.") at 6] During the hearing, Respondent adamantly averred that he was in total compliance with the Settlement Agreement while the Coast Guard argued the contrary. On the issue of compliance with the Settlement Agreement, the Coast Guard Investigating Officers introduced into evidence the testimony of two witnesses and entered thirteen exhibits into the record. In addition to testifying on his own behalf, Respondent introduced into evidence the testimony of one witness and entered four exhibits into the record.

The ALJ issued the D&O, revoking Respondent's mariner license for his failure to comply with the terms of a Settlement Agreement, on February 16, 2005. Respondent filed his Notice of Appeal on February 10, 2005, and his Appellate Brief on March 10, 2005. Therefore, this appeal is properly before me.

APPEARANCE: Hollstein, Keating, Cattell, Johnson & Goldstein, P.C. (Lynne M. Parker, Esq.) for Respondent, 1201 North Orange Street, Suite 730, Wilmington, DE 19801. The Coast Guard was represented by LT Scott Baranowski and LTJG Trevor C. Cowan of U.S. Coast Guard Activities Baltimore, Baltimore, Maryland.

FACTS

At all times relevant herein, Respondent was the holder of a Coast Guard issued license authorizing him to serve as Master of Inland Steam or Motor Vessels of not more than 50 gross registered tons. [D&O at 3; Tr. at 9, 103]

On October 3, 2002, Respondent submitted to a random drug test that later revealed that Respondent had tested positive for marijuana metabolite. [D&O at 4; Tr. at 104] The Coast Guard issued a Complaint against Respondent's mariner license on October 17, 2002. [D&O at 4] The Coast Guard and Respondent entered into a Settlement Agreement which was ratified by a Consent Order issued on December 12, 2002. [D&O at 1] Relevant portions of the Settlement Agreement state that Respondent agrees to:

> 1(d). Participate in a random, unannounced drug-testing program for a minimum period of one-year following successful completion of the drug rehabilitation program. During the drug-testing program, the Respondent must take at least 6 random drug tests conducted in accordance with Department of Transportation procedures found in Title 49, Code of Federal Regulations (CFR), Part 40;
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> 1(i). Not perform any function that requires a Coast Guard issued credential.

[Investigating Officer (hereinafter "IO") Exhibit 7]

Respondent enrolled in a traditional outpatient drug rehabilitation program on July 22, 2003. [D&O at 4; Tr. at 88-91] Respondent also participated in an Alcoholics Anonymous program from July 2003 to July 2004. [*Id.*] During that 12 month period, Respondent was also enrolled in a random drug testing program administered by the National Safety Alliance (hereinafter "NSA"). [*Id.*] While enrolled in the NSA program, Respondent personally selected six dates on which to provide urine samples for drug testing; none of the dates were controlled or randomly selected by NSA or any other third party. [D&O at 4; Tr. at 91-92, 107-108] All of Respondent's urine samples, tested and

analyzed by Choice Point Medical Review Services, were found to be negative for the presence of dangerous drugs.[1] [D&O at 4]

Respondent was also the sole shareholder and owner of the M/V TUNA BITE and operated the vessel as a charter service under the authority of his Coast Guard license prior to October 30, 2002. [D&O at 5; Tr. at 91] After Respondent deposited his license with the Coast Guard on October 30, 2002, he continued to operate his charter service; however, he repeatedly employed a duly licensed captain (Mr. Donny Long) to serve as operator of the vessel on charter excursions. [D&O at 5; Tr. at 94-95] On August 20, 2004, because Respondent was unable to secure the services of Mr. Long, he, instead, hired Mr. Christopher Hornung to serve as operator of his vessel for that day's charter trips. [D&O at 5, Tr. at 77-78, 97-98] Although Mr. Hornung was a duly licensed captain, he failed to have his license available that day for presentation while operating the M/V TUNA BITE. [D&O at 6; Tr. at 80]

On August 20, 2004, Coast Guard officials at Coast Guard Station Indian River Inlet received information from Coast Guard Activities Baltimore that Respondent was improperly operating his vessel without a license. [D&O at 5; Tr. at 22-23; IO Exhibit 1] Indeed, Coast Guard officers observed Respondent operating the M/V TUNA BITE in the Indian River Inlet with five passengers aboard. [D&O at 9; Tr. at 45-46] A boarding team from Coast Guard Station Indian River Inlet was dispatched and met the M/V TUNA BITE as it was pulling into a dock. [D&O at 9] Petty Officer Abramoski, the Coast

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[1] The record also seems to indicate that Respondent initiated the random drug testing program while he was still involved in a rehabilitation program. Although this action may not have been consistent with the terms of the Settlement Agreement, which required that Respondent undergo random drug testing *after* completing a rehabilitation program, the completion date of Respondent's rehabilitation program was not specifically addressed in the record and the issue was not fully developed at the hearing and, as such, will not be further discussed herein.

Guard boarding officer, testified that he observed Respondent operating the vessel by mooring it to a pier and handling lines. [D&O at 9; Tr. at 26] At least two other Coast Guard officers saw Respondent operating the M/V TUNA BITE on that occasion and Respondent, himself, testified that he was operating the vessel in the inlet and while docking. [D&O at 10; Tr. at 98-99, 111]

The Coast Guard boarding officers, Mr. Hornung, and Respondent, all testified that Respondent identified himself as the "Captain" of the M/V TUNA BITE when greeting the boarding officers. [D&O at 10; Tr. at 28, 39, 46, 84, 111] Only after Respondent's passengers disembarked the M/V TUNA BITE and were on the pier, did Respondent admit to the boarding team that he was not the captain and that Mr. Hornung was serving as the licensed captain for the trip. [D&O at 11; Tr. at 111] Respondent apparently did this in order to hide the fact that his license was suspended from his passengers and, thus, to avoid any associated embarrassment. [*Id.*]

Based upon Respondent's violations of the Settlement Agreement and in accordance with the Agreement's terms, the Coast Guard sought revocation of Respondent's mariner license. Although the ALJ determined that Respondent complied with the drug testing portions of the Settlement Agreement, he, nonetheless, issued an Order revoking Respondent's mariner license for violating the portion of the Settlement Agreement that prohibited Respondent from operating a vessel in a manner that would require a Coast Guard license.

BASES OF APPEAL

This appeal has been taken from the order imposed by the ALJ finding proved the charge of use of, or addiction to the use of, dangerous drugs, and ordering the revocation of Respondent's merchant mariner license. In his brief, Respondent asserts the following bases of appeal:

I. *The ALJ erred in concluding that Respondent was acting as the operator of the fishing vessel on August 20, 2004.*

II. *Even if the ALJ's findings are upheld, the Order of Revocation should be vacated.*

III. *Under the circumstances of this case, the Commandant should exercise discretion and waive any waiting period for Mr. Lynch's application for a new license.*

OPINION

As a preliminary matter, I wish to comment on an important issue: whether the ALJ erred in holding that Respondent complied with the drug testing requirements of the applicable Settlement Agreement. The record shows that, in this case, the ALJ determined that Respondent complied with the drug testing terms of the Settlement Agreement. [D&O at 8] In making this determination, the ALJ concluded that Respondent's interpretation of section 1(d) of the Settlement Agreement was "not unreasonable." [D&O at 8]

Section 1(d) of the Settlement Agreement requires that Respondent "participate in a random, unannounced drug-testing program for a minimum period of one-year following successful completion of the drug rehabilitation program" and adds that "[d]uring the drug testing program, the Respondent must take at least 6 random drug tests." [I.O. Exhibit 7] The record shows that, to satisfy this requirement, Respondent

enrolled in an unannounced, random drug testing program administered by NSA. [D&O at 8] In reviewing the Settlement Agreement, the ALJ made a critical distinction between "unannounced random drug tests" and "random drug tests." [D&O at 8] Respondent, while enrolled in NSA's "unannounced" random drug testing program, went to the Cedar Tree Medical Center on six occasions to provide urine samples for drug testing. [D&O at 4; Tr. at 91-92] Respondent determined, each and every time, when he would get tested. [*Id.*] A review of the record shows that the ALJ found that Respondent's actions, to this end, satisfied the Settlement Agreement's requirement of "random drug testing." [D&O at 8] For the reasons discussed below, I do not agree.

First, section 1(d) of the Settlement Agreement should not be read in such a strained manner. It is clear from the Settlement Agreement that the Coast Guard is attempting to ensure that Respondent remains drug free during the one year period following successful completion of the initial drug rehabilitation program. *See* 46 U.S.C. § 7704. To achieve this result, Respondent agreed to be enrolled in an "unannounced, random drug testing program" and to take six random drug tests. [IO Exhibit 7] The term "random" does not, in this context, envision that the person to be drug tested be allowed to set the time and location for testing. Such action cannot be viewed as "random" drug testing. Several prior Commandant Decisions on Appeal show that the term "random" drug testing contemplates a situation when the mariner does not have any control over when and where drug testing is administered. *See, e.g.,* Appeal Decisions 2657 (BARNETT), 2652 (MOORE), 2647 (BROWN), 2645 (MIRGEAUX), 2641 (JONES), and 2637 (TURBEVILLE). The Settlement Agreement was entered into under the auspices of "cure" as allowed under 46 U.S.C. § 7704; 33 C.F.R. § 20.502;

46 C.F.R. § 5.901(d); Appeal Decision 2535 (SWEENEY). For its part, *Sweeney* made clear that "[t]he 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" and added that "[t]his includes participation in an active drug abuse monitoring program which incorporates random, unannounced testing during that year." As such, it is inconsistent with the applicable law and regulation to suggest that a Respondent can demonstrate a complete non-association with drugs when he is allowed to select the time and place of drug testing.

Finally, although Respondent contends that he chose the dates of the tests "at random," the record shows that he was free to either choose or not choose the dates for testing at his whim. [D&O at 8]. Respondent is not permitted, under the Settlement Agreement and within the requirements for "cure" set out in the *Sweeney* line of cases, to select the dates on which he will be drug tested in order to establish that he is drug free. That is because it is impossible for the Coast Guard to determine that the Respondent is drug free when, as the ALJ commented, Respondent could select the dates of the drug tests "to avoid [detection] of dangerous drugs in the mariner's system." [D&O at 8] The ALJ's determination that Respondent satisfied the drug testing requirements in the Settlement Agreement was, therefore, erroneous. However, this decision by the ALJ did not affect his subsequent decision to revoke Respondent's license based upon this operation of the M/V TUNA BITE without a Coast Guard license.

I.

The ALJ erred in concluding that Respondent was acting as the operator of the fishing vessel on August 20, 2004.

On appeal, Respondent contends that the ALJ's conclusion that he was the operator of the M/V TUNA BITE on August 20, 2004, is "under the totality of the circumstances…clearly erroneous, and an abuse of discretion." [Respondent's Appeal Brief at 10] After a thorough review of the record, I do not find Respondent's assertion in this regard to be persuasive.

In order to determine whether Respondent was "operating" the M/V TUNA BITE, it is important to understand what the term "operator" means in this context. A review of prior Commandant Decisions on Appeal is illustrative on this point.

In Appeal Decision 2505 (TAYLOR), the Respondent was charged with acting under the authority of his license while operating a passenger vessel without a certificate of inspection. In that case, the Respondent appealed the ALJ's determination that he was "operating" the vessel claiming that his father was actually in command of the vessel. [Id.] The ALJ's determination that Mr. Taylor was, in fact, the operator of the vessel, was upheld on appeal because the record contained evidence to show that the Respondent was referred to as "Captain" of the vessel and that he had piloted the vessel away from the dock by operating the throttle, wheel and controls. [Id.]

Similarly, in Appeal Decision 2524 (TAYLOR), the Respondent was charged with negligence while operating a vessel. Although the Respondent, in that case, insisted that at all times he was acting as a deckhand and only steered the vessel under the orders and controls of the "licensed captain," the ALJ's decision that the Respondent operated the vessel was upheld because the record contained evidence to show that the Respondent had lied to other crewmembers and indicated that his license was not suspended and that he was simply on probation and that Respondent "independently directed the navigational

control of the...[vessel]...and its tow at critical times and took no direction from the licensed crewman whom Appellant asserts was the operator." [*Id.*] Citing 46 C.F.R. § 5.57, Appeal Decision 2524 (TAYLOR) further found that because the Respondent ostensibly conducted himself as the operator of the vessel, even though his license was suspended, he could properly be found to be the operator of a vessel.

It is well-settled that I may only reverse the ALJ's decision if his findings are arbitrary, capricious, clearly erroneous, or based on inherently incredible evidence. *See, e.g.*, Appeal Decisions 2584 (SHAKESPEARE), 2570 (HARRIS), *aff'* NTSB Order No. EM-182 (1996), 2390 (PURSER), 2363 (MANN), 2344 (KOHAJDA), 2333 (AYALA), 2581 (DRIGGERS), and 2474 (CARMIENKE). In the instant case, the record shows that Respondent testified that he identified himself as the "Captain" to the boarding officers and did not recant his assertion until the passengers had disembarked the vessel. [D&O at 10-11] The record further showed that Respondent admitted that he navigated the M/V TUNA BITE into the inlet and operated the controls to moor up the vessel because Mr. Hornung was not familiar with the inlet and was not familiar with the controls of the vessel. [Tr. at 98] Because the record shows that Respondent was actually in control of the M/V TUNA BITE at critical times and announced himself as the "Captain," I do not find that the ALJ erred in finding that Respondent was the "operator" of the M/V TUNA BITE on August 20, 2004. [*See* D&O at 1, 10-11; Tr. at 98] The ALJ's determination in this regard is consistent with prior Commandant Decisions on appeal and will not be disturbed. *See* Appeal Decisions 2505 (TAYLOR) and 2524 (TAYLOR).

II.

Even if the ALJ's findings are upheld, the Order of Revocation should be vacated.

Respondent urges that the sanction of revocation is disproportionate to the offense committed in this case. [Respondent's Appellate Brief at 14] To that end, Respondent claims, citing 46 C.F.R. Table 5.569, that the suggested sanction for failing to comply with U.S. law or regulation is suspension, not revocation, and concludes that the ALJ erred in assessing a penalty that is more severe than that suggested by the applicable regulations. At the same time, Respondent also avers that because the offense of operating the M/V TUNA BITE on a suspended, or revoked license, is not drug related, a sanction of revocation is inappropriate. [*Id.*]

Because I have already stated that the ALJ erred in finding that Respondent complied with the drug testing requirements of the applicable Settlement Agreement, it is unnecessary for me to address Respondent's assertions regarding the severity of the sanction. That is because an Order of Revocation is appropriate when a suspension and revocation case is predicated upon a charge of use or addiction to the use of dangerous drugs. 46 U.S.C. § 7704(c). Therefore, further discussion of Respondent's second basis of appeal is unnecessary.

III.

Under the circumstances of this case, the Commandant should exercise discretion and waive any waiting period for Mr. Lynch's application for a new license.

Respondent's final argument is that he should be able to apply for a new license immediately since the ALJ ruled that he was in compliance with the drug testing aspects of the Settlement Agreement and has no record of any other offense relating to his license. [Respondent's Appellate Brief at 15] To support his assertion that the waiting

period may be waived by the Commandant, Respondent cites Appeal Decision 2303 (HODGEMAN).

Respondent's assertions of waiver and his reliance on Appeal Decision 2303 (HODGEMAN) are misplaced. Commandant Decisions on Appeal issued after the *Hodgeman* decision have expressly stated that the suspension and revocation appeal process is not an appropriate forum for granting or denying requests for waivers of waiting periods. *See* Appeal Decisions 2435 (BADER) and 2428 (NEAT). That process is best made via the Coast Guard Clemency Review Board, according to the provisions of 46 C.F.R. 5.905. [*Id.*] Accordingly, Respondent's final basis of appeal is not persuasive.

CONCLUSION

Although the ALJ's findings with regard to Respondent's compliance with the Settlement Agreement were erroneous, the ALJ was correct to conclude that Respondent violated the Settlement Agreement by operating the M/V TUNA BITE without proper Coast Guard credentials. Given Respondent's prior failure to comply with the drug testing requirements of the settlement agreement, the sanction of revocation was appropriately levied in this case.

ORDER

The order of the ALJ is modified consistent with this decision. Nevertheless, the sanction imposed by the ALJ is **AFFIRMED.**

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

Signed at Washington, D.C. this 30th of August, 2007.