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. Pavilonis
LT Andrea Katsenes
LTJG Joshua Pennington
United States Coast Guard
Marine Safety Office
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FOR THE RESPONDENT

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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 029466842. 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.

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[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 23 Nottingham Drive, East Sandwich, MA 02537-1315, telephone (508) 888-5516.
2. Respondent holds license number 788197 and merchant mariner's document number 029466842.

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 00299252729 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 Colleries, 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. 029466842) 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 Coat 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 duel 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. 1.45[4] 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 issued 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 ACDARE 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 029466842 are hereby **REVOKED**.

Peter A. Fitzpatrick

PETER A. FITZPATRICK
Administrative Law Judge
United States Coast Guard

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