UNITED STATES OF AMERICA

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

UNITED STATES COAST GUARD

Complainant

vs.

AUBREY THOMPSON

Respondent.

Docket Number: CG S&R 04-0316
CG Case No. 739975

DECISION AND ORDER

Issued: October 13, 2004

Issued by: Jeffie J. Massey, Administrative Law Judge

Appearances:
LCDR Ron Patrick and CWO Jason Boyer
U.S. Coast Guard
MSO Morgan City
800 David Drive, Room 232
Morgan City, Louisiana 70380

For the Coast Guard

Mr. Aubrey Thompson, pro se

For Respondent

PRELIMINARY STATEMENT

The United States Coast Guard (Coast Guard or USCG) initiated this administrative proceeding under 46 U.S.C. 7703 and 7704 seeking revocation of the Merchant Mariner's License issued to Respondent Aubrey Thompson. On June 16, 2004, the Coast Guard MSO Morgan City, Louisiana filed a Complaint[1] alleging Respondent was a user of dangerous drugs and committed an act of Misconduct by submitting a fraudulent renewal application. The jurisdictional allegations listed Respondent's address and telephone number and stated Respondent was a holder of a Coast Guard issued license. The factual allegations alleged that Respondent was a user of dangerous drugs, because a post accident drug test taken on February 22, 2000 tested positive for marijuana. The factual allegations also alleged Respondent committed an act of Misconduct while acting under the authority of his Coast Guard license by submitting a fraudulent application for renewal of his license on April 2, 2001. Respondent filed an Answer on June 16, 2004 admitting all jurisdictional allegations and denying all factual allegations.

The hearing was originally scheduled to commence on Wednesday, August 18, 2004 at 1 p.m. in Morgan City, Louisiana, but was rescheduled and commenced on August 17, 2004 at 9:30 a.m. At the hearing, the following exhibits were admitted into evidence at the Coast Guard's request: (1) the Complaint and Answer, (2) a copy of Respondent's license, (3) a copy of Respondent's application for renewal, and (4) a letter from the Coast Guard denying Respondent's application for renewal. The Coast Guard did not call any witnesses to testify. Respondent testified as part of his case, and two exhibits were admitted into evidence at his request.

[1] The Complaint's certificate of service is dated May 21, 2004, but the Complaint was not filed with the Docketing Center until June 16, 2004.

As a procedural note, the government's representative wanted to explain his documentary evidence to the undersigned judge. I explained that if he were attempting to offer information that supplements the documents already in evidence then he would have to be placed under oath as a witness. (Tr. at 26-27). After a short recess, the government decided not to go forward with any witnesses and declined to submit additional information through testimony. (Tr. at 26-27). At one point, Respondent indicated that he wanted to question the Investigating Officer to prove the Coast Guard makes mistakes. (Tr. at 25-26). However, Respondent did not press this issue. Since the issue of whether the Coast Guard had "made a mistake" would be subsumed in the findings of this decision, I did not find it necessary to press the Investigating Officer into testifying if he did not voluntarily offer himself, which he chose not to do after considering it during the recess.

After the hearing, both parties filed post-hearing briefs. Respondent's brief was filed on August 30, 2004, and the Coast Guard filed its brief along with a Motion for Extension on September 2, 2004. Respondent's brief argued that he has been completely honest with the Coast Guard, he did everything the Coast Guard asked of him, and this case is the result of a lack of communication between the Coast Guard's New Orleans office and the Morgan City Office. The Coast Guard's brief argued that the user of dangerous drugs allegation was established by Respondent's admission, and Respondent failed to offer any evidence of substantial involvement in the cure process. Additionally, the Coast Guard argued that Respondent's answer on his renewal application to the question "Have you ever been a user of or been addicted to a dangerous drug?" was inaccurate, and under Appeal Decision 2569 (TAYLOR) (1995), revocation is required when there is fraud in the procurement of a license.

FINDINGS OF FACT

1. Respondent is a holder of a Coast Guard issued license authorizing him to serve as master aboard steam or motor vessels of not more than 100 gross registered tons upon inland waters.

2. Respondent was convicted of possession of marijuana in St. Mary Perish, Louisiana in 1999. (Tr. at 39). Respondent also took a drug test that was positive for marijuana in 2000. (Tr. at 19, 41).

4. As a result of Respondent's 1999 conviction for marijuana possession, Respondent was fined approximately $1200.00, given two and a half years probation, and was required to attend a drug treatment program at ADAC. (Tr. at 54). As part of his probation, Respondent was required to see his probation officer once a month and submit to drug screens upon request. (Tr. at 54). Respondent has been discharged from his probation. (Tr. 54-55). In addition, the court mandated attendance of education for 8 sessions as well as participation in two AA meetings per week. (Resp't Ex. 01). A letter dated February 2, 2001 written on the State of Louisiana Department of Health and Hospitals stationary indicated Respondent's satisfactory completion at the St. Mary Parish Addictive Disorders Clinic. (Resp't Ex. 01).

5. On April 2, 2001, Respondent filed an application to renew his Coast Guard issued license authorizing him to serve as master of steam or motor vessels of not more than 100 gross upon inland waters. (IO Ex. 03).

6. Originally, Respondent was not going to renew his license, because he did not think he had a chance with his conviction for possession of marijuana and positive drug test result. (Tr. at 59-60). However, Respondent called the Coast Guard and freely discussed his conviction for possession and his positive test result with T.J. Turner, because Respondent wanted to know

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Center until June 16, 2004.

what his chances were. (Tr. at 59-60). T.J. Turner was the Officer in Charge of Marine Inspection for New Orleans, Louisiana. (IO Ex. 02).

7. Respondent was asked to send everything to the Coast Guard, and then the Coast Guard and Respondent would concentrate on the conviction. (Tr. at 60).

8. In a letter dated April 5, 2001 from the Coast Guard's Regional Exam Center in New Orleans, Louisiana to Respondent, the Coast Guard denied Respondent's application because of his conviction for possession of marijuana in 1999. (IO Ex. 04). The letter also explained Respondent's options and stated Respondent's first option was submit a copy of the police arrest report and an evaluation by a state licensed drug abuse counselor or a board certified social worker with training and experience in drug abuse. (IO Ex. 04). After receiving the letter, Respondent spoke with Lt. Lutman, and he told Respondent what he thought would be Respondent's best option. (Tr. at 48). Lt. Lutman was assigned to the New Orleans Marine Safety Office Regional Exam Center. (IO Ex. 04).

9. Respondent submitted a copy of the police arrest report and an evaluation by a certified social worker. (Tr. at 51-52).

10. Respondent was evaluated for chemical dependency by a licensed clinical social worker, and in a letter dated April 26, 2001, the social worker informed Lt. Lutman USCG of her evaluation of Respondent. (Resp't Ex. 01). The letter stated Respondent was given the Sassi-3 test, and the results did not reflect a current substance dependence disorder. (Resp't Ex. 01). The letter also stated Respondent showed the social worker a letter from the State of Louisiana Department of Health and Hospitals indicating Respondent's satisfactory completion at the St. Mary Parish Addictive Disorders Clinic. (Resp't Ex. 01).

11. On May 1, 2001, the Coast Guard renewed Respondent's license authorizing him to serve as master of steam or motor vessels of not more than 100 gross tons upon inland waters. (IO Ex. 02). Respondent's license expires on May 1, 2006. (IO Ex. 02). The name "T. J. Turner III, MK3, USCG, by Dir." appears on the line for Officer in Charge of Marine Inspection on Respondent's license. (IO Ex. 02).

12. As of the hearing date, neither Respondent nor the Coast Guard had been able to locate T.J. Turner. (Tr. at 32).

13. The renewal application contained the following question, "Have you ever been a user of/or addicted to a dangerous drug? (including marijuana)." (IO Ex. 03). Respondent answered "no", because he had not been addicted and the Coast Guard was already aware of his positive test result. (IO Ex. 03; Tr. at 30-32). I find that the Respondent answered this question to the best of his ability.

14. The application also asked if any court, including military court, had ever convicted Respondent of any offense other than a minor traffic violation, and to which, Respondent stated that he had been convicted of possession of marijuana. (IO Ex. 03).

15. In a letter dated November 13, 2004 from Respondent's marine employer to the Coast Guard, Respondent's marine employer recommended the Coast Guard favorably consider his application for any license or renewal. (Resp't Ex. 02). The letter also stated that between November 13, 2000 and November 13, 2001 Respondent was subject to random drug test by his marine employer and did not fail or refuse a drug test. (Resp't Ex. 02).

16. Respondent has less than a seventh grade education. (Tr. at 58-59).

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent is a holder of a Coast Guard issued license authorizing him to serve as master aboard steam or motor vessels of not more than 100 gross registered tons upon inland waters.

2. The Coast Guard failed to prove by a preponderance of the evidence that sanctions are warranted against Respondent's license under 46 U.S.C. 7704(c), because the evidence shows cure, the Coast Guard was aware of the circumstances, and the Coast Guard found Respondent suitable for service in the merchant marine.

3. The Coast Guard failed to prove the existence of a positive drug test, within the meaning of 46 Part 16.

4. The Coast Guard's allegation that Respondent committed Misconduct by filing a fraudulent application for renewal is time barred.

DISCUSSION

The Administrative Procedure Act (APA), 5 U.S.C. 551-59, governs Coast Guard suspension and revocation hearings. 46 U.S.C. 7702(a). The APA only authorizes sanctions to be imposed if, upon consideration of the record as a whole, the charges are supported by reliable, probative, and substantial evidence. 5 U.S.C. 556(d). "The term substantial evidence is synonymous with preponderance of the evidence as defined by the Supreme Court." Appeal Decision 2477 (TOMBARI) (1998). The burden of proving a claim by a preponderance of the evidence "simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence.'" Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 622 (1993)(citing In re Winship, 397 U.S. 358, 371-72 (1970)(Harlan, J., concurring)(brackets in original)). Under

Coast Guard procedural regulations, the Coast Guard bears the burden of proving the charges by a preponderance of the evidence. 33 CFR 20.701, 20.702(a). Therefore, the Coast Guard must prove with reliable and probative evidence that Respondent more likely than not committed the violations charged.

In these proceedings, the Administrative Law Judge is vested with broad discretion to determine witness credibility and resolve inconsistencies in the evidence, and the findings of the Administrative Law Judge are not required to be consistent with all the evidence in the record as long as there is sufficient evidence to justify the finding. Appeal Decision 2639 (HAUCK) (2003). In this case, I find Respondent is credible, and the record as a whole supports his testimony. I note that Respondent has less than 7th grade education, and on his application for renewal, in response to the question "citizenship," Respondent answered "yes" when clearly the question was asking for the country of citizenship. (Tr. at 58-59; IO Ex. 03). In the strictest of technical terms, Respondent's answer to that question was not 100% true. However, I cannot find it to be fraudulent under the facts of this case. See Appeal Decision 809 (MARQUES) (1955) (A fraudulent statement is a statement made with either actual or constructive knowledge that it was incorrect.).

A. USER OF DANGEROUS DRUGS ALLEGATION

In this case, the Coast Guard alleged Respondent took a post accident drug test, Respondent signed a Federal Drug Testing and Control Form, Respondent's urine specimen was collected and analyzed using procedures approved by the Department of Transportation, and the specimen tested positive for marijuana. Title 46 U.S.C. 7704(c) provides that a license, certificate of registry, or merchant mariner's document (MMD) shall be revoked if it is shown that the holder has been a user of, or addicted to, a dangerous drug unless he can prove

satisfactory cure. 46 U.S.C. 7704(c). A "dangerous drug" is defined as "a narcotic drug, controlled substance, or a controlled substance analog (as defined in section 102 of the Comprehensive Drug Abuse and Control Act of 1970). 46 U.S.C. 2101(8a). A "controlled substance" is further defined as a "drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter." 21 U.S.C. 802. Any material containing any quantity of "Marihuana" is listed under Schedule I(c) of the controlled substances schedules. 21 U.S.C. 812(c). Based on Respondent's admission that he was a user of dangerous drugs and had a positive drug test for marijuana, I find Respondent is a user of dangerous drugs.

However, this now raises the question of whether Respondent has shown cure. Cure is a two step process that requires the Respondent to have successfully: (1) completed a bona fide drug abuse rehabilitation program and (2) demonstrated complete non-association with drugs for one year after successful completion of the rehabilitation program. Appeal Decision 2535 (SWEENEY) (1992), *rev'd on other grounds sub nom.* Commandant v. Sweeney, NTSB Order No. EM-152 (1992). The second prong of the SWEENEY test involves participation in random, unannounced drug tests. Appeal Decision 2535 SWEENEY (1992).

Although this test has been described as two step process, Appeal Decision 2638 PASQUARELLA (2003) raises the question of whether a third prong applies to the definition of cure in this case. In PASQUARELLA, the Coast Guard proved a DOT drug test resulted in a positive test result, and on appeal the Commandant, citing 46 CFR 16.201(f), held that cure required completion of the two pronged SWEENEY test as well as a finding by a Medical Review Officer that the respondent's risk of returning to drugs was low.

Section 16.201(f) of Title 46 of the Code of Federal Regulations partly provides that "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." However, unlike PASQUARELLA where the Coast Guard proved the respondent took pre-employment drug test and the test was conducted in accordance with 49 CFR Part 40, in this case, the Coast Guard failed to offer any evidence regarding the alleged drug test. There is no evidence in the record to show that the test was required by 46 CFR Part 16. Under 46 CFR 16.240 marine employers are required to ensure that all persons directly involved in a serious marine[2] incident are chemically tested for evidence of dangerous and drugs and alcohol in accordance with the requirements of 46 CFR 4.06. Although the Coast Guard alleges the drug test was the result of an accident, the Coast Guard did not offer any evidence of a serious marine incident, so there is no way to determine if the drug test was required by 46 CFR Part 16 Subpart B. Therefore, 46 CFR 16.201(f) by its own terms does not apply in this case.

Additionally, 46 CFR 16.201(f) does not apply to this case, because the Coast Guard did not prove Respondent failed a drug test within the meaning of 46 CFR Part 16. The phrase "fails a chemical test for dangerous drugs" means "the result of a chemical test conducted in accordance with 49 CFR 40 was reported as positive by a Medical Review Officer because the chemical test indicated the presence of a dangerous drug at a level equal to or exceeding the levels established in 49 CFR part 40." 46 CFR 16.105. Using the case law discussing the evidentiary burden that the Coast Guard must meet to show that individual failed a chemical test for dangerous drugs and is presumed to be a user of dangerous drugs under 46 CFR 16.201(b) as a guide for determining if Respondent "failed a chemical test", I find the Coast Guard failed to prove Respondent failed a chemical drug test within the meaning of 46 CFR 16.105.

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[2] The term "serious marine incident is defined in 46 CFR 4.03-2.

Under the case law, the presumption in 46 CFR 16.201(b) applies if the Coast Guard establishes a prima facie case of dangerous drug use by showing that (1) Respondent was tested for a dangerous drug, (2) Respondent tested positive for a dangerous drug, and (3) the test was conducted in accordance with 49 CFR Part 40. Appeal Decision 2332 (WHITE) (2002). According to Appeal Decision 2603 HACKSTAFF (1998), the first prong "necessarily involves proof of the identity of the person providing the specimen; proof of a link between the respondent and the sample number or Drug Testing Custody and Control number which is assigned to the sample and which identifies the sample throughout the chain of custody and testing process; and proof of the testing of that sample." For the second prong, the Coast Guard must prove that Respondent failed the drug test, and this necessarily involves proof of the test results, proof of the MRO's status and qualifications, proof of the test results were reviewed by the MRO, and proof of his report of the results as positive. Appeal Decision 2603 (HACKSTAFF) (1998). Finally, under 46 CFR 16.201(a), chemical testing of personnel under Subpart B of Part 16 of Title 46 of the CFR must be conducted in accordance with the procedures detailed in 49 CFR Part 40. The Commandant has held that the Coast Guard has made a prima facie showing of this element when the Coast Guard introduced evidence involving the collection process, the chain of custody, how the specimen was handled and shipped to the testing facility, and proof of the qualifications of the laboratory. Appeal Decision 2632 (WHITE) (2002).

In this case, the Coast Guard rested its case after entering documentary evidence that is only relevant to the Misconduct allegation and failed to call any witnesses who could testify about the collection process or the events giving rise to the drug test (such as Respondent's marine employer, the drug test collector, and/or the medical review officer) even though

witnesses were present at the hearing and placed under oath. (Tr. at 11 – 13, 23 - 28). Additionally, the Coast Guard did not offer any documentary exhibits, such as a chain of custody form, that could prove its case. Instead, the Coast Guard chose to rely solely on Respondent's statement that he tested positive for marijuana. (Tr. at 32, 41). Therefore, the Coast Guard did not offer any evidence that the drug test in question was conducted in accordance with 49 CFR Part 40, and because of this, I conclude that the Coast Guard did not prove Respondent failed a chemical test for dangerous drugs within the meaning of 46 CFR 16.201(f). Consequently, 46 CFR 16.201(f) does not apply to the facts of this case, and this case is distinguishable from PASQUARELLA and the relevant standard for cure is the two pronged SWEENEY test. To be clear, Respondent's admissions established that he was a user of dangerous drugs but failed to establish that 46 CFR 16.201(f) applies in this case, and since the Coast Guard failed to offer additional evidence, cure is governed by the familiar SWEENEY test.

I also note that the Investigating Officer most likely could have established facts that satisfy the legal requirement during cross-examination of Respondent. The Investigating Officer most likely believed that once evidence of a positive test result was admitted into evidence there was nothing further required for the government to prove its case. As discussed above, WHITE and HACKSTAFF require more than just an admission or stipulation of a positive test result there must also be evidence that the test was conducted in accordance with 49 CFR Part 40.

Having concluded that the two-prong test of SWEENEY applies in this case, the evidence in the record shows cure. As a result of his conviction, Respondent completed a drug rehabilitation program and was subject to drug testing for approximately two and a half years. (Tr. at 54-55; Resp't Ex. 01). Respondent was also subject to random drug tests between November 13, 2000 and November 13, 2001 from his marine employer, and Respondent did not

refuse or fail any of those tests. (Resp't Ex. 02). Additionally, I find that the Coast Guard was informed of both Respondent's conviction for possession of marijuana and Respondent's positive drug test before the Coast Guard renewed Respondent's license. (Tr. at 59-60; IO Ex. 01; Resp't Ex. 01). The Coast Guard now seeks to revoke Respondent's license after having been aware of the circumstances, found him eligible for a license, and found him suitable for service in the merchant marine under 46 CFR 10.201[3]. Upon consideration of the above, I find that the preponderance of the evidence does not warrant any sanction under 46 U.S.C. 7704(c) because Respondent has shown evidence of cure.

B. MISCONDUCT ALLEGATION

In the Complaint, the Coast Guard alleged Respondent while acting under the authority of his Coast Guard issued license submitted a fraudulent application for renewal on April 2, 2001. Specifically, the Coast Guard alleged Respondent answered "no" to question 2 in section VI of the renewal application, and Respondent was proven to be a user a of dangerous drugs by testing positive during a post-accident drug test administered on February 22, 2000. Section 7703(1)(B) of Title 46 of the United States Code partly provides that a license may be suspended or revoked if the holder when acting under the authority of that license commits an act of Misconduct. Misconduct is partly defined as human behavior that violates some formal, duly established rule, and such rules are found in, among other places, statutes, regulations, the common law, the general maritime law, a ship's regulation or order, or shipping articles and similar sources.

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[3] Under 46 CFR 10.201(b) partly provides that no person who has been a user of dangerous drugs is eligible for a license unless he/she furnishes satisfactory evidence of suitability for service in the merchant marine as provided in 46 CFR 10.201(j). Subsection (j) partly provides that if an applicant has ever been a user of dangerous drugs the OCMI may, in addition to other factors the OCMI considers appropriate, consider the following factors in assessing the applicants suitability to hold a license: (1) proof of completion of an accredited alcohol or drug abuse rehabilitation program; (2) active membership in a rehabilitation or counseling group; (3) character references from person who can attest to the applicant's sobriety, reliability, and suitability; (4) steady employment; (5) successful completion of all conditions of parole or probation.

However, actions for misconduct under 46 U.S.C. § 7703(1)(B) and 46 CFR 5.27 are subject to either a 3 year or a 5 year limitation depending on the offense serving as the basis for the misconduct. Title 46 CFR 5.55(a)(2) provides that a complaint for misconduct based on offenses listed in 46 CFR 5.59(a) and 46 CFR 5.61(a) shall be served on a license, certificate, or document holder within 5 years after the offense alleged in the complaint. The offenses listed in part 5.59(a) include wrongful possession, use, sale, or association with dangerous drugs. Title 46 CFR 5.61(a) includes the following acts: (1) assault with a dangerous weapon; (2) misconduct resulting in loss of life or serious injury; (3) rape or sexual molestation; (4) murder or attempted murder; (5) mutiny; (6) perversion; (7) sabotage; (8) smuggling of aliens; (9) incompetence; (10) interference with a master, ship's officer, or government official in performance of official duties; (11) wrongful destruction of ship's property.

Title 46 CFR 5.55(a)(3) provides that a complaint for an act or offense not otherwise provided for shall be served within 3 years after the commission of the act or offense alleged in the complaint. Ordinarily, the three-year time limitation in 46 CFR 5.55(a)(3) applies in misconduct cases based on a fraudulent application because a fraudulent application is "an act or offense not otherwise provided for". Appeal Decision 2608 (SHEPERD) (1999). However depending on the facts and circumstances in an individual case, written falsification can constitute interference with a government official's duties under 46 CFR 5.61[4]. Appeal Decision 2608 (SHEPERD) (1999).

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[4] Interference in 46 CFR 5.61(a)(10) "is generally intended to encompass affirmative acts (e.g. a physical motion or verbal pronouncement) which have the effect of preventing a government official...from discharging his or her duties". Appeal Decision 2608 (SHEPERD) (1999). The Commandant held in Appeal Decision 2608 (SHEPERD) (1999) that the appellant's submission of a false application to the Marine Inspection Officer in Charge did not give rise to the level of interference required under 46 CFR 5.61(a)(10).

Under 46 CFR 5.55(a)(3), the starting date to determine whether a complaint is time barred is the date the offense occurred. In applying 46 CFR 5.55(a)(3) in SHEPERD, the Commandant computed the time based on the date Appellant applied for a license renewal. However, 46 CFR 5.55(b) provides that when computing time for 46 CFR 5.55(a)(2)&(3), time periods when the respondent could not have attended a hearing or could not have been served because the respondent was outside the United States, in prison, or in a hospital shall not be included in the computation. In SHEPERD, the offenses charged in the complaint occurred on June 24, 1993, which means the original time limitation would have expired on June 24, 1996. However, the Commandant noted that during this three-year period the Appellant was at sea for 448 days and 5.55(b) requires exclusion of the 448 days from the computation, because Respondent was outside of the United States.

In this case, the evidence shows Respondent submitted his renewal application on April 2, 2001. (IO Ex. 3). However, the Coast Guard did not file a Complaint until June 16, 2004, approximately 3 years and 2 months after Respondent filed his renewal application. Although the Coast Guard argued that it was unable to serve Respondent before June 16, 2004, the Coast Guard offered no evidence to support that argument. Additionally, I find there is no justification for finding Respondent's conduct rises to the level of interference with a government official's performance of official duties. Therefore, the Coast Guard's allegation of Misconduct is time barred.

ORDER

IT IS HEREBY ORDERED that the administrative action against Respondent Aubrey Thompson's Coast Guard issued license shall be dismissed and removed from the docket.

PLEASE TAKE NOTICE that service of this Decision on the parties and/or parties' representative(s) serves as notice of appeal rights set forth in 33 CFR 20.1001 – 20.1004. (Attachment A).

Done and dated October 13, 2004
New Orleans, Louisiana

JEFFIE J. MASSEY
ADMINISTRATIVE LAW JUDGE
U.S. COAST GUARD