

UNITED STATES OF AMERICA
DEPARTMENT OF HOMELAND SECURITY
UNITED STATES COAST GUARD

UNITED STATES COAST GUARD
Complainant

vs.

JAY W. BARNETT,
Respondent

Docket Number CG S&R 02-0681
CG Case No. 1694666

DECISION AND ORDER

Issued: May 13, 2003

Issued by: Honorable Archie R. Boggs, Administrative Law Judge

APPEARANCES:

MST1 Ray S. Robertson
Investigating Officer
United States Coast Guard
Marine Safety Office Mobile
Bldg. 102, Brookley Complex
South Broad Street
Mobile, AL 36615-1390

For the Coast Guard

J. Mac Morgan, Esq.
Post Office Box 24501
879 Robert E. Lee Boulevard
New Orleans, LA 70124

For the Respondent

I. PRELIMINARY STATEMENT

The United States Coast Guard (Coast Guard) initiated this administrative action seeking revocation of Coast Guard License Number 849935, Merchant Mariner's Document, and all certificates or documents issued by the Coast Guard to Jay W. Barnett (Respondent). This administrative action was brought pursuant to the legal authority contained in 46 U.S.C. 7704(c) and its underlying regulations codified at 46 CFR Part 5.

On October 23, 2002, the Coast Guard issued a Complaint charging the Respondent with one count of being a user of or addicted to the use of dangerous drugs. In support of this Complaint, the Coast Guard alleged that on September 17, 2002, the Respondent participated in a random drug test which proved positive for marijuana metabolites. On November 7, 2002, MST1 Ray S. Robertson, Investigating Officer (IO), attempted to initiate settlement options by forwarding a Motion for Approval of Settlement Agreement and Entry of Consent Order to the Respondent. This motion was not adopted by the Respondent and consequently withdrawn by the IO on January 16, 2003.¹

On November 8, 2002, the Respondent filed an Answer and Request for Change of Venue. The Respondent denied the jurisdictional and factual allegations contained in the Complaint and averred Appeal Decision 2535 (SWEENEY) was arbitrary, capricious, and improper rulemaking; thus depriving the Respondent of the ability to raise a statutory defense of cure as provided in 46 U.S.C. 7704(c). On November 25, 2002, for good

¹ The reason cited and relied upon for withdrawal of the motion by the IO was the discovery of a prior positive drug test.

cause shown, Respondent's change of venue request was granted.² The undersigned administrative law judge ordered the hearing location of Daphne Alabama, moved to the Marine Safety Office in New Orleans, Louisiana, and scheduled the hearing for January 29, 2003.

On January 28, 2003 one day before the above-captioned matter was scheduled for hearing the Respondent filed a Verified Motion for Disqualification of the Administrative Law Judge. When the hearing commenced on January 29, 2003, Respondent's Counsel, Mr. Mac Morgan, was afforded an opportunity to argue the motion. After consideration of the Respondent's arguments and applicable law, sufficient reason existed to begin the hearing without further delay and Respondent's Motion was denied.

The hearing was conducted in accordance with the Administrative Procedures Act as amended and codified at 5 U.S.C. 551-559, and Coast Guard procedural regulations set forth at 33 CFR Part 20. The Investigating Officer, presenting the case on behalf of the Coast Guard moved for admission of four exhibits and presented three witnesses. The attorney representing the Respondent introduced seven exhibits and one witness. The list of witnesses and exhibits is contained in Attachment A. The undersigned ordered post-hearing briefs with proposed findings of fact and conclusions of law due on or before March 17, 2003. In the alternative, Respondent filed a Second Verified Motion for Disqualification of the Administrative Law Judge alleging bias. On March 14, 2003, the Coast Guard filed a post-hearing brief and an opposition to Respondent's motion for disqualification. An order denying Respondent's motion for disqualification was entered

² Respondent requested a change of venue in the interest of justice. Respondent provided that some witnesses were located in New Orleans and none of the witnesses were located in Daphne, Louisiana.

on April 4, 2003. Rulings on the Coast Guard's proposed findings of fact are contained in Attachment B.

After careful review of the facts and applicable law in this case, I find that the Coast Guard has established by a preponderance of reliable and credible evidence that Respondent, Jay W. Barnett, was a user of dangerous drugs in violation of 46 U.S.C. 7704(c) as evidenced by the positive test for marijuana metabolites following a random drug test on or about September 17, 2003.³

II. FINDINGS OF FACT

The Findings of Fact are based on a thorough and careful analysis of the documentary evidence, testimony of witnesses, and the entire record.

1. At all relevant times mentioned herein and specifically on or about September 17, 2002, through January 29, 2003, the captioned Respondent was a holder of a United States Coast Guard issued Merchant Mariner's Document and License. (Tr. 9-10).⁴
2. On September 17, 2003, Keystone Shipping Company contacted Marine Medical Unit and requested a random drug test specimen collection from the Respondent. (Tr. 88 and 92).

Moreover, the ALJ's office is located in New Orleans.

³ During the pendency of this case, the United States Coast Guard transferred from the Department of Transportation to the Department of Homeland Security. Pursuant to the Savings Provision of HR 5005 §1512 (PL 107-296), pending proceedings are continued notwithstanding the transfer of the Agency.

⁴ The citations in this Initial Decision and Order are as follows: Transcript followed by the page number, (Tr. ____); Agency Exhibit followed by number (Gov't Ex. ____); and Respondent Exhibit followed by a letter (Resp Ex. ____).

3. Tabitha Straughter, a certified medical assistant/drug screen collector and employee of Marine Medical Unit, boarded a vessel and positively identified the Respondent before collecting the urine specimen.⁵ (Tr. 87-90).
4. Ms. Straughter testified that she follows DOT regulations and verifies the identity of all seamen with picture identification. An individual's identity is verified by a driver's license or merchant mariner's document before collecting the specimen. (Tr. 108-109).
5. When the testing procedure commenced, the Respondent was instructed to remove all items from his pockets and proceed to the restroom to wash his hands. Ms. Straughter handed a cup to the Respondent and instructed him to place a mark on the cup; this demarcation indicated the amount of urine needed. (Tr. 94).
6. When the Respondent returned with the urine sample, Ms. Straughter poured the urine into two containers held by the Respondent. Ms. Straughter proceeded to remove two seals from the bottom of the Chain of Custody form and placed them across the top of each bottle. Once the seal was tightly secured and dated, the Respondent placed his initials on the seal. (Tr. 94-95; Gov't Ex 3).
7. Additional information on the seal includes the specimen identification number which is also referenced on the Chain of Custody form. The purpose of the specimen identification number is to track a particular specimen with the correct donor. (Tr. 95; Gov't Ex 3).

⁵ In this case, Ms. Straughter could not remember whether she verified Respondent's identity with his driver's license or merchant mariner's document. Moreover, she was unable to recall the name of the vessel she boarded to obtain the specimen sample. However, she did recall this particular collection because one of the two vessels, which were docked side-by-side, sank. Ms. Straughter recalled collecting a specimen from the Respondent who was not on the vessel which sank. Ms. Straughter stated, "I was on the right vessel at the right time." (Tr. 103-107).

8. The specimen remained in Ms. Straughter's view prior to being sealed and initialed by the Respondent. (Tr. 93)
9. Following the collection, Ms. Straughter proceeded to complete the Chain of Custody form. According to the report, the specimen was collected for random drug testing of THC, COC, AMP, OPI, or PCP.⁶ The temperature of Respondent's specimen was noted within the acceptable range of 90°F and 100° F. (Tr. 92; Gov't Ex. 3).
10. Respondent executed his signature on the Chain of Custody form and certified that he had not adulterated the specimen in any manner, the specimen was closed with a tamper evident-seal in his presence, and the information provided on the Chain of Custody form and label affixed to the specimen bottle was correct. (Tr. 95-96; Gov't Ex. 3).
11. Ms. Straughter executed her signature on Step 4 of the Chain of Custody form and certified the following, "specimen given to me was by the donor identified in the certification agreement on Copy 2 of this form, was collected, labeled, sealed, and released to the delivery service noted in accordance with the federal shipping requirements."
12. In the afternoon of September 17, 2003, a courier from Quest Diagnostics (Quest) shipped the specimen bottle to its laboratory in Atlanta, Georgia, for drug testing. (Tr. 96-97; Gov't Ex. 3).
13. Scientist, Tomeka Hill, received and processed Respondent's urine specimen on September 18, 2002. (Tr. 40-41; Gov't Ex. 1). Processing the specimen includes

⁶ These abbreviations are commonly known as marijuana, cocaine, amphetamines, opiates, and phencyclidine. (Tr. 41). See also, 49 CFR 40.85

opening the bag, entering the demographics into the computer, and placing the lab accession number label on the chain of custody form. (Tr. 49)

14. Dr. Edward Azary, M.D., laboratory director of Quest, described the testing procedures followed by the laboratory upon receipt of a specimen. The initial screening identifies the negative and positive classes of five certified drugs: marijuana, cocaine, opiates, phencyclidine, and amphetamines. (Tr. 41-42).
15. Here, the test results performed by Ms. Hill and certified by scientist Ellean White proved positive for marijuana metabolite. (Tr. 49; Gov't Ex.1).
16. When the initial testing yields a positive result, the scientist draws a second sample from the original specimen bottle and sends the sample to a gas chromatography mass spectrometry (GCMS) confirmation process. The purpose of the GCMS confirmation is to verify the positive test result. (Tr. 42).
17. Dr. Azary explained that a specimen sample might be rejected if the following occurs: the seal is not intact, identification does not match the accession number, either the name or signature of collector is not on the Chain of Custody form, or evidence of tampering exists. (Tr. 42).
18. Quest produced a final laboratory report which summarized the test results. The final report validated a positive result of 83 nanograms per milliliter of marijuana. (Tr. 46; Gov't Ex. 2). Dr. Azary testified that Quest followed the Department of Transportation workplace protocol for drug and alcohol testing procedures established in CFR Part 40. Further, Dr. Azary testified the results were accurate and reliable. (Tr. 47-48).

19. When a donor tests positive, they are given the opportunity to provide a medical explanation for the positive test result. (Tr. 65). In this case, the positive test results were forwarded to Dr. Stephen Oppenheim, Medical Review Officer, at Greystone Health Sciences (Greystone) on September 19, 2002. (Tr. 48). Greystone provides medical review officer services for the Department of Transportation. (Tr. 58).
20. A second medical review officer, Dr. Thomas Dosumu-Johnson, interviewed the Respondent on September 26, 2002. During the interview, the Respondent failed to provide a verifiable medical explanation for the positive test. (Tr. 66). Dr. Johnson determined after the interview and absent additional evidence, the Respondent did not have a verifiable medical explanation for the positive drug test. (Tr. 66).
21. Dr. Johnson and Dr. Oppenheim, verified the positive test results and executed their signatures on Step 6 of the Chain of Custody Form. (Tr. 62, 65; Exhibit 3).
22. Mr. Ellis, President of Greystone, reported respondent's positive drug test to the Coast Guard in a letter dated September 26, 2002. (Tr. 67; Exhibit 4).

III. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent and the subject matter of the hearing are properly within the jurisdiction vested in the United States Coast Guard under 46 U.S.C. 7704(c); 46 CFR Parts 5 and 16; and 33 CFR Part 20.
2. At all relevant times, Respondent was the holder of his U.S. Coast Guard License (No. 849935) and Merchant Mariner's Document.

3. On September 17, 2002, Respondent participated in a random drug test which proved positive for marijuana metabolites.
4. Respondent's positive drug test created the presumption that he is a user of dangerous drugs under 46 CFR 16.350(a)(1).
5. The Respondent failed to rebut the presumption that he is a user of dangerous drugs.
6. The Coast Guard's allegation that the Respondent was a user of or addicted to dangerous drugs is **PROVED** by a preponderance of reliable and credible evidence.

IV. OPINION

The purpose of Coast Guard suspension and revocation proceedings is to promote safety at sea. See 46 U.S.C. 7701. A mariner's license, certificate of registry, or merchant mariner's document is subject to revocation upon a showing that the holder of such documents has been a user of, or addicted to a dangerous drug. 46 U.S.C. 7704(c). See also Appeal Decision 2634 (BARRETTA), 4. "Congress enacted 46 U.S.C. 7704 with the express purpose of removing those individuals possessing and using drugs from service in the United States merchant marine." BARRETTA at 4. (Citing House Report No. 338, 98th Cong., 1st Sess. 177 (1983)). Under 46 CFR 5.19, the Commandant delegated to the Administrative Law Judges, the authority to suspend or revoke a license or certificate in a hearing for a violation arising under 46 U.S.C. 7704.

A marine employer is responsible for establishing a chemical drug testing program in accordance with 49 CFR Part 40. Coast Guard chemical drug testing

regulations authorize marine employers to conduct pre-employment, periodic, random, serious marine incident, and reasonable cause drug testing. 46 CFR Part 16, Subpart B. If an employee fails the chemical drug test by testing positive for dangerous drugs, the individual is presumed to be a user of dangerous drugs. 46 CFR 16.201(b). See also Appeal Decision 2584 (SHAKESPEARE), 2. The employer is required to remove the employee from duties that directly affect safe operation of the vessel and must report the positive drugs test results to the nearest Coast Guard Officer in Charge, Marine Inspection. 46 CFR 16.201(c).

A. Prima Facie Case of Use of a Dangerous Drug

The Coast Guard must establish a prima facie case to prove the allegation of use of a dangerous drug. SHAKESPEARE, at 2. First, the Coast Guard must demonstrate that the respondent was tested for a dangerous drug. Second, the Coast Guard must show the test was conducted in accordance with 46 CFR Part 16. Id. Once both of these requirements have been satisfied, the burden shifts to the respondent who must produce persuasive evidence to rebut the positive drug test. Id. If the respondent fails to rebut the evidence, the administrative law judge may find the charges proved based upon the presumption alone. Id. See also Appeal Decision 2592 (MASON), 4; Appeal Decision 2603 (HACKSTAFF), 4.

I find that the Coast Guard did establish a prima facie case and proved the Respondent was a user of dangerous drugs in violation of 46 U.S.C. 7704(c). The Coast Guard demonstrated that the Respondent was tested for marijuana metabolites; a dangerous drug enumerated under 49 CFR 40.85. Further, I find the drug test was conducted in accordance with Department of Transportation Guidelines in 49 CFR Part

40. (Tr. 40-49, 62,65; Gov't Ex. 1, 2, and 3). No evidence was presented to suggest the positive test results were compromised in any manner or should not be relied upon.

In contrast, I do not find that the Respondent carried his burden to rebut the positive drug test. The Respondent was interviewed by the MRO after the positive drug test and did not provide a verifiable medical explanation for the positive test results for dangerous drugs. (Tr. 66). Moreover, the Respondent has not challenged or attempted to explain the positive test results for marijuana metabolites. I find that the Coast Guard has proved by substantial, reliable and probative evidence that the charge of use of or addiction to the use of dangerous drugs proved. Appeal Decision 2603 (HACTSTAFF), 3-4.

B. Proof of Cure as Required Under Sweeney

Use of a dangerous drug has been proved, therefore an order of revocation of Respondent's license and merchant mariner's document issued by the Coast Guard is required under 46 U.S.C. 7704(c) and Appeal Decision 2535 (SWEENEY) until cure is proven. SWEENEY defined "cure" as a two step process:

1. The respondent must have successfully completed a bona fide drug abuse rehabilitation program designed to eliminate physical and psychological dependence.
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.

SWEENEY, 4. The Respondent bears the burden of establishing cure. Appeal Decision 2526 (WILCOX), 2.

Finally, a MRO must verify that the mariner is drug-free, the risk of subsequent drug use is sufficiently low to justify his return to work, and the mariner must agree to

unannounced testing. 46 CFR 16.201(f). A Respondent may request a continuance to the suspension and revocation hearing to demonstrate substantial involvement in the cure process by proof of enrollment in an acceptable rehabilitation program. SWEENEY, 5.

Here, the Respondent argued that the National Transportation Safety Board (NTSB) reversed the definition of cure established in SWEENEY and moved for a continuance of six months so he can complete his cure program. (Tr. 116-119, 152-154).⁷ The Respondent desires this ALJ to adopt the definition of “cure” from a clinical substance abuse diagnosis. (Tr. 119).

The Respondent presented Kurt Schenker, a certified drug and alcohol counselor, as an expert witness. (Tr. 130). Mr. Schenker recommended that the Respondent attend an outpatient evening program, six months of after care, and random drug testing. (Tr. 133-134). On October 11, 2001, Mr. Schenker evaluated and performed a Substance Abuse Subtle Screening Inventory (SASSI) on the Respondent. (Tr. 130-131). Mr. Schenker concluded that the Respondent had a low probability of having a substance abuse problem. (Tr. 132). Mr. Schenker concluded that the Respondent’s participation in Alcoholics Anonymous meetings coupled with his earlier SASSI assessment, demonstrated that the Respondent has started the “cure” process. (Tr. 134).

Despite Respondent’s passionate argument that SWEENEY was reversed by the NTSB therefore the cure process should be ordered to six months following the successful completion of a drug rehabilitation program, opposed to one year non-association with drugs, is denied. Review of NTSB Order No. EM-165 intimated no

⁷ Any party may appeal the ALJ’s decision to the Commandant of the Coast Guard. See 33 CFR Part 20 Subpart J – Appeals: see also infra Attachment C. The National Transportation Safety Board (NTSB) reviews decisions of the Commandant, U.S. Coast Guard, which suspend or revoke mariner licenses, certificates or other documents issued by the Coast Guard. 46 CFR Part 5 – Subpart J.

view on the validity of the Vice Commandant's proposed definition of cure under 46 U.S.C. 7704(c). Commandant v. Sweeney, 2 NTSB 5744 (Order ME-152, 1992), 5. The NTSB did not review or consider Commandant's decision regarding the definition of cure because the parties did not litigate the meaning of the statute. Id. The NTSB did not reverse SWEENEY or the definition of cure; it merely offered no view on its definition.

The definition of cure established in SWEENEY was followed and upheld on March 6, 2003, in Appeal Decision 2638 (PASQUARELLA). The Commandant held that the one-year non-association with drugs was a mandatory requirement. Id. at 8. Thus, an order mandating less than one-year non-association with drugs following the successful completion of a drug rehabilitation program as the Respondent proposes would not only be improper, it would be contrary to established authority and precedent.

V. SANCTION

Once the Coast Guard has proved a mariner used or was an addict of dangerous drugs, his license or document must be revoked unless cure is proven. SWEENEY, at 3. Absent evidence of cure, an ALJ must revoke Respondent's license and document. Appeal Decision 2583 (WRIGHT), 4; 46 CFR 5.569(d). In contrast, when Respondent demonstrates "substantial involvement in the cure process by proof of enrollment in an accepted [drug] rehabilitation program," an ALJ may stay the revocation and continue the suspension and revocation hearing. Id. at 4-5. (emphasis added). See also Review Decision 18 (CLAY), 1; Appeal Decision 2526 (WILCOX), 3 (ALJ has discretion to grant or deny a continuance). During the continuance period, the Coast Guard retains

respondent's license and/or document because the mariner is deemed to be a threat to public safety. (PASQUARELLA), 5-6.

However, Coast Guard law and policy does not favor giving a Respondent with a prior record of drug use two opportunities to avoid an order of revocation. Title 46 CFR 5.201(b)(4) prohibits the voluntary deposit of a mariner's documents to prove cure when a respondent has a prior record of drug use:

(b) Where the mental or physical incompetence of a holder of a license, certificate, or document is caused by use of or addition to dangerous drugs, a voluntary deposit will only be accepted contingent on the following circumstances:

* * *

(4) The holder has not voluntarily deposited or surrendered a license, certificate, or document, or had a license, certificate, or document revoked for a drug related offense on a prior occasion.

Accordingly, consideration of Respondent's prior record of drug use in determining a sanction is appropriate. See 46 CFR 5.569(d) (repeat offenders ordinarily receive a greater order); Appeal Decision 2219 (BUFORD), 3 (proper for Administrative Law Judge to consider mariner's prior record after charges were proved). Further, an "overriding interest in assuring that merchant vessel personnel performing duties which directly affect the safety of a vessel's navigation or operations do so free from [dangerous drugs]." See Programs for Chemical Drug and Alcohol Testing of Commercial Vessel Personnel, 53 FR 47064, 47065 (Nov. 21, 1988) (to be codified at 46 CFR Parts 4, 5, and 16); see also Appeal Decision 2633 (MERRILL), 6.

In this case, the fact that the Respondent previously participated in the cure program after testing positive for dangerous drugs on or about May 28, 1996, precludes an order less than revocation from being issued. Even if the Respondent did not have a

prior record of drug use, a continuance for the limited purpose of showing cure would still not be appropriate because the Respondent has failed to show substantial involvement in the cure process by proof of enrollment in an accepted drug rehabilitation program. Testimony of Respondent's expert witness, Kurt Schenker, that Respondent's participation in Alcoholics Anonymous (AA) meeting is considered a "step" in the cure process, (Tr. 134), is rejected.


A "bona fide drug abuse rehabilitation program" is defined as a program designed to eliminate physical and psychological dependence on drugs, which is 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).

SWEENEY, 4. AA on the other hand is a support group for men and women seeking to maintain sobriety from alcohol. See generally A.A. at a Glance, http://www.alcoholics-anonymous.org/default/en_about_aa.cfm?pageid=1 (last visited May 1, 2003). AA does not keep membership records or case histories, make medical or psychiatric prognosis, or provide letters of reference to agencies or employers. Id. Therefore, AA is not a bona fide drug abuse rehabilitation program contemplated by SWEENEY.

VI. ORDER

IT IS HEREBY ORDERED, that United States Coast Guard Licenses No. 849935 and Merchant Mariners' Document and all certificates of service issued by the Coast Guard to Jay W. Barnett, are hereby **REVOKED**, and shall be immediately surrendered to the United States Coast Guard, Marine Safety Office, 1615 Poydras Street, Room 737, New Orleans, Louisiana.

PLEASE BE ADVISED THAT THE SERVICE OF THIS decision on Respondent's counsel will serve as notice to the Respondent of his right to appeal. The rules and procedures governing administrative appeals are set forth in 33 CFR 20.1001-20.1003. Attachment C.



ARCHIE R. BOGGS
Administrative Law Judge
U.S. Coast Guard

Dated this 13th day of May, 2003
New Orleans, Louisiana