UNITED STATES OF AMERICA
U.S. DEPARTMENT OF HOMELAND SECURITY
UNITED STATES COAST GUARD

UNITED STATES COAST GUARD

Complainant

vs.

ROBERT KELVIN COOK III,

Respondent.

Docket Number 2017-0358
Enforcement Activity No. 5745123

CURE ORDER

Issued: April 17, 2019

By Chief Administrative Law Judge: Honorable Walter J. Brudzinski

Appearances:

Lineka N. Quijano, *Esq*.
Suspension and Revocation
National Center of Expertise
For the Coast Guard

-and-

LT Charles W. Taylor
Sector Delaware Bay
For the Coast Guard

Jeffrey S. Moller, *Esq.*
For the Respondent

Table of Contents

On November 1, 2018, I issued a Decision and Order that revoked Respondent's credentials after finding an allegation of Dangerous Drug Use Proved and Stayed the Revocation to allow Respondent time to complete cure. On December 19, 2018, I reconvened these proceedings to receive evidence addressing Respondent's completion of cure. As set forth below, I find Respondent **PROVED** with satisfactory evidence he completed cure as contemplated under 46 U.S.C. § 7704 and pertinent authority. Accordingly, the **STAYED REVOCATION** imposed on November 1, 2018, is set aside. The period of time Respondent's credential was with the Coast Guard is converted to a period of outright suspension and Respondent may retrieve his credential from the Coast Guard.

I. BACKGROUND

On October 11, 2017, Respondent took a random drug test resulting in a positive urinalysis for marijuana metabolites. (November 1, 2018, D&O). Respondent began the cure process on October 17, 2017, which included: 1) completing a bona fide drug abuse rehabilitation program; 2) demonstrating complete non-association with drugs for one year following completion of the drug rehabilitation program; and, 3) obtaining a Medical Review Officer's (MRO) verification that Respondent is drug free and not at risk of subsequent dangerous drug use.

On November 27, 2017, the Coast Guard filed a Complaint charging Respondent with one count of "Use of, or Addiction to the Use of Dangerous Drugs" in violation of 46 U.S.C. § 7704(c) and 46 C.F.R. § 5.35. In his Answer, Respondent admitted to the jurisdictional allegations along with numerous factual allegations. However, Respondent denied he was a user of dangerous drugs and requested a hearing on the proposed order. Between November 2017 and March 6, 2018, the date of the suspension and revocation hearing, Respondent continued to participate in the cure process.

During the March 6, 2018 in-person hearing, the Coast Guard presented evidence showing Respondent was a user of dangerous drugs. Respondent presented evidence purporting to rebut the prima facie case of drug use while also presenting evidence showing he had begun cure. At the conclusion of the in-person hearing, I continued the proceedings so the parties could brief the issue of whether Respondent rebutted the prima facie case of drug use as contemplated under 46 U.S.C. § 7704 and 46 C.F.R. § 5.35.

On November 1, 2018, I issued a Decision and Order finding the Coast Guard proved drug use under 46 U.S.C. § 7704. I entered a **STAYED REVOCATION** and ordered the Respondent to submit his evidence of cure to the Coast Guard by December 17, 2018. I convened a telephonic post hearing conference with the parties on December 19, 2018, to receive oral argument concerning proof of cure. Respondent introduced six exhibits (Attachment A) showing he completed drug education as recommended by the Substance Abuse Professional (SAP), followed by twelve negative drugs tests. Respondent argued this evidence shows he is "cured" as the term is used under 46 U.S.C. § 7704.[1]

The Coast Guard disagreed and argued Respondent's evidence is deficient because: 1) prior CDOAs require a mariner to deposit his credential before the mariner may start non-association; 2) Respondent must have twelve months of reasonably spread out tests to satisfy Appeal Decision 2535 (SWEENEY) (1992); and, 3) the MRO return to work letter must come after the twelve months' testing.

II. DISCUSSION

The issue I must now decide is whether Respondent met the burden of establishing cure as prescribed by statute and case precedent, and thus receive a sanction less than revocation. See

[1] The December 19, 2018 teleconference's transcript is cited as "Cure Tr. at XX"; Respondent's exhibits introduced during this teleconference are cited as "Cure Ex. X." The transcript from the initial May 6, 2018 hearing is cited at "Tr. at XX" and Respondent's original exhibits are "Resp't. Ex. X."

Appeal Decision 2526 (WILCOX) (1991) at 2 (the burden of establishing "cure" is on the Respondent).

A. A Mariner Must Complete Three Requirements To Prove Cure

Title 46 U.S.C. § 7704(b) requires an ALJ to revoke a merchant mariner's credential if the Coast Guard shows the mariner is a user of or addicted to the use of dangerous drugs.[2] However, Congress provided an exception to the mandatory revocation, allowing a mariner to avoid this severe penalty through one avenue—"**provides satisfactory proof that the holder is cured.**" See 46 U.S.C. § 7704(b) (emphasis added); see e.g., Appeal Decision 2552 (FERRIS) (1993). Congress did not, however, define cure. Instead, Congress left it to the Coast Guard, as the Agency charged with implementing the statute, to develop the definition. See Bragdon v. Abbott, 524 U.S. 624, 646 (1998).[3]

In 1992, the Vice Commandant defined "cure" in SWEENEY. SWEENEY details two requirements for a mariner to prove cure and thus receive a sanction less than revocation:

> 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, such as the Joint Commission on Accreditation of Health Care Organizations (JCAHO).
>
> **2) *The respondent must have successfully demonstrated a complete non*-association with drugs for a minimum period of one year following successful completion of the rehabilitation program.** This includes participation in an active drug abuse monitoring program which incorporates random, unannounced testing during the year.
>
> SWEENEY at 4 (emphasis added).

Later, the Commandant added a third requirement to SWEENEY's cure definition. Appeal Decision 2634 (BARRETTA) (2002) at 3. Pursuant to 46 C.F.R. § 16.201(f), a mariner

[2] Title 46 U.S.C. § 7704(b) was recently amended in August 2018, without substantive change; i.e., Congress only altered the subsection lettering. Most decisions interpreting this statute refer to the pre-August 2018 version of 46 U.S.C. § 7704(b), which was then codified at 46 U.S.C. § 7704(c).

with a positive drug test must also obtain a "return to work" letter which is a determination from an MRO indicating the mariner is drug free and the risk of subsequent use of dangerous drugs is sufficiently low to justify his return to work.[4] Against this background, I turn to the evidence at bar to determine whether Respondent provided satisfactory proof that he is cured.

1. Respondent Completed the Drug Rehabilitation Program

The parties agree Respondent satisfied the first requirement by successfully completing a bona fide drug abuse rehabilitation program designed to eliminate physical and psychological dependence. (Cure Tr. at 19). The parties agree Respondent completed an SAP evaluation and a rehabilitation program. (Id.). Therefore, there is no need to further analyze the first prong in this case. However, Respondent and the Coast Guard disagree over whether Respondent completed the one year non-association period and whether Respondent received an effective return to work letter. Accordingly, I must now review the record and determine whether Respondent provided satisfactory proof that he completed the remaining two requirements.

2. Respondent Completed One Year of Non-Association

The mariner must show he successfully demonstrated 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 for a year. SWEENEY at 4. The record shows Respondent satisfied the second requirement.

Between October 25, 2017, and December 11, 2018 (approximately thirteen months), Respondent participated in an active drug abuse monitoring program and was tested sixteen times.[5] Of the sixteen tests Respondent took, at least eight of the tests were random,

---

[3] See also 46 U.S.C. § 7701(d).
[4] Title 46 C.F.R. § 16.210(f) has other requirements the mariner must meet after returning to work, none of which are relevant to this case.
[5] A complete list of Respondent's negative drug tests can be found in Attachment B.

unannounced tests.

Under SWEENEY, Respondent's unannounced tests need to begin after successfully completing a bona fide drug abuse rehabilitation program. On November 22, 2017, the date Respondent completed a drug abuse rehabilitation program, the MRO issued a return to work letter instructing the Pilot's Association to begin a series of twelve unannounced drugs tests on Respondent over the course of the following year; the Pilots Association only ended up ordering eight tests (tests 5-12 in Attachment B). (Resp't Exs. 4, 15; Tr. at 66; Cure Tr. at 10-14; Cure Ex. 5). The MRO issued a second letter on November 12, 2018, stating the eight follow-up tests initiated by the Pilots Association were sufficient to establish Respondent's non-association with drugs and concluded additional testing was not warranted. (Cure Ex. 6). Despite the MRO's conclusion, Respondent still requested and received four additional tests between November and December 2018 (tests 13-16 in Attachment B). (Cure Tr. at 12; Cure Ex. 5). The record does not show if these last four tests were unannounced and random; however, the record does show the MRO verified the tests. Because the record is unclear, I am not considering these four tests part of the eight unannounced random tests.

The Coast Guard also argues the second prong of SWEENEY requires Respondent to attend a support group, such as Alcoholics Anonymous (AA) or Narcotics Anonymous (NA). (Cure Tr. at 21-27). The Coast Guard asserts, "as part of that one year non-association participation in those kinds of support group or individual group counseling sessions would be required." (Cure Tr. at 21). This is incorrect. The second prong of SWEENEY has no such requirement. The Marine Safety Manual may require attendance of AA/NA in standard settlement agreements; however, such procedures are not binding on ALJs during S&R proceedings. Here, record evidence from the SAP reflects no substance abuse issue for which attendance at AA/NA meetings would be appropriate. (See Tr. at 95; Resp't. Ex 7). Therefore,

requiring Respondent to attend AA/NA meetings in order to show a one year non-association with drugs would be punitive and not remedial in nature.

3. Respondent Obtained an MRO Return to Work Letter

The Coast Guard argues the MRO's return to work letter must come after 12 months of non-association. I disagree.

After failing a dangerous drug test, a mariner may return to work only after an MRO determines the individual is drug free and the risk of subsequent dangerous drug use is sufficiently low to justify his or her return to work. 46 C.F.R. § 16.201(f); BARRETTA at 5. The regulations and case law are silent as to when the MRO must issue the return to work letter. The Commandant has previously recognized a respondent properly obtained a return to work letter after successful completion of drug rehab, but prior to completing the one year non-association with dangerous drugs. Appeal Decision 2638 PASQUARELLA (2003) at 5. Regardless, in our case, the MRO issued two separate letters stating Respondent was drug free.

On November 22, 2017, the MRO issued a "Return to Duty" letter stating Respondent "has completed the required SAP evaluation and recommendations. A return to duty urine drug test was performed on November 16, 2017, and has returned NEGATIVE . . . [and Respondent] may return to duty at this time. He is to undergo minimum of 12 random, unannounced follow up urine drug tests during the next 12 months." (Cure Ex. 4).

Following Respondent's one-year non-association with drugs, the MRO issued another letter supplementing his November 22, 2017 return to work letter. On November 12, 2018, the MRO issued a second letter stating "[p]lease be advised Captain Cook has satisfied the requirements of 46 CFR Part 16.01 [sic] and 49 CFR Part 40. Following his negative return to duty testing on 11-15-2017, Capt. Cook has undergone 8 follow up drug test[s] all of which have been performed under direct observation and negative results obtained. At this time I do not feel additional testing is warranted." (Cure Ex. 6). Both letters provide substantial evidence to

support a finding that Respondent received the needed return to work letter from the MRO.

B. Respondent Must Show One Year of Non-Association With Dangerous Drugs to Satisfy SWEENEY

The Coast Guard next argues Respondent does not have twelve months of reasonably spread out drug tests, and without this testing, he cannot show cure. I disagree. Although SWEENEY and its progeny identify a one year period of non-association, it does not require that testing take place each month for twelve months. My research reveals no authority indicating that twelve months of testing is required, but only evidence showing there is non-association with drug use for a period of one year.

The Coast Guard also argues twelve months of testing is required by the current settlement agreements for positive drug test cases. Settlement agreements do not create binding precedent, nor do they modify SWEENEY and its progeny. As is clear in 46 C.F.R. § 5.65, I am only bound by CDOAs, or higher, competent authorities modifying CDOAs.

C. Commandant Decisions on Appeal Do Not Require Mariners to Deposit Their Credentials Before They Start the One Year of Non-Association

The Coast Guard argues the drug testing and one year association period cannot start until the date the mariner deposits the credential. In support of its view, the Coast Guard relies on SWEENEY, PASQUARELLA, BARRETTA, and Commandant Decision on Review #18 (CLAY) (1992). As discussed below, the Coast Guard's argument is neither supported by these decisions nor 46 U.S.C. § 7704.

1. SWEENEY

First, a plain reading of SWEENEY shows why the Coast Guard's argument fails. After defining cure as requiring: 1) successful completion of a bona fide drug abuse rehabilitation program; and, 2) successful demonstration of complete non-association with drugs for a

minimum period of one year after completing a rehabilitation program, SWEENEY acknowledged the possibility of an "unfair" situation, noting:

> In most cases which are docketed in a timely manner, at the time when the charge of drug use is found proved, sufficient time may not have elapsed to evidence cure under the above guidelines. To avoid such a potentially unfair result, the Administrative Law Judge could continue the hearing if the respondent has demonstrated substantial involvement in the cure process by proof of enrollment in an accepted rehabilitation program. On the other hand, continuance would not be appropriate if it were based on the mere promise or assurance from the respondent that he will commence steps to effect a cure. In these latter situations, an order of revocation would be required.
>
> SWEENEY at 4.

SWEENEY recognized that the new cure definition could create a clear obstacle to a mariner's ability to prove cure at a hearing. Because some parts of proving cure require the mariner to expend a one-year period in the process, it became highly unlikely after SWEENEY for a mariner to ever show up at a hearing and prove cure; not because the right to show cure evaporated, but because the case proceeded to hearing much quicker than the time it might take to complete the cure process.

Implicitly recognizing the Coast Guard could not create a process that could take away a mariner's ability (granted by Congress) to prove cure at a hearing, SWEENEY struck a compromise by allowing the presiding ALJ to "continue the hearing," thereby providing a mariner sufficient time to continue to gather satisfactory evidence to prove cure. However, a mariner's ability to ask for a continuance is not automatic under SWEENEY; continuing the hearing should be granted only if the mariner had taken substantial steps in the cure process before he or she appears at the hearing. Id. Without proof that the mariner had taken substantial steps before the hearing, a continuance should not be granted under SWEENEY.

Under SWEENEY's cure definition, it is not feasible for a mariner to prove SWEENEY's second requirement at a hearing because the process requires more than a year to complete and the normal course of the hearing takes less than a year. However, SWEENEY does contemplate

that a mariner might appear at the hearing with evidence of "substantial involvement in the cure process." To that end, SWEENEY does not limit what that involvement in the cure process may be. It merely recognizes that it would be unfair to define cure as requiring a year of non-association, but having the hearing before a respondent could invoke the cure argument at a revocation hearing.

Therefore, SWEENEY recognizes that a mariner could appear at the hearing showing substantial involvement in the cure process, and further recognizes the mariner can undergo part of the cure process between the time the Complaint is filed and the hearing on the merits. More importantly, because the Coast Guard cannot usually take a mariner's credential at the time the Complaint is filed, mariners may begin the cure process and begin satisfying cure during this period while holding their credential.

Accordingly, mariners under SWEENEY may hold their credentials, begin the cure process, and appear at a hearing showing "substantial involvement" in completing cure. Therefore, SWEENEY directly contradicts the Coast Guard's argument that mariners may not begin non-association without depositing their credential.

2. CLAY

In the aftermath of SWEENEY, the Commandant issued CLAY. There, the Commandant addressed whether a Respondent could retain possession of the credential after the Coast Guard proved a prima facie case of drug use at a hearing, but before the mariner completed the cure requirements. During the proceedings before the ALJ, the judge decided to retain the credentials after the hearing, relying on 46 C.F.R. § 5.521(b) which provides,

> When a hearing is continued or delayed, the Administrative Law Judge returns the credential to the respondent: unless a prima facie case has been established that the respondent committed an act or offense which shows that the respondent's service on a vessel would constitute a definite danger to public health, interest or safety at sea.

On review, the Commandant agreed with the ALJ, holding: "where a *prima facie* case of drug use is established by the Investigating Officer to the satisfaction of the Administrative Law Judge, sufficient cause exists to withhold return of the . . .[MMC] . . . pursuant to . . . 46 C.F.R. § 5.521(b)." CLAY at 3. However, CLAY is of little guidance in this issue because it concerns depositing or withholding a credential after a prima facie case is proved and does not require a respondent to deposit the credential before starting the one year non-association period.

3. BARRETTA

The Commandant's decision in BARRETTA provides a more relevant discussion on the issue but does not support the Coast Guard's argument that mariners must deposit their credentials with the Coast Guard prior to beginning the one year non-association from drugs.

In BARRETTA, the ALJ convened a hearing to consider the Coast Guard's allegation that the mariner was a user of or addicted to the use of dangerous drugs under 46 U.S.C. § 7704(b). There, the respondent advised the ALJ that she had entered a drug counseling program one week prior to the hearing and wished to pursue cure in accordance with SWEENEY. BARRETTA at 2. The ALJ, however, did not continue the hearing as was directed by SWEENEY but instead found the charge and specification proved and revoked Respondent's credential. Id. The ALJ then modified the revocation by establishing a period from April 24, 2002, to June 30, 2003, with the exception of the months of July and August 2002, in which Respondent could not serve under the authority of her credential.

When deciding to allow this deviation from the normal cure process, the ALJ considered the limited work Respondent was expected to do in July and August 2002. Respondent said she would be operating a launch only in protected waters. The ALJ also considered the fact that Respondent enrolled in an intensive outpatient substance abuse program and had been removed from her position as a launch operator in June 2001 following the positive test result and had not served under the authority of her credential since then. The ALJ explained the suspension period

cited above was longer than the usual 12-month period required in SWEENEY. Id. at 3. On Appeal, the Commandant held this peculiar sanction "not appropriate" and reversed.

In reversing the ALJ's decision, the Commandant reasoned that "once the Coast Guard has proven that a mariner used an illegal drug, his license or document must be revoked, or, in the alternative, the license . . . [is] withheld until the Respondent proves that he or she is cured." Id. at 3. As the Commandant made clear, an ALJ may not return a credential before "all the requirements of cure have been met." Id. at 4. Again, this case is silent concerning this issue of whether respondent must deposit their credentials before starting the one year non-association period.

4. PASQUARELLA

PASQUARELLA involved a very similar question as BARRETTA. There, the ALJ found the drug use allegation proved at a hearing and six months later returned the mariner's credential prior to issuing a decision and order and before the mariner proved cure. PASQUARELLA at 1-2. The Commandant reversed, again noting the ALJ cannot return a mariner's credential after determining that the mariner is a user of dangerous drugs until after the mariner completes the cure process.

5. Mariners are Permitted to Begin the Cure Process While Holding a Credential and Before Appearing at the Hearing

Title 46 C.F.R. § 16.201(b) provides: "[i]f an individual fails a chemical test for dangerous drugs under this part, the individual will be presumed to be a user of dangerous drugs." To trigger the 46 C.F.R. § 16.201(b) presumption, thus establishing a prima facie case of dangerous drug use, the Coast Guard must prove the following:[6]

> (1) that the respondent was the person who was tested for dangerous drugs, (2) that the respondent failed the test, and (3) that the test was conducted in

[6] A prima facie case is one in which the facts as alleged will prevail until contradicted and overcome by other evidence. See Black's Law Dictionary 1189 (6th ed. 1990).

> accordance with 46 C.F.R. Part 16. Proof of those three elements establishes a *prima facie* case of use of a dangerous drug (*i.e.*, a presumption of drug use), which then shifts the burden of going forward with evidence to the respondent to rebut this presumption. If the respondent produces no evidence in rebuttal, the ALJ may find the charge proved on the basis of the presumption alone. Appeal Decisions 2592 (MASON); 2584 (SHAKESPEARE); 2560 (CLIFTON); 2555 (LAVALLAIS); 2379 (DRUM) and 2279 (LEWIS).
>
> Appeal Decision 2603 (HACKSTAFF) (1998) at 1.

As referred to under the discussion of CLAY above, 46 C.F.R. § 5.521(b) provides, "[w]hen a hearing is continued or delayed the [ALJ] returns the credential to the respondent: **unless a prima facie case has been established** that the respondent committed an act or offense which shows that the respondent's service on a vessel would constitute a definite danger to public health, interest or safety at sea." (Emphasis added).

After the hearing on March 6, 2018, I had not yet decided whether Respondent rebutted the prima facie case given the dearth of authority on topical use of THC. Further, none of the language in CLAY, BARRETTA, PASQUARELLA, or 46 C.F.R. § 5.521(b) required that I take Respondent's credentials during the continuance of the hearing/briefing period and prior to deciding whether Respondent rebutted the presumption of drug use.

After receiving briefs, I issued a decision on November 1, 2018, finding Respondent to be a user of dangerous drugs as contemplated in 46 U.S.C. § 7704 and instructed him to deposit his credentials, which he did on November 7, 2018. I also stayed the revocation to provide Respondent sufficient time to finish the cure process. Respondent had already completed a substantial amount of the cure process from when the Complaint was filed to November 1, 2018, when I found a prima facie case of drug use. The Coast Guard now argues all of this evidence of non-association cure should be disregarded, because it was not completed after Respondent deposited his credentials.

As set forth above, SWEENEY contemplates a mariner showing up to a hearing with evidence of cure partially completed while the mariner has an MMC. Thus, from that perspective, a mariner is permitted to begin the cure process while holding a credential and before appearing for the hearing. Given the above review of CLAY, BARRETTA, and PASQUARELLA, nothing indicates that a mariner may not continue to participate in the cure process between the time an ALJ has a hearing and the period of a continuance. These cases only direct the ALJ to take the credential when the ALJ is sufficiently convinced the mariner is a user of drugs at the close of the hearing. Accordingly, I disagree with the Coast Guard that a merchant mariner's credentials must be deposited before the mariner starts the one year non-association period.

D. The Coast Guard Should Encourage Mariners to Begin Cure As Soon As Possible After Receiving a Positive Drug Test

Policy also guides me to reject the Coast Guard's assertion that mariners must deposit their credentials before starting the one year non-association period. Under the facts of this case, requiring Respondent to re-start the one year non-association period so that the deposit of his credential and non-association coincide would be punitive in nature and inconsistent with 46 C.F.R. § 5.5. Encouraging mariners to immediately enroll in and successfully complete a drug abuse rehabilitation program and thus start the drug testing sooner would allow the Coast Guard to more easily conclude that the mariner is not under the influence of drugs and enhances safety at sea.

Here, Respondent tested positive on October 11, 2017, and immediately sought an evaluation from an MRO and began drug testing. By the time the Coast Guard filed its Complaint, Respondent had already been seen by a SAP, MRO, and taken two observed drug tests. At the time the case went to a hearing, Respondent had already taken five additional drug

tests. Shortly after I issued the Initial Decision, Respondent deposited his credentials having already undergone 12 additional drug tests following his initial positive tests.

Respondent had a head start on the cure process and never slowed down. To require a mariner to restart the non-association aspect of cure after the credential deposit seems penal in nature, not remedial. SWEENEY states the one-year non-association with drugs starts after the mariner successfully completes a rehabilitation program. This is what happened in the instant case. By allowing mariners to undergo the cure process as soon as possible, the Coast Guard encourages mariners to begin monitoring and rehabilitation as soon as they test positive for dangerous drugs which clearly fosters the purpose of suspension and revocation proceedings which is to promote safety at sea.

III. CONCLUSION

Respondent has been a credentialed mariner for close to 40 years and has an outstanding personal and professional reputation. Respondent's 40 years of negative drug tests, outstanding professional performance, and community service illustrate his impeccable behavior. Respondent exemplified a prudent mariner by immediately enrolling in a drug rehabilitation program, receiving two MRO return to work letters, and continuing to participate in random drug testing for over twelve months. As set forth above, Respondent provided satisfactory evidence showing completion of the cure process. Because Respondent proved cure, the Coast Guard is directed to return his credential immediately.

WHEREFORE,

IV. ORDER

IT IS HEREBY ORDERED that having found Respondent provided proof of cure to my satisfaction, the Coast Guard is to return Respondent's credential.

IT IS FURTHER ORDERED that the period of time Respondent's credential was deposited with the Coast Guard is converted to a period of outright suspension.

PLEASE TAKE NOTICE, service of this Order on the parties and/or parties' representative(s) serves as notice of appeal rights set forth in 33 C.F.R. §§ 20.1001–20.1004, attached hereto as Attachment C.

Walter J. Brudzinski
U.S. Coast Guard Administrative Law Judge

Date: April 17, 2019

ATTACHMENT A – CURE EXHIBIT LIST

Respondent's Cure Exhibits:

Cure Ex. 1: October 19, 2017 SAP Evaluation and Recommendation (1 page).

Cure Ex. 2: October 25, 2017 Certification that Respondent completed the prescribed education Program (1 page).

Cure Ex. 3: SAP letter of October 30, 2017, to MRO certifying Respondent completed SAP Recommendations (1 page).

Cure Ex. 4: MRO return to duty letter of November 22, 2017 (1 page).

Cure Ex. 5: Twelve (12) negative tests dated as follows: 4/12/18; 05/01/18; 06/15/18; 07/13/18; 08/22/18; 9/7/18; 10/04/18; 10/16/18; 11/16/18; 11/30/18; 12/7/18; and 12/11/18 (12 pages).

Cure Ex. 6: MRO letter of November 12, 2018, stating Respondent has completely fulfilled the requirements of the regulations and expressing his opinion that no additional testing is warranted (1 page).

Coast Guard's Cure Exhibits:

None

ATTACHMENT B – NEGATIVE DRUG TEST TIMELINE

1. 10/25/17 - return to duty test verified by the SAP. (Resp't. Ex. 5).

2. 11/16/17 - return to duty test verified by the MRO. (Resp't. Exs. 4, 7) [Some paperwork references 11/16/17 as collection date and some referenced 11/15/17 as collection date. MRO letter and Respondent's signature referenced 11/16/17 as collection date, so that is considered the date of the collection].

3. 12/07/17 - observed test administered by SAP. (Resp't Ex. 14; Tr. at 115, 119) [Final lab paperwork was not submitted for this test, but SAP testified that test was administered and it was negative].

4. 02/09/18 - observed test verified by MRO. (Resp't Ex. 13).

5. 04/12/18 - observed test verified by MRO. (Cure Ex. 5).

6. 05/01/18 - observed test verified by MRO. (Cure Ex. 5).

7. 06/15/18 - observed test verified by MRO. (Cure Ex. 5).

8. 07/13/18 - observed test verified by MRO. (Cure Ex. 5).

9. 08/22/18 - observed test verified by MRO. (Cure Ex. 5) [MRO copy of test was blank except for MRO signature and checkmark indicating test was negative. Despite form being incomplete, this test is included as a negative test because MRO submitted letter stating he conducted 8 follow-up drug tests on Respondent, and this form was included as one of those eight tests. (Cure Ex. 6)].

10. 09/07/18 - observed test verified by MRO. (Cure Ex. 5).

11. 10/04/18 - observed test verified by MRO. (Cure Ex. 5).

12. 10/16/18 - observed test verified by MRO. (Cure Ex. 5).

13. 11/16/18 - observed negative test administered by Dr. Kleeman, MRO. (Cure Ex. 5) [Respondent filled in 11/16/17. Applying chronological order, it looks like he just printed 11/16/17. It should be 2018 because MRO shows 2018].

14. 11/30/18 - observed test verified by MRO. (Cure Ex. 5).

15. 12/07/18 - observed test verified by MRO. (Cure Ex. 5).

16. 12/11/18 - observed test verified by MRO. (Cure Ex. 5).

ATTACHMENT C - APPEAL RIGHTS

33 CFR 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.

33 CFR 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.

33 CFR 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.

33 CFR 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.