

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

UNITED STATES COAST GUARD

Complainant

vs.

KENNETH LONG

Respondent.

Docket Number: CG S&R 04-0576
CG Case No. 2207204

DECISION AND ORDER

Issued: April 19, 2005

Issued by: Peter A. Fitzpatrick, Administrative Law Judge

Appearances:

For Complainant

LT M.S. Cavallaro
ENS Jon D. Lane
Marine Safety Office Hampton Roads
200 Granby Street
Norfolk, VA 23510

For Respondent

Carter B.S. Furr, Esquire
333 West Freemason Street, Suite 201
Norfolk, VA 23510

I.
PRELIMINARY STATEMENT

1. On October 25, 2004 the Coast Guard filed a Complaint against Kenneth Long which alleged as follows:

“JURISDICTIONAL ALLEGATIONS

The Coast Guard alleges that:

1. Respondent’s address is as follows: REDACTED.
2. Respondent holds the following Coast Guard-issued credential(s): MMD REDACTED.

FACTUAL ALLEGATIONS

The Coast Guard alleges that:

1. On 06/25/2004 Respondent took a random drug test.
2. A urine specimen was collected by S.A. Clark of Quality Drug Screens.
3. The Respondent signed a Federal Drug Testing Custody and Control Form.
4. The urine specimen was collected and analyzed by using procedures approved by the Department of Transportation.
5. That specimen subsequently tested positive for marijuana metabolites.”

The proposed Order sought was “Revocation in accordance with 46 USC 7704.”

Respondent’s Answer was filed on November 2, 2004 and Mr. Long admitted Numbers One and Two of the Jurisdictional Allegations. In regard to the Factual Allegations, the Answer stated:

“FACTUAL ALLEGATIONS

1. The allegations set forth in paragraph one, are admitted.

2. The allegations set forth in paragraph two are denied due to insufficient knowledge to justifiable belief.
3. The allegations set forth in paragraph three are denied due to insufficient knowledge to justifiable belief.
4. The allegations set forth in paragraphs four are denied.
5. The allegations contained in paragraph five are denied.”

The Answer also included a paragraph entitled “AFFIRMATIVE DEFENSE” which read as follows:

“AFFIRMATIVE DEFENSES

1. Plaintiff without waving any right, to challenge the adequacy or the results of the drug tests, custody and control of the specimen pleads cure and requests an adjournment to finish the requirements of cure as set forth in Sweeney.”

The Respondent requested that the Complaint be dismissed with costs and attorney fees awarded to Plaintiff, or in the alternative, “. . . that this matter be adjourned, as to allow plaintiff to undergo cure as set forth in Sweeney.” The Answer was submitted by Respondent’s attorney at the time, Jacob Shisha, Esq.

2. On November 15, 2004 the case was assigned to this Judge and subsequently, the hearing was set for February 2, 2005 at Norfolk, VA. See Scheduling Order – Notice of Hearing dated December 6, 2004.

3. Respondent’s counsel submitted an unopposed request for a 30 day adjournment and the case was continued to March 9, 2005. See Order issued January 14, 2005. Respondent’s counsel submitted a second request for a short continuance which was opposed by the Coast Guard. See Counsel’s letter of January 24, 2005 and the Coast Guard’s Motion Opposing

Continuance dated February 2, 2005. A two week continuance was granted and the case was set for March 23, 2005 at Norfolk. See Order issued February 1, 2005.

4. After various procedural motions were filed, Respondent's counsel at the time, Mr. Shisha, advised this forum that he had been discharged by Mr. Long and no longer represented the Respondent. See letter dated March 14, 2005.

5. On March 21, 2005 Carter B. S. Furr, Esq. entered an appearance as counsel for Mr. Long. The hearing convened on March 23, 2005 as scheduled and the Investigating Officer, the Respondent, and his counsel, Mr. Furr, were present. At the outset, Mr. Furr indicated that the Respondent wished to change his Answer and admit the Factual Allegations contained in Numbers 1-5. (Transcript, (hereinafter Tr.) 7-9). Mr. Furr further stated that Mr. Long does not contest that the drug test involved "was positive and that he smoked marijuana." (Tr. 8). Counsel stated that the Respondent continued to request that the case be adjourned to allow Mr. Long the opportunity to complete the requirements of cure as set forth in the well known SWEENEY decision. He asserted that this is the same position set out in the Respondent's Answer ". . . filed quite some time ago at this point." (Tr. 9, 16-17).

The Investigating Officer opposed that request and asserted that previously the Respondent refused to enter into a Settlement Agreement affording him that very opportunity; that Respondent was not "substantially involved" in the cure process during the five month period between the filing of the Complaint and the hearing; and that the appropriate order in this case was revocation once the allegations of the Complaint were proved.

6. Once the witnesses were identified, Mr. Furr stated that the substance of their testimony was not contested and that facts to be adduced were admitted. (Tr. 12-13). The Investigating Officer did not oppose that request and it was decided that the Laboratory Director,

Dr. Harold H. Miller, (Quest Diagnostics Incorporated, Irving, Texas) and Dr. John Womack, Medical Review Officer, would not be required to testify. (Tr. 13-16). The collector, Ms. Shelly Ann Clark, Quality Drug Screens, Le Porte, Texas was required to testify. (Tr. 13).

7. The Coast Guard's case in chief included one witness, Ms. Clark, who testified by a telephone conference call from Texas. (Tr. 34-45). Also, four exhibits were offered and admitted into evidence at that time (Exhibits 1-4). Those documents are identified on Attachment B.

The Respondent testified on his own behalf and also offered four exhibits (Exhibits A-D). They were admitted into evidence and are identified on Attachment B.

On rebuttal the Coast Guard offered three exhibits and they were admitted. (Exhibits 5-7). Those items too are identified on Attachment B.¹

After both sides rested and closing statements were presented, the case was taken under advisement. It is now ripe for decision.

II. **FINDINGS OF FACT**

1. Kenneth Long is the holder of a Merchant Mariner's Document issued by the Coast Guard. He was the holder of that document on June 25, 2004 when he took a random chemical test for dangerous drugs. He has been a merchant seaman for 23-24 years. (Tr. 50).

¹ The rulings on all exhibits are set out in the transcript at pp 49-50, 74-75, and 86.

2. The specimen was collected by Ms. Shelly Clark aboard the DILIGENCE where the Respondent was serving as Chief Steward. (Tr. 60). Ms. Clark completed Steps 1-4 of the Drug Testing Custody and Control Form (hereinafter DTCCF) and certified that the specimen was collected in accord with applicable Federal requirements. (CG Exhibit 1). Also, Mr. Long signed that same form and certified that the specimen was his and that the collection bottle was sealed in his presence. (*Id.*).

3. Those bottles were sent by courier to Quest Diagnostics Incorporated, Irving Texas, a drug testing laboratory certified by the U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration (SAMHSA), to engage in urine drug testing for federal agencies. (CG Exhibit 2). The initial screening test at the laboratory revealed that the Respondent's specimen contained marijuana metabolite. The confirmatory GC/MS test at that same laboratory confirmed the result. (CG Exhibit 3).

4. Those results were transmitted to Dr. John Womack, the Medical Review Officer, who concluded that the test results were positive for marijuana. (CG Exhibit 1) Accordingly, he signed the DTCCF on July 9, 2004 verifying the positive result. (CG Exhibit 1).

5. In accordance with Federal requirements, the Respondent was notified of the result and he requested a second laboratory analysis. The Respondent's specimen was sent to another SAMSHA certified laboratory (LabCorp RTP Laboratory) and the positive test result for marijuana was reconfirmed. (CG Exhibit 1).

6. Mr. Long continued to sail aboard the DILIGENCE and completed his tour of duty on August 6, 2004. (Tr. 61). He returned to the United States and was served with the

Complaint in this case two months later on October 25, 2004. (Tr. 61-62). He sent the papers to his attorney and subsequently signed on to the GREENDALE on November 29, 2004. (Tr. 62). No one told him he could not sail and Mr. Long did not notify the GREENDALE's Master of the failure to pass the random drug test on June 25, 2004. (Tr. 62; CG Exhibit 7). Subsequently, Mr. Long contacted his attorney and was instructed to get off the ship. (*Id.*). The mariner indicated he couldn't quit without authorization and instructed his attorney to contact the Coast Guard to arrange for his removal. (Tr. 63). On February 18, 2005 he was signed off Articles on the GREENDALE in Dubai and he paid his repatriation expenses. (CG Exhibit 6).

7. On February 28, 2005 Mr. Long made a Good Faith Deposit of his Merchant Mariner's Document to the Coast Guard at Norfolk.² (Respondent's Exhibit A).

8. Mr. Long took a urine drug test at Sentara Norfolk General Hospital on March 8, 2005 and the results were negative. (Tr. 64; Respondent's Exhibit B). The following day the mariner visited the Norfolk Community Services Board and explained his drug use and the case brought against him by the Coast Guard. (Tr. 65, Respondent's Exhibit C). The Board did not admit him into a program since the counselor concluded that the seaman was not a cannabis abuser. (*Id.*). Next, Mr. Long contacted his union (Seafarers International Union) and was admitted to the Seafarers Addiction Rehabilitation Center for treatment to commence on March 31, 2005. (Respondent's Exhibit D).

9. The Respondent and the Coast Guard scheduled a meeting to review and execute a Settlement Agreement on March 11, 2005 but the Respondent did not appear. (Tr. 71-72).

² The Good Faith Deposit agreement is signed by his sister Yvette Long who delivered Long's merchant mariner's document to the Marine Safety Office.

III.
STATUTES AND REGULATIONS INVOLVED

A. Procedural Matters

1. This proceeding is governed by the Administrative Procedure Act , which is incorporated into these proceedings under 46 U.S.C. 7702, which reads:

§ 7702. Administrative procedure

(a) Sections 551-559 of title 5 apply to each hearing under this chapter about suspending or revoking a license, certificate of registry, or merchant mariner's document.

2. 46 U.S.C.§§ 7701-7705 set out the general procedures governing the suspension and revocation of merchant mariners' licenses and documents. 46 U.S.C. § 7704 provides in pertinent part:

§ 7704. Dangerous drugs as grounds for revocation

(c) If it is shown that a holder has been a user of, or addicted to, a dangerous drug, the license, certificate of registry, or merchant mariner's document shall be revoked unless the holder provides satisfactory proof that the holder is cured.

3. The regulations governing the performance of chemical tests for dangerous drugs adopted by the United States Department of Transportation and applicable to this proceeding are codified at 49 C.F.R. § 40. Specifically, the specimen collection procedures are set out at 49 C.F.R. § 40, subpart E.

4. The Coast Guard regulations governing chemical testing for dangerous drugs are codified at 46 C.F.R. § 16. As pertinent here, 46 C.F.R. § 16.201(b) provides that:

Subpart B – Required Chemical Testing

§ 16.201 Application.

(b) If an individual fails a chemical test for dangerous drugs under this part, the individual will be presumed to be a user of dangerous drugs.

5. The Coast Guard Rules of Practice which apply to this proceeding are codified at 33 C.F.R. § 20.

IV.
ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Mr. Kenneth Long is and was the holder of a merchant mariner's document at all pertinent times involved in this proceeding.

2. Mr. Long failed a chemical test for dangerous drugs administered in accord with the applicable Federal regulations codified at 49 CFR 40. As such he is a user of dangerous drugs within the purview of 46 USC 7704.

3. Mr. Long has made a sufficient effort to seek a cure of his drug use within the meaning of 46 USC 7704 and will be afforded the opportunity to complete the rehabilitation process in accord with the Commandant's decisions beginning with Appeal Decision 2535 (SWEENEY).

V.
DISCUSSION

1. The principle issue to be decided in this case is whether Mr. Long should be allowed to pursue a course of drug rehabilitation under the SWEENEY doctrine or have his merchant mariner's document revoked at this stage. The Investigating Officer asserts that Mr. Long failed a drug test on June 25, 2004, was served with a Complaint on October 25, 2004 seeking to have his document revoked for drug use, and yet did not enroll in a treatment program or become "substantially involved" in his rehabilitation until a few weeks before the hearing. The Investigating Officer urges that Mr. Long's actions are too little and too late and that he should

have his document revoked now, especially since he refused to enter into a Settlement Agreement on March 11, 2005 which would have afforded him the very opportunity he now seeks.

The Respondent's counsel urges that Mr. Long has been a merchant seaman for nearly 24 years, that he has a ninth grade education and the sea is all he knows, and that he has taken steps to seek cure under the SWEENEY line of cases and should be allowed to continue. Counsel seeks an adjournment until the Respondent has had enough time to meet the SWEENEY cure criteria.

2. Turning first to the applicable law, 46 USC 7704(c) clearly states that where the holder of a merchant mariner's document issued by the Coast Guard is found to be the user of a dangerous drug, his credentials are to be revoked unless the holder is cured. In applying that Congressional mandate to the individual merchant mariner the Commandant in Appeal Decision 2546 (SWEENEY) held that the burden of establishing "cure" is on the Respondent. See also Appeal Decision 2526 (WILCOX). The mariner must "(1) successfully complete a bonafide drug abuse rehabilitation program, and (2) demonstrate a complete non-association with drugs for a minimum of one year following the successful completion of the drug abuse program." See also Appeal Decision 2638 (PASQUARELLA), p. 5. In addition the Coast Guard regulations require that the Medical Review Officer verify the mariner is drug free and that the risk of subsequent use of dangerous drugs by that mariner is sufficiently low to justify his return to work aboard a vessel. Appeal Decision 2638 (PASQUARELLA), p. 5. The regulation referred to above is 46 CFR 16.201(f).

The term "substantial involvement" used by the Investigating Officer here appears in one of the SWEENEY decisions and in Appeal Decision 2638 (PASQUARELLA), p. 5. In Appeal

Decision 2535 (SWEENEY) the Commandant discussed the fact that the presiding Judge may grant a continuance of the hearing to allow the Respondent more time to complete the cure process “. . . where the mariner has demonstrated substantial involvement in the cure process by proof of enrollment in an acceptable rehabilitation program.” See also Appeal Decision 2638 (PASQUARELLA), p. 5. That is exactly what the Respondent has done here. He has enrolled in the Seafarers Addiction Rehabilitation program and at the time of the hearing was scheduled to enter on March 31, 2005. Previously, Mr. Long took a drug test at Sentara Norfolk General Hospital and sought to enroll in the Norfolk Community Service Board’s substance abuse program. Mr. Long’s efforts meet the substantial involvement test in the cases cited above and he will be afforded the opportunity to seek “cure.”

It is well to observe too that on March 11, twelve days before the hearing, the Investigating Officer offered Mr. Long the opportunity to seek cure by entering into a settlement agreement to avoid this hearing. At that time the Coast Guard was not deterred by the Respondent’s service aboard the GREENDALE or the fact that nearly five months had passed since the filing of the Complaint. No allegation in the Complaint asserts that Mr. Long’s conduct during that interim period was unlawful.

Accordingly, for these reasons this hearing will be continued until June 1, 2006 to afford Mr. Long the opportunity to meet the established Coast Guard requirements regarding drug abuse rehabilitation. Those conditions are set out below.

VI.
ORDER

1. It is ORDERED THAT the Respondent:
 - a. Enroll in and successfully complete the drug abuse treatment program conducted by the Seafarers Addiction Center;
 - b. successfully complete with the follow up program recommended by the Center;
 - c. upon completion of the entire drug abuse treatment program including the follow-up, attend a substance abuse monitoring program (such as AA/NA) for a minimum period of one year to include four meetings each month;
 - d. participate in a random, unannounced drug-testing program for a minimum period of one year following successful completion of the drug rehabilitation program. During the year long period, the Respondent must take at least 6 random drug tests spread reasonably throughout the year, that are conducted in accordance with Department of Transportation procedures found in Title 49, Code of Federal Regulations (CFR), Part 40;
 - e. obtain and file a copy of the Medical Review Officer's (MRO) letter that indicates the Respondent is drug-free and the risk of Respondent's subsequent use of dangerous drugs is sufficiently low to justify return to work. The MRO who made the original positive determination in this matter must sign the Return-To-Work determination. The name and address of the MRO is as follows:

John Womack, M.D.
First Advantage Corporation
1746 Cole Boulevard
Suite 100
Lakewood, CO 80401
Phone: 303-238-0189
 - f. be subject to increased, unannounced testing for a period of up to 60 months in accordance with 46 CFR 16.201(f)(2). The MRO will determine the period and frequency of testing;
 - g. pay all expenses associated with completion of these conditions;
 - h. deposit all Coast Guard-issued credentials including licenses, certificates, and/or documents with Marine Safety Office Hampton Roads until successfully completing the terms of this agreement;
 - i. not perform any function that requires a Coast Guard-issued credential;

- j. advise the Investigations Department at Marine Safety Office Hampton Roads of any change of address and/or telephone number by mail;
 - k. one month before the hearing set out below, provide the Judge and the Marine Safety Office Hampton Roads evidence in writing that the requirements of this Order including 1a-1h have been successfully accomplished.
2. At the hearing the Coast Guard will have the opportunity to examine Respondent's evidence and witnesses and introduce rebuttal evidence. The burden of proof to show "cure" is upon the Respondent.
3. The hearing will be held as follows:
- Date: June 1, 2006**
- Time: 9:30 AM**
- Place: United States Coast Guard
MLCA Courtroom
300 East Main Street, Suite 900
Norfolk, VA 23510**
4. A Notice of Hearing will be issued 60 days before the date above to remind the parties of the hearing.

**PETER A. FITZPATRICK
ADMINISTRATIVE LAW JUDGE
U.S. COAST GUARD**

Done and dated April 19, 2005
Norfolk, Virginia

ATTACHMENT A

NOTICE OF ADMINISTRATIVE 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.

ATTACHMENT B

WITNESS AND EXHIBIT LISTS

WITNESS LIST

COMPLAINANT'S WITNESSES

1. Shelly Clark

RESPONDENT'S WITNESSES

1. Kenneth Long

EXHIBIT LIST

PLAINTIFF'S EXHIBITS

- CG Exhibit 1 – Drug Testing Custody and Control Form
- CG Exhibit 2 – Federal Register/Vol. 69, No. 106, Wednesday, June 2, 2004/Notices
- CG Exhibit 3 – Documentation Package provided by Quest Diagnostics, Inc.
- CG Exhibit 4 – Federal Drug Testing Custody and Control Form
- CG Exhibit 5 – Particulars of Engagement
- CG Exhibit 6 – Notice of Dismissal
- CG Exhibit 7 – Letter of 18 February, 2005 from Matthew C.R. Craven

RESPONDENT'S EXHIBITS

- Respondent's Exhibit A – Good Faith Deposit
- Respondent's Exhibit B – Drug Test on March 8, 2005
- Respondent's Exhibit C – Clinical Data Sheet
- Respondent's Exhibit D – Seafarers Addiction Rehabilitation Center letter of March 22, 2005