

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

UNITED STATES COAST GUARD

Complainant

vs.

VERONICA BARRETTA,

Respondent.

Docket Number CG S&R 01-0582
PA No. 01001577

DECISION AND ORDER

Issued : June 18, 2002

Issued by: Peter A. Fitzpatrick , Administrative Law Judge

APPEARANCES

FOR THE COAST GUARD

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

FOR THE RESPONDENT

Christopher J. Snow, Esq.
Law Office of Snow & Snow
90 Harry Kemp Way
P.O. Box 291
Provincetown, MA 02657

I.

PRELIMINARY STATEMENT

This case began when the United States Coast Guard filed a Complaint against the Respondent, Veronica A. Barretta, holder of License Number 788553 on August 23, 2001 under the statutory authority contained in 46 U.S.C. § 7704 and the Coast Guard regulation codified at 46 CFR 5.35. In the Complaint, the Coast Guard alleged that Mrs. Barretta tested positive for marijuana metabolite on a random drug test administered on June 8, 2001.

Mrs. Barretta filed a timely Answer to the Complaint on October 2, 2001. The Answer admitted all jurisdictional allegations. With respect to the factual allegations, Respondent admitted numbers 1-3 and denied numbers 4 and 5. In the Complaint, the Investigating Officer sought the revocation of Mrs. Barretta's Coast Guard License under 46 U.S.C. § 7704.

On October 9, 2001 the case was assigned to this Judge and the hearing was set for February 12, 2002 by Order dated October 29, 2001. Next, the Coast Guard requested a continuance and absent opposition from the Respondent, it was granted. The hearing was rescheduled for April 24, 2002 at Providence, Rhode Island.

A Pre-Hearing conference was conducted on March 19, 2002 and an Order containing rulings on various motions was issued that same day.

The hearing commenced as rescheduled and the Investigating Officers, the Respondent and her counsel were present. At the outset, the Complaint and the Answer were reviewed.

At that point, counsel requested a conference in chambers prior to the presentation of the evidence. That request was granted and a conference was conducted with the Coast Guard representatives and counsel for approximately 30 minutes. The substance of those discussions was placed on the record once the hearing reconvened. See Transcript (Tr.) at pages 42-49.

Thereafter, Respondent's counsel stated that Mrs. Barretta admitted the facts showing that the drug test involved was accurate and that she did not contest any aspect of the test and would stipulate to that effect. (Tr. 46). Additionally, counsel asserted that the Respondent did not contest the Medical Review Officer's conclusion, the test conducted by the laboratory, or the collection process. (Id.) He continued that no witnesses would be required to substantiate the validity of the drug test ". . . inasmuch as we agreed to the -- that aspect of the [G]overnment's case." (Id.). At that point, the three witnesses who were available (Marie Weber, Dr. Louis Jambor, and Dr. Susan Green) were not required to testify since the substance of their testimony was stipulated by the Respondent. (Tr. 46-47).

Respondent's counsel urged that Mrs. Barretta had entered a drug counseling program and she wished to pursue the so called "Sweeney" cure option. She was willing to complete the necessary requirements of the program and a long suspension of her license if she would be allowed to work for two months as operator of a launch only for the Provincetown Marina carrying passengers from the moorings there to and from the marina.

Mrs. Barretta testified to this effect and admitted that she used marijuana before the drug test here. (Tr. 54-55, 93-94, 99).

The only other witness who testified was Lt. Kallen and her testimony was related to the service of a number of exhibits on Respondent's counsel. Mr. Snow objected to the admission of IO Exhibits No. 1-4, 6, 8, 9 and 10 on the grounds that they had not been served. (Tr. 197). I admitted Exhibits 5, 7, 11 and 12 and reserved a ruling on the others pending a further search by counsel of his records. This matter was resolved when Mr. Snow found the records after the hearing as is described in his letter of April 24, 2002. Accordingly, the exhibits which were reserved at the hearing are now admitted.

Additionally, the Respondent's four exhibits (Respondent A-D) were admitted. (Tr. 62, 197). A list of all exhibits is attached hereto as Attachment A. At the conclusion of the hearing, I agreed to allow Mrs. Barretta to continue the Sweeney cure process as described in the Opinion section hereof.

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 CFR § 40. The specimen collection procedures are set out at 49 CFR § 40.25.

4. The Coast Guard regulations governing chemical testing for dangerous drugs are codified at 46 CFR § 16. Specifically, 46 CFR § 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 Coast Guard Rules of Practice which apply to this proceeding are codified at 33 CFR § 20.

III.

FINDINGS OF FACT

A. Jurisdictional Allegations Admitted by the Respondent

1. The Respondent is the holder of License No. 788553.

B. Factual Allegations Admitted by the Respondent

At the hearing the Respondent admitted all factual allegation of the complaint. (Tr. 46-48, 54-55, 93-94, 99).

1. On June 8, 2001 Respondent took a random drug test.
2. A urine specimen was collected by Marie Weber of Outer Cape Health Services, Provincetown, MA 02657.
3. The Respondent signed a Federal Drug Testing Custody and Control Form.
4. The urine specimen was collected and analyzed by SmithKline/Quest Diagnostics, Van Nuys, CA 91405 using procedures approved by the Department of Transportation
5. That specimen subsequently tested positive for Marijuana Metabolite.

IV.

ULTIMATE FINDINGS

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." The Coast Guard has the burden of proving the charge and its supporting specification by a preponderance of the evidence or "by substantial, reliable and probative evidence." 46 C.F.R. § 5.539; 46 C.F.R. § 5.63; Appeal Decision No. 2603 (HACKSTAFF) (1998); See also, Dept. of Labor v. Greenwich Collieries, 512 U.S. 267 (1994); Steadman v. SEC, 450 U.S. 91, 100-103 (1981). The proceeding is conducted under the provisions in 46 C.F.R. Part 5, 33 C.F.R. Part 20, and the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*
2. There are no material issues of fact in dispute in this case. The remaining controversy is whether the Respondent should be afforded the opportunity to demonstrate "cure" under the well-known "Sweeney" line of cases while being allowed to serve under her license during a two-month period in the summer. I am of the opinion that due to the limited service involved and the length of the suspension period, justice is served by allowing this modification of the Sweeney principals.

Here, Mrs. Barretta tested positive for marijuana metabolite on a chemical test for dangerous drugs on June 8, 2001. She was removed from her position as a launch operator for Provincetown Marina and had not served under that license up to the date of the hearing. She enrolled in an intensive outpatient program for substance abuse a week before the hearing (the Gosnold Program). That program includes three meetings per week (3 hours

each) over a three week period. (Tr. 61, 64-65) (Exhibit A). Thereafter, aftercare recommendations are made. Additionally, she has agreed to six random drug screens during the following 12 months. Also, and importantly, the Respondent agrees that the period of suspension involved here will encompass a longer period than the usual 12 months as required by the Sweeney doctrine. The suspension will run from April 24, 2002 to June 30, 2003 with the exception of the months of July and August 2002. Finally, Mrs. Barretta's service under her license during the July-August season will be limited to the operation of the launch at Provincetown Marina to and from the moorings in the harbor to the marina dock. If Mrs. Barretta completes the Gosnold Program, the required aftercare, the random drug testing requirements, and does not exceed the restrictions imposed on operations under her license, the conditional revocation of her license imposed here will be cancelled and the license will be returned to her at the conclusion of the entire suspension period. Mrs. Barretta will be required to submit appropriate documentation to show she has met the terms of this Order before this conditional revocation will be lifted.

V.

ORDER

1. The Jurisdictional and Factual Allegations of the Complaint are Proved by the Answer and by the Admissions of the Respondent.
2. Mrs. Barretta's License No. 788553 is hereby **REVOKED** subject to the following conditions:

- a. Respondent will complete a drug rehabilitation program that establishes that the Respondent is drug-free and the risk of Respondent's subsequent use of dangerous drugs is sufficiently low to justify a return to work.
- b. Respondent will:
 - i. Provide adequate evidence of successful completion of all elements of the rehabilitation and drug testing programs;
 - ii. Complete the intensive out-patient substance abuse program in which she was enrolled at the date of the hearing (the Gosnold Program);
 - iii. Enroll in a drug rehabilitation program certified by a governmental agency or accepted by an independent professional association;
 - iv. Attend a substance abuse monitoring follow-up program for a minimum period of one-year following successful completion of the Gosnold program as specified by the substance abuse professional;
 - v. Participate in a random, unannounced drug-testing program for a minimum period of one-year following successful completion of the 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.
 - vi. File a copy of the Medical Review Officer's (MRO) determination that 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

who made the original positive determination in this matter must sign this determination. The name and address of the MRO is as follows:

Dr. Susan M. Green, MD, MPH
Newport Hospital Occupational Health/Newport Alliance
Borden Carey Building, Suite G-40
19 Friendship Street
Newport RI 02840

Another MRO can not be used in this matter unless the substitute MRO is agreeable to both the Respondent and the USCG;

- vii. Be subject to increased, unannounced testing for a period of up to 60 months in accordance with 46 CFR 16.370(d). The MRO will determine the period and frequency of testing;
- viii. Pay the expenses for this rehabilitation program;
- ix. Deposit all Coast Guard-issued licenses, certificates, and/or documents with Marine Safety Office Providence for the duration of the entire rehabilitation program except as provided below;
- x. Advise the Coast Guard Investigations Department at Providence of any change of address and/or telephone number by mail; and
- xi. Submit evidence of successful completion to the Judge and the Investigating Officer at the following addresses:

Judge Peter Fitzpatrick
Norfolk Federal Building
200 Granby Street, Room 602
Norfolk, VA 23510

Commanding Officer
U.S. Coast Guard Marine Safety Office Providence
20 Risho Avenue
East Providence, RI 02914-1208

- xii. The Respondent's license will be temporarily returned to her for two months during the summer, 2002 (July and August). Service under that license is limited to providing launch service at Provincetown to and from the moorings and the dock at the Provincetown Marina. The license is to be returned to the Investigating Officer at Providence Marine Safety Office immediately thereafter.
- xiii. If the Respondent satisfactorily meets the conditions set out in this Order, her license will be returned to her at the end of the suspension period or by June 30, 2003. Otherwise, her license will be **REVOKED**.


PETER A. FITZPATRICK
Administrative Law Judge
United States Coast Guard

Done and dated June 18, 2002 at
Norfolk, Virginia

APPENDIX A

Exhibits

IO Exhibits

1. Drug Testing Control Form
2. Certification/Dr. Green
3. Curriculum Vitae, Dr. Green
4. Custody Control Form
5. Laboratory Test Results
6. MRO Checklist
7. Controlled Substance Test Result
8. Newport Alliance Letter
9. Litigation Package
10. Exhibit List
11. Letter, March 28, 2002
12. Letter, April 11, 2002

Respondent's Exhibits

- A. Gosnold Letter
- B. Newport Alliance Test
- C. Townsend Letter
- D. Cabral Letter

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: 401-435-2331

Christopher J. Snow, Esq.
90 Harry Kemp Way
Provincetown, MA 02657
Telephone: 508-487-1160



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

Done and dated June 18, 2002 at
Norfolk, Virginia

33 C.F.R. PART 20
SUBPART J
APPEALS

§ 20.1001 General.

- (a) Any party may appeal the ALJ's decision by filing a notice of appeal. The party shall file the notice with the U. S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022. The party shall file the notice 30 days or less after issuance of the decision, and shall serve a copy of it on the other party and each interested person.
- (b) No party may appeal except on the following issues:
 - (1) Whether each finding of fact is supported by substantial evidence.
 - (2) Whether each conclusion of law accords with applicable law, precedent, and public policy.
 - (3) Whether the ALJ abused his or her discretion.
 - (4) The ALJ's denial of a motion for disqualification.
- (c) No interested person may appeal a summary decision except on the issue that no hearing was held or that in the issuance of the decision the ALJ did not consider evidence that that person would have presented.
- (d) The appeal must follow the procedural requirements of this subpart.

§ 20.1002 Records on appeal.

- (a) The record of the proceeding constitutes the record for decision on appeal.
- (b) If the respondent requests a copy of the transcript of the hearing as part of the record of proceeding, then, --
 - (1) If the hearing was recorded at Federal expense, the Coast Guard will provide the transcript on payment of the fees prescribed in 49 CFR 7.45; but,
 - (2) If the hearing was recorded by a Federal contractor, the contractor will provide the transcript on the terms prescribed in 49 CFR 7.45.

§ 20.1003 Procedures for appeal.

- (a) Each party appealing the ALJ's decision or ruling shall file an appellate brief with the Commandant at the following address: U.S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022, and shall serve a copy of the brief on every other party.

- (1) The appellate brief must set forth the appellant's specific objections to the decision or ruling. The brief must set forth, in detail, the --
 - (i) Basis for the appeal;
 - (ii) Reasons supporting the appeal; and
 - (iii) Relief requested in the appeal.
 - (2) When the appellant relies on material contained in the record, the appellate brief must specifically refer to the pertinent parts of the record.
 - (3) The appellate brief must reach the Docketing Center 60 days or less after service of the ALJ's decision. Unless filed within this time, or within another time period authorized in writing by the Docketing Center, the brief will be untimely.
- (b) Any party may file a reply brief with the Docketing Center 35 days or less after service of the appellate brief. Each such party shall serve a copy on every other party. If the party filing the reply brief relies on evidence contained in the record for the appeal, that brief must specifically refer to the pertinent parts of the record.
- (c) No party may file more than one appellate brief or reply brief, unless --
- (1) The party has petitioned the Commandant in writing; and
 - (2) The Commandant has granted leave to file an added brief, in which event the Commandant will allow a reasonable time for the party to file that brief.
- (d) The Commandant may accept an amicus curiae brief from any person in an appeal of an ALJ's decision.

§ 20.1004 Decisions on appeal.

- (a) The Commandant shall review the record on appeal to determine whether the ALJ committed error in the proceedings, and whether the Commandant should affirm, modify, or reverse the ALJ's decision or should remand the case for further proceedings.
- (b) The Commandant shall issue a decision on every appeal in writing and shall serve a copy of the decision on each party and interested person.