

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

UNITED STATES COAST GUARD
Complainant

vs.

NATHAN WAYNE JELM,
Respondent.

Docket Number CG S&R 03-0289
CG No. 1779692

DECISION AND ORDER

Issued: December 5, 2003

Issued by: Honorable Thomas E. McElligott, Administrative Law Judge

Appearances:

ENS C. Nicholas Parham,
Investigating Officer
CWO Raymond Colicci,
Assistant Investigating Officer
800 David Drive
Room 232
Morgan City, Louisiana 70380

For the Coast Guard

Nathan Wayne Jelm, Pro Se

For the Respondent

PRELIMINARY STATEMENT

The United States Coast Guard (Coast Guard) by Investigating Officers of the Marine Safety Office Morgan City, Louisiana initiated this administrative action seeking revocation of the Coast Guard License and Merchant Mariner's Document issued to Nathan Wayne Jelm (Respondent). This administrative action was brought pursuant to 46 U.S.C. 7703 and 7704(c) and its underlying regulations codified at 46 CFR Part 5.

On April 30, 2003, the Coast Guard issued a Complaint alleging use of or addition to dangerous drugs as a result of Respondent's positive reasonable cause drug test on April 9, 2003. The Coast Guard also charged Respondent with misconduct for possession and intoxication of alcohol in violation of company policy. The Administrative Law Judge Docketing Center received an Answer dated May 13, 2003. Respondent admitted the jurisdictional and factual allegations but denied paragraph 5. Factual paragraph 5 alleged he tested positive for cocaine metabolite. Respondent explained in his Answer that Dr. Smith, from LaFourche Services, Inc., contacted him regarding a positive drug test for marijuana not cocaine metabolite. On July 7, 2003, the Coast Guard filed an Amended Complaint to correct paragraph 5. Respondent filed an Answer to the Amended Complaint and admitted all factual allegations and requested a hearing on the proposed order of revocation.

The undersigned Administrative Law Judge (ALJ) scheduled the hearing for August 6, 2003, at the Marine Safety Office in Morgan City, Louisiana.¹ The hearing proceeded in accordance with the Administrative Procedure Act as amended and codified

¹This matter was originally assigned by order of the Chief Administrative Law Judge to The Honorable Archie Boggs. During the pendency of this case, ALJ Boggs announced his retirement and the Chief Administrative Law Judge re-assigned this matter to The Honorable Thomas E. McElligott, Administrative Law Judge.

at 5 U.S.C. 551-559, and Coast Guard procedural regulations set forth at 33 CFR Part 20.

The Investigating Officer (IO) presented one witness and introduced seven exhibits.

Respondent did not present witness testimony or testify on his on behalf; but did introduce and the Undersigned accepted eight exhibits into evidence. The witness and exhibit lists are located in Attachment A.

After careful review of the factual allegations admitted by Respondent and applicable law in this case, I find the Coast Guard **PROVED** the charges that Respondent used or was addicted to marijuana and violated the Substance Abuse Policy issued by Kevin Gross Marine, Inc. resulting in misconduct.

FINDINGS OF FACT

The Findings of Fact are based on a thorough and careful analysis of the entire record including: documentary evidence; witness testimony; and Respondent's admissions.

1. At all relevant times mentioned herein and specifically on or about April 9, 2003 through August 4, 2003, the above-captioned Respondent held and acted under his Coast Guard issued License and Merchant Mariner's Document as required by law or regulation. (Tr. 6-7; Gov't Ex. 8, 9).²
2. Kevin Gross Marine, Inc. (Gross Marine), employed Respondent on April 9, 2003, to serve as captain (master) aboard the M/V ROSEANNA. (Tr. 42-45; Gov't Ex. 1).

² 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. The M/V ROSEANNA is an offshore supply vessel, which carries dry bulk such as cement, liquid mud, fuels, water, and deck cargo for the offshore oilfield industry. The M/V ROSEANNA operates with a four person crew and is certified to carry up to 14 passengers. (Tr. 36-37).
4. On April 9, 2003, the Coast Guard and Harbor Police in Fouchon, Alabama, contacted Bruce Kennedy, Port Engineer and Health Safety Coordinator for Gross Marine. The authorities informed Mr. Kennedy of a report concerning possible drug activity on the M/V ROSEANNA. Mr. Kennedy along with the Coast Guard and Harbor Police boarded the vessel and performed "a walk through." (Tr. 29-30).
5. Mr. Kennedy immediately contacted LaFourche Services to arrange for a specimen collector to perform alcohol and drug testing of the entire crew. (Tr. 30-31).
6. The crew assembled in the galley and Mr. Kennedy explained that a search of the vessel rooms would commence. The search included removal of bunks and lockers. During the search of their rooms, crewmembers were allowed to accompany Mr. Kennedy. (Tr. 33).
7. Mr. Kennedy notified the crew that drug and alcohol tests would be performed contemporaneously with the vessel search. (Tr. 34).
8. During the vessel search, Mr. Kennedy discovered a fifth of vodka and marijuana cigarette residue in Respondent's room. Respondent did not share the room with another crewmember, and Mr. Kennedy testified that alcohol was missing from the bottle of vodka. (Tr. 35).

9. Craig Hendrix, representative from LaFourche Services, collected urine from Respondent for a drug test. Mr. Hendrix also performed a blood alcohol content breath test. (Tr. 31-36; Resp Ex. B and C).
10. Respondent's breath tested positive for alcohol. The blood alcohol content test measured .069 and a confirmation test measured .066. (Tr. 17-18, 35; Gov't Ex. 3).
11. Respondent submitted to a reasonable suspicion/cause drug test on April 9, 2003. The specimen tested positive for marijuana metabolite. (Tr. 17, 20; Gov't Ex. 2, 4, 5, 6 and 7).
12. Mr. Kennedy immediately removed Respondent from the vessel after testing positive for alcohol. (Tr. 36).
13. Respondent admitted all factual allegations detailed in the Complaint, Amended Complaint and facts presented at the hearing. (Tr. 14-15, 46, 49-50; Resp Ex. 1 -- 3).³

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent and the subject matter of this hearing are within the jurisdiction vested in the Coast Guard under 46 U.S.C. 7703 and 7704.
2. At all relevant times, Respondent held and acted under his United States Coast Guard License and Merchant Mariner's Document as required by law or regulation.

³After the Coast Guard rested, the Undersigned ALJ asked whether Respondent desired to testify and Respondent volunteered the following statement, "No, Your Honor... I've already made the statement of guilt and everything—all the allegations are true I was completely out of control and misconduct one hundred percent." (Tr. 49-50).

3. The Coast Guard **PROVED** by a preponderance of reliable, probative, and substantial evidence that on April 9, 2003, Respondent used or was addicted to the use of dangerous drugs.
4. The Coast Guard also proved by a preponderance of reliable, probative, and substantial evidence that on April 9, 2003, Respondent committed misconduct by possessing alcohol and being intoxicated aboard the M/V ROSEANNA which constitutes a violation of company policy.

DISCUSSION

The purpose of Coast Guard suspension and revocation proceedings is to promote safety at sea. 46 U.S.C. 7701. The Commandant delegated to Administrative Law Judges the authority to suspend or revoke a license or certificate for violations arising under 46 U.S.C. 7703 and 7704. See 46 CFR 5.19. Here, the Coast Guard charged Respondent with the use of or addiction to the use of dangerous drugs and misconduct arising under 46 U.S.C. 7703 and 7704(c). See also 46 CFR 5.35 and 5.27. The Coast Guard seeks revocation of Respondent's License and Merchant Mariner's Document. In contrast, Respondent requests the opportunity to prove cure as established by Appeal Decision 2535 (SWEENEY) (1992) (rev'd on other grounds); see also Appeal Decision 2546 (SWEENEY) (1992) (holding that the definition of cure established in Appeal Decision 2535 (SWEENEY) will remain in effect).

Generally, the Coast Guard bears the burden of proving charges by a preponderance of the evidence. See 33 CFR 20.701 and 20.701(a). Preponderance of evidence requires reliable, probative and substantial evidence. 5 U.S.C. 556(d); see also

Appeal Decision 2477 (TOMBARI) (1988) (“The term substantial evidence is synonymous with preponderance of the evidence as defined by the Supreme Court.”). However, an admission of all facts by a respondent constitutes a waiver of all non-jurisdictional defects and defenses and is sufficient to support a finding of charges proved. Appeal Decision 2376 (FRANK) (1985). Here, the Coast Guard satisfied the burden of proof because Respondent admitted to all factual and jurisdictional allegations. The only remaining issue is determination of the appropriate sanction.

SANCTION

The authority to impose sanctions at the conclusion of a case is exclusive to the Administrative Law Judge (ALJ). Appeal Decision 2362 (ARNOLD) (1984). Title 46 of the Code of Federal Regulations Part 5 Section 569 provides the Table of Suggested Range of Appropriate Orders for various offenses. The purpose of the Table is to provide guidance to the ALJ and promote uniformity in orders rendered. Appeal Decision 2628 (VILAS) (2002). The offense of misconduct, possession of intoxicating liquor, is a 1-4 month suspension and dangerous drug use under 46 U.S.C. 7704 is revocation. See Table 46 CFR 5.569. However, the ALJ is not bound by the Table and is given discretion to exceed the suggested range or impose a sanction less severe depending on the presence of aggravating or mitigating factors. Id.

The appropriate sanction for use of a dangerous drug alleged under 46 U.S.C. 7704 (c) is revocation unless the holder can provide satisfactory proof the holder is “cured.” Appeal Decision 2634 (BARRETTA) (2002). The respondent carries the burden of establishing “cure”. Appeal Decision 2526 (WILCOX) (1991). In Appeal

Decision 2535 (SWEENEY), a two step cure process was established. First, a mariner must prove completion of a bona fide drug abuse rehabilitation program. Second, a mariner must demonstrate complete non-association with drugs for at least one year. And participate in a drug abuse monitoring program. This includes random unannounced drug testing. Id. at 4-5. Further, a Medical Review Officer must make a determination whether an individual who fails a drug test is drug-free and risk of subsequent drug use is low. 46 CFR 16.201(f).

Although Appeal Decision 2535 (SWEENEY) was reversed on other grounds, the Commandant held the definition of cure stated in the first SWEENEY decision was to remain in effect for all future drug related cases. Appeal Decision 2546 (SWEENEY). When a Respondent has demonstrated substantial involvement in the cure process, an ALJ has the authority to grant a continuance. Appeal Decision 2535 (SWEENEY). The purpose of effectuating a continuance allows the ALJ to stay the revocation of a license or other document while Respondent completes the SWEENEY two-step cure process. Appeal Decision 2634 (BARRETTA). In contrast, the opportunity to prove cure is not appropriate if respondent merely promises to commence steps for the cure process. Appeal Decision 2535 (SWEENEY).

The Coast Guard seeks revocation of Respondent's License and Merchant Mariner's Document. In support of revocation, the Coast Guard requests the undersigned to take notice of Appeal Decision 2539 (HARRISON) (1992) and Appeal Decision 2098 (CORDISH) (1977). These decisions are unpersuasive and irrelevant. HARRISON was a negligence case involving an allision. Here, Respondent was not charged with negligence, and an allision did not occur. Therefore, HARRISON does not apply to the

law or facts. In CORDISH, the respondent refused to obey the chief mate's orders. Here, Respondent cooperated with authorities conducting the search. Again, CORDISH does not apply to the facts or law in this case.

Respondent submitted documentation supporting his steps to effectuate cure in accordance with SWEENEY. Worth Wilkinson, MD, is licensed to practice medicine and surgery in the State of Louisiana. In a letter dated August 31, 2003, Dr. Wilkinson explained Respondent would be meeting with him on a weekly basis to progress in his drug rehabilitation program. Further, a second letter from Liz O'Connor filed with the Undersigned ALJ, explained Respondent would be provided with treatment for his chemical dependency.⁴ Ms. O'Connor prescribed the following treatment: daily AA/NA meetings (with signed attendance sheet), obtain a sponsor in the above 12-step program, work the 12 steps of AA/NA, develop a relapse prevention plan, meet with Ms. O'Connor on a weekly basis, and participate in random drug screens.

Respondent requested an order implementing the SWEENEY cure process; this request will be granted. Respondent accepted full responsibility for his actions, does not have a prior record of violations of Coast Guard laws and regulations, and immediately sought counseling for his chemical and personal problems. I conclude Respondent is substantially involved in the cure process and sufficient mitigating facts support my decision of cure. See Resp Ex. A – H.

⁴ Several designations followed Ms. O'Connor's name: MA, BCSAC, AADC, and CCGC.

WHEREFORE,

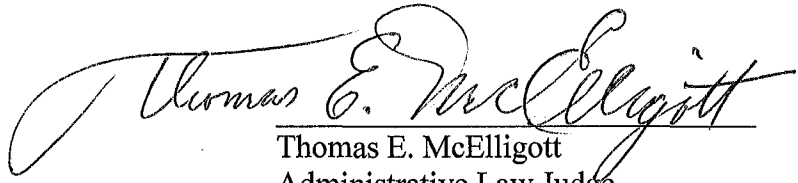
ORDER

IT IS ORDERED that the United States Coast Guard License, Merchant Mariner's Document, and all other valid unexpired Coast Guard documents, licenses, certificates and authorizations issued to Nathan Wayne Jelm are hereby **REVOKED**. Revocation is effective August 6, 2003; date of the suspension and revocation hearing. However, the revocation is **STAYED** and this hearing is continued in order to allow Respondent to complete the cure two-step process as detailed by Appeal Decision 2535 (SWEENEY).

Respondent is ordered to attend a substance abuse monitoring program and drug rehabilitation program that shall be completed no later than August 5, 2004. These programs shall include Respondent's participation in random, unannounced drug-testing program during the one year monitoring program. Following Respondent's successful completion of rehabilitation and monitoring program, a letter from a Medical Review Officer is required. The MRO letter must indicate that Respondent is drug-free and the risk of Respondent's future use of dangerous drugs is sufficiently low to justify his return to work. Successful completion of the SWEENEY cure conditions described above will **SUSPEND** the order of revocation.

IT IS FURTHER ORDERED, if Respondent fails to complete the conditions of cure, his License, Merchant Mariner's Document, all duplicate and other valid and unexpired Coast Guard documents, licenses, certificate and authorizations will be **REVOKED**.

IT IS FURTHER ORDERED that Respondent's License, Merchant Mariner's Document, and all valid unexpired Coast Guard documents, license, certificates and authorizations are hereby suspended for four months for possession and intoxication of alcohol in violation of Gross Marine Substance Abuse Policy. The four month suspension for the aforementioned misconduct charge shall run contemporaneously with the cure process ordered in this matter.

A handwritten signature in cursive script that reads "Thomas E. McElligott". The signature is written in black ink and is positioned above a horizontal line.

Thomas E. McElligott
Administrative Law Judge
United States Coast Guard

Done and dated this 5th day of December, 2003
Houston, Texas