

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

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UNITED STATES COAST GUARD

Complainant

vs.

MICHAEL J. MORRISSEY

Respondent.

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Docket Number: CG S&R 04-0603  
CG Case No. 2228397

**ORDER DENYING PETITION TO REVISE TERMS OF SETTLEMENT AGREEMENT**

**Issued: March 27, 2006**

**Issued by: Walter J. Brudzinski, Administrative Law Judge**

Background

On September 4, 2004, Respondent took a post accident chemical test as required by 46 CFR 16.240 and 46 CFR Subpart 4.06. Respondent's specimen tested positive for marijuana and on November 2, 2004, the Coast Guard issued a Complaint against Respondent seeking to revoke his merchant mariner's license.

On February 24, 2004, the parties entered into a standard cure settlement agreement. The relevant terms provided, among other things, that within 30 days of entering into the agreement, Respondent is to enroll in a drug rehabilitation program and within 90 days thereof successfully complete the program. Further, Respondent is to attend a substance abuse monitoring program for a minimum of one year following successful completion of the drug rehabilitation program. During the one year substance abuse monitoring program, Respondent must participate in at least 6 random, unannounced drug tests. The monitoring program must be completed no later than August 4, 2006 but Respondent will be subject to unannounced testing for a period up to 60 months in accordance with 46 CFR 16.201(f)(2) and that the Medical Review Officer (MRO) will determine the period and frequency of testing.

The settlement agreement goes on to say that Respondent is also to obtain and file a copy of a letter from the MRO indicating he is drug free and that the risk of subsequent use of dangerous drugs is sufficiently low to justify his return to work. The MRO who made the original positive determination in Respondent's case must sign the return to work determination.

The agreement lists the name and address of the MRO and also provides that a substitute MRO may be agreed upon by the parties. Finally, the Respondent must deposit all of his Coast Guard issued credentials with USCG Sector Boston until successfully completing the terms of the agreement and is not to perform any function that requires a Coast Guard issued credential during the period of deposit.

After entering into the agreement, the parties submitted their joint motion for consent order to the USCG ALJ Docketing Center where the case was assigned to the undersigned. After reviewing the settlement agreement to ensure it complied with applicable laws, rulings, and regulations, the undersigned issued a consent order on February 28, 2005.

#### Petition to revise the terms of the settlement agreement

On March 14, 2006, Respondent petitioned the undersigned to revise the settlement agreement terms so that he may return to work earlier than a “strict construction of the settlement agreement would normally appear to permit.” In support of his request, Respondent states that since he completed the drug rehabilitation program on May 19, 2005, he would be eligible to apply for the return of his credentials on May 19, 2006. Further, he has “complied with all of the requirements of the settlement agreement save for the full year following completion of the rehabilitation program, but that is just 2 months away.”

#### Respondent’s additional arguments

- 1) That Respondent initially tested positive on September 4, 2004, “but there is documentation, i.e., numerous Drug Free Certificates, to establish that he has been completely drug free for the period from September 23, 2004 until now, which is roughly 20 months;”
- 2) That the incident causing the accident which triggered the drug test could have been catastrophic but for the conscientious efforts of the licensed engineers, foremost among them being Respondent;
- 3) That after entering into the settlement agreement Respondent promptly entered and successfully completed a drug rehabilitation program for which his counselor opined that the risk of subsequent drug use by him is negligible;
- 4) That Respondent nevertheless continued to attend AA/NA meetings on a regular basis and has also obtained a number of drug free certificates during the year following rehabilitation, said certificates having been presented to the MRO in accordance with the terms of the settlement agreement;
- 5) That Respondent has complied with and satisfactorily completed all material terms of the settlement agreement and has demonstrated substantial involvement in the cure process;
- 6) That under SWEENY, (sic) a mariner can establish proof of cure by showing successful completion of a drug abuse rehabilitation program and non-association with drugs for at least one year;

- 7) That the Coast Guard has argued and maintained in several cases subsequent to SWEENY (sic) that the guidelines established by SWEENY (sic) are not inflexible but rather are guidelines subject to evaluation in the context of determining the adequacy of proof in a given case; and
- 8) That in this case Respondent can establish both elements [drug rehabilitation and non-association with drugs for at least one year] and therefore, by any reasonable interpretation of SWEENY, (sic) Respondent is cured.

Respondent goes on to list “compelling personal circumstances” that should be considered:

- 1) That Respondent has attended a number of courses at his union school in Baltimore that will eventually permit him to seek an upgrade in his license;
- 2) That Respondent has had a number of personal hardships including his wife’s job loss resulting in no steady income; and
- 3) That Respondent’s mother had recently passed away.

Respondent states that at the end of March 2006, his former employer will have an opening for him to replace an incumbent First Assistant Engineer who will be relieved for vacation. If Respondent is unable to report for work, the position will be given to another engineer and Respondent will have to wait several months for another suitable position. Also, Respondent understands that he will continue to be monitored by the designated Medical Review Officer for the full 5 year period.

In addition to a copy of the settlement agreement and the consent order, the petition also contains a copy of an undated letter signed by Paul F. McDevitt stating that Respondent has completed drug rehabilitation. Mr. McDevitt’s states that he met Respondent initially on February 16, 2005 for evaluation and that Respondent has since successfully completed the recommended program by attending individual sessions on February 16<sup>th</sup>, March 16<sup>th</sup>, 24<sup>th</sup>, and 31<sup>st</sup>, April 5<sup>th</sup>, 14<sup>th</sup>, 21<sup>st</sup>, and 28<sup>th</sup>, and May 5<sup>th</sup> and 12<sup>th</sup> of 2005. Mr. McDevitt states that Respondent is currently attending AA meetings on a regular basis and has demonstrated a firm commitment to no longer use and/or be associated with illegal drugs. He opines that Respondent is drug free and that the risk of subsequent use of drugs by him is sufficiently low so as to be characterized as negligible.

Finally, Respondent states that the Coast Guard Investigating Officer advised him that he was not authorized to revise the terms of the settlement; however, he does not object to the requested revisions.

In essence, Respondent is requesting that the Administrative Law Judge revise the terms of the settlement agreement to allow him to return to work under the authority of his license prior to completion of cure.

### Issue

The issue is whether the Administrative Law Judge may revise the terms of a settlement agreement to allow a mariner to work under the authority of the mariner's credentials prior to the mariner's completion of cure.

### Law

The purpose of suspension and revocation proceedings is to promote safety at sea. 46 U.S.C. § 7701(a). Under Title 46 U.S.C. § 7704 (c),

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

Title 46 CFR 5.901(d) provides that the fundamental elements of cure are as follows:

For a person whose license, certificate, or document has been revoked or surrendered for the wrongful simple possession or use of dangerous drugs, the three year time period (after revocation or surrender) may be waived by the Commandant upon a showing that the individual:

1. Has successfully completed a bona fide drug abuse rehabilitation program;
2. Has demonstrated complete non-association with dangerous drugs for a minimum of one year following completion of the rehabilitation program; and
3. Is actively participating in a bona fide drug abuse monitoring program.

Under Appeal Decision 2535 and 2546 (SWEENEY) (1992) the Commandant further defined and reiterated the elements of cure with the following language:

Because the issue of cure is central to this case, a discussion of what should be considered as constituting cure is in order.

A sound, reasonable basis upon which to craft a viable definition of cure exists in [46 C.F.R. §5.901\(d\)](#). Using that regulation as a foundation, I consider the following factors to satisfy the definition of cure in cases where drug use is an issue:

1. The respondent must have successfully completed a bonafide drug abuse rehabilitation program designed to eliminate physical and psychological dependence. This is interpreted to mean a program certified by a governmental agency, such as a state drug/alcohol abuse administration, or in the alternative, certified by an accepted independent professional association, such as the Joint Commission on Accreditation of Health Care Organizations (JCAHO).

2. The respondent must have successfully demonstrated a complete non-association with drugs for a minimum period of one year following successful completion of the rehabilitation program. This includes participation in an active drug abuse monitoring program which incorporates random, unannounced testing during that year.

\* \* \*

The aforementioned guidelines and procedures should also be utilized regarding an issue of cure that arises pursuant to a charge of use or possession of drugs in [46 C.F.R. §5.59](#).

Under 46 CFR 16.201, the requirements for cure are further prescribed:

(e) An individual who as failed a required chemical test for dangerous drugs may not be re-employed aboard a vessel until the requirements of paragraph (f) of this section and 46 CFR Part 5, (noted above) if applicable, have been satisfied.

(f) 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. In addition, the individual must agree to be subject to increased unannounced testing ---

(1) For a minimum of six (6) tests in the first year after the individual returns to work as required in 49 CFR part 40; and

(2) For any additional period as determined by the MRO up to a total of 60 months.

Appeal Decision 2634 (BARRETTA) (2002) and Appeal Decision 2638 (PASQUARELLA) (2003) answer the question whether an Administrative Law Judge may permit a mariner to work under the authority of the mariner's credentials prior to the mariner's completion of cure. Under BARRETTA,

The ALJ is not authorized to permit a mariner to sail under the authority of the mariner's credential until all the requirements of cure have been met. The ALJ can only find that cure has been established after the mariner has successfully completed a bona fide drug rehabilitation program, demonstrated a complete non-association with drugs for one year following completion of the drug rehabilitation program, and the MRO has made a determination in accordance with 46 CFR 16.201(f) that the mariner is drug-free and his risk of use of illegal drug use again is sufficiently low. During the period of cure, the ALJ may stay the order of revocation and continue the hearing to allow cure, but the ALJ cannot allow the mariner to work under the authority of the mariner's credential.

And, as stated in (PASQUARELLA), “[u]nder BARRETTA . . . the ALJ cannot allow the mariner to work under the authority of the mariner's credentials prior to completion of cure. This is accomplished by the Coast Guard retaining possession of the document.”

#### Discussion

The most important aspect of the cure is that Respondent not only successfully complete the drug rehabilitation program and remain drug free for one year thereafter, but also that the MRO certify Respondent is drug free and that the risk of his subsequent dangerous drug use is sufficiently low to justify return to work. These provisions are required by law and may not be waived by revising a settlement agreement.

While Mr. McDevitt's opinion that Respondent is drug free is noteworthy, Mr. McDevitt is not the MRO and may not be considered a substitute MRO. Under the law as noted above, a mariner may not be deemed to have successfully completed cure until all of the requirements for cure have been met. That includes the return to work letter from the MRO.

#### Decision

Without addressing the extent to which, if any, an Administrative Law Judge may revise some parts of a cure settlement agreement, the law is clear that any revision must not result in the mariner returning to work under the authority of his license prior to all of the requirements for cure having been met. Therefore, the Administrative Law Judge may not allow a mariner to work under the authority of the mariner's credentials prior to completion of cure.

Wherefore,

**ORDER**

**IT IS HEREBY ORDERED** that Respondent's petition to revise the terms of the settlement agreement to allow him to return to work under the authority of his license prior to completing cure is **DENIED**.

Done and dated March 27, 2006  
New York, NY

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**WALTER J. BRUDZINSKI  
ADMINISTRATIVE LAW JUDGE  
U.S. COAST GUARD**

## Certificate of Service

This is to certify that I have sent the foregoing Order to the following parties and entities by the means indicated below:

LT Edward Munoz  
CWO John Hulslander  
USCG Sector Boston  
455 Commercial Street  
Boston, MA 02109

Via Facsimile (617) 223-3032

Owen F. Duffy, Esq.  
Fowler, Rodriguez and Chalos  
366 Main Street  
Port Washington, NY 11050

Via Facsimile (516) 767-3605

ALJ Docketing Center  
40 S. Gay Street, Room 412  
Baltimore, MD 21202

Via Facsimile (410) 962-1746

Done and dated March 27, 2006  
New York, NY

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Regina V. Thompson  
Paralegal Specialist  
Assistant to the Administrative Law Judge  
Phone: (212) 668-2970  
Facsimile: (212) 825-1230