UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

UNITED STATES COAST GUARD
Complainant

vs

THOMAS HASTINGS
Respondent

Docket Number CG S&R 01-0734
CG Case No. PA 01 002040

DECISION AND ORDER

Issued: June 12, 2002

Issued by: Edwin M. Bladen, Administrative Law Judge

Preliminary Statement

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

Respondent, Thomas Hastings in a two count complaint was charged by the Coast Guard, first with being a user of a dangerous drug having taken a pre-employment drug test in which the result was positive for cocaine, and second with misconduct because on October 9, 2001, he failed to join his vessel and report and perform his required duties aboard the CSX PACIFIC (D612085).

Respondent answered the complaint and admitted all jurisdictional and factual allegations respecting the two charged violations. He demanded a hearing characterizing his

request as one to determine the sanction to be imposed. Subsequently on February 11, 2002 in Honolulu, Hawaii a hearing was held as requested by Respondent.

Respondent appeared at the hearing *pro* se. The Coast Guard was represented by the Senior Investigating Officer and an Investigating Officer. No witnesses were presented at that time. As required by 33 CFR § 20.601(a)(2), and 33 CFR § 20.601(c)(2), the Coast Guard had previously filed the exhibits intended for the hearing on the merits of the complaint.

Based upon the Respondent's answer to the complaint [including the filed Coast Guard exhibits] in which he fully admitted all of the factual and jurisdictional allegations, this judge found that the Coast Guard met is initial burden of proof and determined, that a regulatory rebuttable presumption arose that Respondent was a user of dangerous drugs. See, 46 USC § 16.201(b); *Appeal Decisions* 2592 (*Mason;* 2584 (*Shakespeare*); 2560 (*Clifton*). [1]

Respondent, however, inconsistent with his written answer, strongly asserted he was not then, and has never been, a user of dangerous drugs. He says he admitted to the positive outcome of the drug test because he had in fact experimented with or taken, one time only, some cocaine given him by friends to alleviate his depression and pain as a result of very recent prostrate cancer surgery. He pointed out that drug test was taken

[1] The Coast Guard has brought these cases charging a mariner is a ***user*** of a dangerous drug under 46 USC § 7704 (c) based solely upon the results of single chemical test by urinalysis. Currently, 46 CFR § 16.201 (b) provides that one who fails a chemical test for drugs under that part will be ***presumed*** to be a user of dangerous drugs. In turn, 46 CFR § 16.105 defines ***fail a chemical test for dangerous drugs*** to mean that a Medical Review Officer (MRO) reports as ***positive*** the results of a chemical test conducted under 49 CFR § 40. In other words, 46 CFR Part 16 establishes a ***regulatory presumption*** on which the Coast Guard may rely, provided the Coast Guard can satisfactorily show that a 49 CFR § 40 chemical test of a merchant mariner's sample or specimen was reported positive by a MRO.

shortly after he had been discharged from the hospital. The Coast Guard IO has not disputed these facts.

Given the Respondent's inconsistent assertions, his insistence upon being heard on his claims, and because he has appeared *pro se*, due process considerations have dictated that Respondent be permitted to either rebut this regulatory presumption or in the alternative demonstrate cure as the governing statute provides.

In that respect, however, Respondent had not brought to the February 11, 2002 hearing either a witness, or other evidence which would have supported his claimed defenses. Recognizing this, the Coast Guard IO supported a continuance of the hearing so that Respondent could present his evidence in support of his claims.

This matter was then adjourned until April 1, 2002. Prior to convening on that date, we were informed by the IO that Respondent was still unable to secure a supporting witness since he had been under follow-up treatment for the prostrate surgery. Respondent had advised the Coast Guard IO he needed additional time. The Coast Guard then supported an additional 30-day adjournment[2] to allow Respondent to secure the needed evidence. The matter was again adjourned until May 6, 2002.

On May 6, 2002 the adjourned hearing was reconvened by telephone between the Coast Guard Marine Safety Office, 433 Ala Moana Blvd, Honolulu, Hawaii and the

[2] Respondent was served with the Order of Continuance by Certified Mail, Return Receipt in care of the Seafarer's Union, Honolulu, Hawaii. Respondent is a member of the union and had previously advised he communicates with the union on a regular basis. Otherwise, the record shows that Respondent claims to be homeless but also claims to communicate from time to time through email at Internet cafes. Attempts to provide copies of notices and orders by attachments to email messages have proved fruitless. Nevertheless, Respondent has consistently appeared at scheduled hearings, communicated and cooperated with the Honolulu Coast Guard Marine Safety Office and has been apprised of the various orders and notices in that manner as well.

chambers of this Judge in the Jackson Federal Building, Seattle, Washington. A court reporter was engaged to record the telephonic hearing.

Representing the Coast Guard was: LT William N. DeLuca, Investigating Officer.

Respondent Thomas Hastings appeared Pro Se.

Respondent presented the following exhibits:

RA -- Letter from John V. Mickey, M.D. Respondent's treating physician.

RB -- Results from certain private arranged drug tests

RC -- Respondents Medical file.

RD -- Federal Drug Testing Custody & Control Form and Results.

RE -- MRO Kusaka letter dated May 13, 2002

RF -- Respondent's medical file.[3]

The Coast Guard had previously filed and thus offered the following exhibits:

IO-A -- Coast Guard Merchant Mariners Document for Thomas Hastings.

IO-B-- Letter and Log from CSX Lines Notification of Misconduct.

IO-C -- MRO letter for positive drug test.

IO-D -- Interview notes of Respondent Hastings by IO.

The IO only had a brief opportunity to examine Respondent's three exhibits prior to their offer that day. The Coast Guard IO requested additional time to review the material and speak to Dr. Mickey regarding his opinion and credentials as a Medical Review Officer.

Consequently, the hearing was again adjourned until Tuesday, May 14, 2002 at 11:00 PST for the purposes of receiving any further information or evidence from the IO, a Medical Review Officer and Respondent.

Subsequently, on May 14, 2002 the hearing was again reconvened. Respondent appeared *pro* se and brought with him a letter from a Medical Review Officer based at the Straub Clinic. The letter was marked as Exhibit RE. The Coast Guard agreed with its admission as evidence.

From the totality of the record evidence the following facts are shown.

Finding of Fact

1. Respondent Thomas Hastings holds a Merchant Mariners Document issued by the Coast Guard which authorizes him to serve as a Junior Engineer, Machinist, Fireman-Water tender, Oiler, Pump man, Lifeboatman, Ordinary Seaman and in the Steward's Department. [Exhibit IO-A; Complaint & Answer ¶ 2][4]
2. Respondent was diagnosed in July, 1999 with Prostrate cancer and was admitted to Straub Clinic and Hospital on July 23, 1999 for surgery to alleviate that condition. [Exhibit R-C]
3. Respondent was discharged from the Straub Clinic and Hospital on July 27, 1999 with Foley catheter intact along with a small supply of Vicodin and Peri-Colace. [Exhibit R-C (Discharge Summary)]
4. Respondent experienced pain and mild depression as a result of the surgery. [Transcript 2/11/02 pp. 20 ff].

[3] The file is noted as confidential medical information and not subject to disclosure.
[4] The citation to Complaint & Answer ¶ will be hereafter noted as C & A ¶.

5. On Wednesday, August 4, 1999, Respondent was offered and he inhaled some cocaine in an effort to relieve his pain and depression he was experiencing from the surgery. [Transcript 2/11/02 pp. 21 ff; Exhibit IO-D].
6. On Friday, August 6, 1999, the Respondent took a pre-employment physical, which included a Department of Transportation sanctioned drug test to detect use of certain specified dangerous drugs. [C & A ¶ 1].
7. At the time of the drug test Respondent was still in post-operative care by his physician, Stephen Chinn, MD (urologist) with Foley Catheter still intact. He was seen by this physician on 8/9/99 for removal of the catheter and the status in follow-up showed post radical retropubic prostatectomy with removal of lymph nodes vesicles and margins. [Exhibit R-C; Report 8/9/99].
8. The urine specimen provided by Respondent on August 6, 1999 was collected by Kathleen N. Awayu of Straub Occupational Health Services in Honolulu, Hawaii [C & A ¶ 2]
9. The Respondent signed a Federal Drug Testing Custody and Control Form at the time he provided his urine specimen [C & A ¶ 3]
10. The Respondent's specimen was transmitted to and analyzed by Quest Diagnostics using Enzyme Immunoassay and Gas Chromatography/Mass Spectrometry procedures approved by the Department of Transportation [C & A ¶ 4].
11. The specimen was determined to be positive for Cocaine [Exhibit IO-C; C & A ¶ 5].

12. A medical Review officer, J. T. Plander M.D. of Greystone Health Sciences Corporation interviewed Respondent on August 16, 1999 and determined as a result that the test was a valid test and confirmed the positive result [Exhibit IO-C; C & A ¶ 6].
13. Respondent informed Dr. Plander of his prostrate cancer surgery about 10 days prior to providing his urine specimen. Dr. Plander made no further inquiry regarding any cocaine containing drugs which may have been used in connection with the surgery. [Transcript May 14, 2002 pp. 15-16]
14. Respondent was due to join the vessel CSX PACIFIC (D612085) on October 9, 2001 but failed to do so report and perform his required duties as specified in his MMD [Exhibit IO-B, Exhibit IO-D; C & A ¶ *Misconduct*].
15. Respondent deposited his Merchant Mariner's Document with the Coast Guard on November 28, 2001.
16. Respondent has had drug tests in July, 2001, April, 2002, and May, 2002 each using Enzyme Immunoassay methodology all of which have been negative for any illegal or dangerous drug. [Exhibit RD pp 1-3].
17. A Medical Review Officer, Michael N. Kusaka, MD has reviewed the drug tests and has determined that Respondent is drug free, there is no evidence Respondent is a user of illegal drugs, and has opined Respondent can work in the maritime trades. [Exhibit RE]
18. Respondent is under continuing medical observation and treatment for any lingering or reoccurring evidence of his prostrate cancer. [Exhibit RF]

DISCUSSION

This matter presents two questions. Can Respondent rebut the regulatory presumption arising from the single positive drug test with an opinion supplied by a Medical Review Officer that he is not a user of illegal or dangerous drugs such as cocaine.

The second is whether the opinion of the Medical Review Officer together with the results of drug tests over a two year period, and Respondent's deposit of his credentials since November 28, 2001 and his continuing medical treatment are sufficient evidence of *cure* which can be used in mitigation to support the issuance of an order less than revocation.

Turning to the first issue, I said in my earlier Interim Order, there were four methods of rebuttal of the regulatory presumption. The fourth said a respondent may choose to present evidence the respondent was not a user of dangerous drugs. I suggested that such evidence could come from a Medical Review Officer coupled with the successful completion of a drug abuse rehabilitation program and the disassociation with drugs for at least one year. I cited *Appeal Decision* 2535 (Sweeney) and *Commandant v. Wright*, NTSB Order No. EM-186 (12/30/99).

After further consideration and review of the *Sweeney* decision and the legislative history[5] of 46 USC § 7704(c). I must conclude that the fourth method of rebuttal erroneous for the reasons stated below.

[5]See House Report No. 338, 98th Congress, 1st Session (1983) cited in *Appeal Decision 2535 (Sweeney)* at p. 6 and also found in Title 46, United States Code Annotated, Legislative History for House Report No. 98-338 at p. 577 [Pamphlet] [West Group, 2001].

The employment of the term *user* in 46 USC § 7704(c) presented the conundrum of whether the meaning of *user* was to be understood as it was so understood in 46 USC § 239(c), the predecessor to 46 USC § 7704(c). In sum, I viewed the term *user* in 46 USC § 7704(c) to be ambiguous such that reliance upon its ordinary dictionary meaning(s) was not possible. Thus, I turned to the legislative history of 46 USC § 239 which employed the term *user* in the manner then intended by Congress *i.e.*, user essentially meant habitual addictive use.

However, the later legislative history of 46 USC § 7704 revealed that Congress intended that my exploration of the legislative history of § 239 should be avoided. The reporting committee said:

> . . . the interpretation of the maritime safety laws as codified and enacted by this bill *will be based on the language of the bill itself*. The bill, as reported, is based on that premise. There should therefore, be little or no occasion to refer to the statutes being repealed in order to interpret the provisions of this bill.[6][6] [emphasis supplied]

More importantly, the Commandant, in *Appeal Decision 2535 (Sweeney)* formally interpreted 46 USC § 7704(c) where he stated that an order issued by an Administrative Law Judge contravenes the operative law [§ 7704(c)] which mandates revocation upon a showing of use, unless cure is proven. The Commandant said:

> Unless and until 46 U.S.C.§7704 is amended, ***where drug use is found proved***, an order less than revocation will not be permitted to stand on review absent proof of cure, clearly reflected in the record and satisfactory to the Administrative Law Judge.

This interpretation left me with the distinct understanding, the Commandant interpreted the word *user* in § 7704(c) to mean something other than habitual use, *i.e.*,

[6] See House Report No. 98-338 at West Pamphlet, *supra note 6* p. 586.

proof of even a ***one time use*** of an illegal drug is sufficient to establish a person is a *user* for the purposes of § 7704(c). Administrative Law Judges are bound by the appeal decisions of the Commandant. Thus, given this interpretation of § 7704(c), together with the legislative direction to not look to the predecessor statute's history, my Interim Order allowing for a rebuttal of use by proving one is not a habitual user was in error.

Moreover, the decision in *Sweeney* provided further instruction relevant to the matter presently under consideration here. There the Administrative Law Judge was also presented a letter from a Medical Review Officer which expressed the opinion that Sweeney was not addicted to dangerous drugs. Sweeney also provided the results of subsequent negative drug tests. The judge relying substantially on that information issued an order other than revocation.

The Commandant on appeal reversed the order saying:

> The order issued by the Administrative Law Judge contravenes the operative law, 46 USC § 7704, which mandates revocation unless cure is proven. Notwithstanding the fact that Appellant subsequently tested negative for drug use and the statement of the Medical Review Officer that Appellant is "not addicted" to drugs (Respondent Exhibit C), the record fails to support even a colorable argument that Appellant has been cured of his drug use.

All of this taken together leads me to the inescapable conclusion that I must reject the MRO opinion in this matter as proof Respondent is not a user of dangerous drugs.

To the extent the Interim Order on this point is (or might be) read or interpreted as precedent that medical evidence of "cure" or rehabilitation can be used to **rebut** the presumption of use that Interim Order will be withdrawn.

This leads to the second issue and whether Respondent has demonstrated to my satisfaction he is cured so that an order other than revocation may be supported. The Coast Guard was given an opportunity to evaluate the MRO's opinion and has stated that they believe that in order for Respondent to show cure, he must also show he was free of drugs for at least one year and have undergone a rehabilitation program in that time period. This they point out Respondent has failed to show. Nevertheless, the Investigating Officer had no objection to the Medical Review Officer's evaluation and opinion, and expressed they do not have any strong objection to Respondent going to work. [Transcript 5/14/02, p. 9].

The one year non-association with drugs and related rehabilitation programs to which the IO makes reference is peculiarly associated with *cure* as pronounced in *Appeal Decision 2535 (Sweeney).* The Commandant emphasized the *cure* concept of the *Sweeney* decision in *Appeal Decision 2583 (Wright)*:

> My decision in Appeal Decision 2535 (SWEENEY) *articulated a standard of cure*, which if a mariner met, and absent aggravating factors, would satisfy proof of cure. The two part Sweeney standard included successful completion of a *bona fide* drug abuse rehabilitation program and demonstration of complete non-association with drugs for a minimum of one year. (Emphasis added)

However, in the appeal of *Wright* before the National Transportation and Safety Board, the Coast Guard took the position these *Sweeney* criteria were not inflexible requirements, but was guideline subject to evaluation in the context of determining the adequacy of proof of cure in a given case. See *Commandant v. Wright*, NTSB Order No. EM-186, note 12 at p. 8. I have not seen any statement the Coast Guard has renounced that position.

Respondent has undertaken efforts toward cure. He has undergone continuous medical care follow up for his prostrate cancer including taking drug tests. He has been evaluated by a Medical Review Officer. Respondent has obtained the relevant testimony of a qualified professional who had already conducted an evaluation and my continuance to secure such testimony was appropriate. *Appeal Decision 2526 (Wilcox).* In short, Respondent has demonstrated to my satisfaction substantial involvement in a rehabilitation effort but which has not lasted a full year especially since Respondent has deposited his MMD in November, 2001. *Decision of the Vice Commandant on Review No. 18 (CLAY).* In substance, Respondent has had his MMD effectively suspended since November 28, 2001 – just a little over six months.

Lastly, based on his admission, Respondent engaged in an act of misconduct by failing to report join his vessel to report and perform required duties aboard the CSX PACIFIC (D612085).

DECISION AND ORDER

I find based solely upon the results of the positive drug test of August 6, 1999, Respondent is a user of dangerous drugs. I further find that Respondent cannot lawfully rebut the regulatory presumption based upon the opinion of a Medical Review Officer and the results of subsequent negative drug tests.

I find, however, that Respondent has shown a substantial involvement in a rehabilitation effort toward cure including loss of credentials for six months, continuing medical treatment and observations, a favorable Medical Review Officer evaluation and several negative drug tests.

IT IS THEREFORE ORDERED, commencing on the date of this Decision and Order until November 30, 2002, Respondent shall participate in a random, unannounced drug testing program during which Respondent shall take three random drug tests conducted in accordance with the Department of Transportation procedures found in Title 49 Code of Federal Regulations (CFR), Part 40, and obtain and file an updated Medical Review Officer's letter that continues to indicate Respondent is drug free and the risk of Respondent's subsequent use of dangerous drugs is sufficiently low to justify return to work. The MRO is Michael M. Kusaka, MD, Straub Health Works, Honolulu, Hawaii.

IT IS FURTHER ORDERED, upon successful completion of this additional six month program as ordered Respondent's Merchant Mariners Document is SUSPENDED for the period of deposit commencing on November 28, 2001 and concluding on November 30, 2002.

IT IS FURTHER ORDERED should Respondent fail to satisfactorily complete this additional six month program as ordered, his Merchant Mariner Document will be REVOKED.

IT IS FURTHER ORDERED that misconduct having been proved, Respondent's Merchant Mariner's Document is SUSPENDED OUTRIGHT effective November 28, 2001 to May 31, 2002.

IT IS FURTHER ORDERED, the Interim Order in this matter dated February 19, 2002 is withdrawn.

Service of this Decision upon you serves to notify you of your right to appeal as set forth in 33 CFR Subpart J, §20.1001. (Attachment I)

Dated: June 12, 2002

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Edwin M Bladen
Administrative Law Judge