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

UNITED STATES COAST GUARD

Complainant

vs.

KEVIN PATRICK FITZSIMMONS

Respondent

Docket Number 2009-0351
Enforcement Activity No. 3565487

DECISION AND ORDER

Issued: August 12, 2011

By Administrative Law Judge: Honorable Michael J Devine

Appearances:

LT NIYA J. WILLIAMS
Sector New York

For the Coast Guard

KEVIN PATRICK FITZSIMMONS, Pro se

For the Respondent

PROCEDURAL BACKGROUND

This order is issued in accordance with 33 CFR 20.502(c), and the settlement agreement between the parties approved by the ALJ on September 15, 2009. As provided by the settlement agreement, all jurisdictional and factual allegations were admitted. The parties also waived all other procedural steps before the ALJ; and waived all rights to seek judicial review except for what is expressly provided in the settlement agreement. The settlement agreement only allows Respondent to request a hearing before the ALJ within 10 days of being notified by the Coast Guard that Respondent has failed to complete the agreement and that the Coast Guard intends to execute the sanction provided. If Respondent requests a hearing the decision of the ALJ with respect to the issue of compliance is final.

The United States Coast Guard initiated this administrative action seeking revocation of the Merchant Mariner's Document ("MMD") issued to Kevin P. Fitzsimmons, the respondent in this case. The Complaint, dated August 18, 2009, alleges Respondent is the holder of a Coast Guard issued MMD and that he violated 46 U.S.C. 7704(c) and 46 CFR 5.35 (use of or addiction to the use of dangerous drugs). The Complaint alleges that on August 3, 2009 Respondent took a random drug test and tested positive for marijuana.

On September 14, 2009, the parties submitted a motion for approval of a settlement agreement in this matter. In the agreement Respondent admitted all jurisdictional and factual allegations and agreed to complete all of the requirements stated in the agreement. On September 15, 2009, a Consent Order was issued approving the settlement agreement and incorporating that agreement by reference into the Consent Order.

On April 25, 2011, the Coast Guard served Respondent with a Notice of Failure to Complete Settlement Agreement informing Respondent the sanction of revocation would be enforced unless Respondent requested a hearing under the terms of the agreement. Respondent then requested a hearing on this matter.

The Settlement Agreement provides that "[i]f the Respondent requests a hearing before an ALJ under the provisions of paragraph 3c, then the revocation will be stayed until the ALJ issues a final order. ***The ALJ's ruling on this request and any subsequent hearing will be final.***" Respondent timely requested a hearing on his alleged breach of the Settlement Agreement, therefore, the undersigned must review the record to determine whether Respondent has successfully completed all elements or was making positive progress towards completion of all elements of the drug rehabilitation program.

On May 26, 2011 a telephone conference was conducted in this matter. During the conference it was not disputed that Respondent had completed the required drug rehabilitation program with a substance abuse professional (SAP) and had acted in good faith. Respondent stated that he had asked for follow up guidance from the Coast Guard investigating officer and was told that the Coast Guard was not in the drug rehabilitation business, so he followed the urinalysis testing program specified by the SAP. When Respondent submitted the documentation of his completion of the testing program he was informed that it was not sufficiently in compliance with DOT testing program requirements and it was indicated that he could undertake another 12 months of urinalysis testing to complete the agreement and his MMD would remain suspended. Respondent objected to the proposal to require another 12 months of urinalysis testing since he had already gone to considerable expense and effort in completing the required program. The undersigned inquired as to whether there might be some potential for settlement between the parties that would consider a probationary period or something short of an additional 12 months of testing by Respondent. The parties agreed to attempt to resolve their differences through settlement discussions that might result in something other than another 12 months of additional testing and expense to Respondent. The parties failed to reach agreement and another telephone conference was held on June 16, 2011.

During the June 16, 2011 telephone conference the parties agreed that an in-person hearing would not be necessary and instead the undersigned would make a ruling based on the record, including the matters presented during the telephone conferences with supplemental arguments by the parties and potentially an affidavit by the Medical Review Officer (MRO) explaining his position in regard to this matter. Before the telephone conference ended the MRO was contacted and the parties agreed to allow his testimony to be provided during the telephone conference. The testimony of the MRO included agreement that Respondent had acted in good faith but that some of the programs used by SAPs do not comply with DOT testing requirements even though the SAP may represent that they do to the individual participating in the program. The MRO indicated that he had not provided a return to work letter to Respondent because the urinalysis testing program Respondent completed did not meet all of the DOT urinalysis testing requirements. The MRO explained the differences in the testing programs and then indicated that an additional 9 months of DOT testing would be sufficient for him to issue a return to work letter. Respondent stated he did not understand all of the technical medical discussion but that he should not have to pay for another program because when he initially asked for the Coast Guard to approve what he was doing they refused and then changed the requirements after he had already gone through the program. He stated that he had already spent over $3,000 and had been without his credentials for almost 2 years. He was concerned that even if he could afford the additional expense there would be some other technical matter raised to prevent the return of his credentials. At the close of the telephone conference Respondent indicated he would seek a follow up letter from his SAP to submit and the parties agreed to submit any additional argument to the ALJ for a decision on the record including the telephone testimony of the MRO and the documents in the record. At the conclusion of the telephone conference on June 16, 2011, both parties waived having an in-person hearing and agreed to the undersigned issuing a decision based on the matters presented during the telephone conferences and the record in this case to

address the issue of whether Respondent had sufficiently complied with the settlement agreement.

DISCUSSION

In keeping with the settlement agreement and the regulations the ALJ's role is to review the record and determine whether Respondent has sufficiently complied with the terms of the settlement agreement to prove cure. Cure is not specifically defined in 46 USC 7704(c) but the requirements for demonstration of cure have been addressed through case law. See Appeal Decision 2535 (SWEENEY) (1992) referring to 46 CFR 5.901(d) in developing the "cure" standard. Also compare 46 CFR 5.205. While compliance with the DOT testing regulations is important, technical violations may be excused under certain circumstances. Cf. Appeal Decision 2688 (HENSLEY) (2010). The SWEENEY case standard as it developed through various cases including appeals to the NTSB was presented by the Coast Guard as not establishing inflexible requirements. See Loy v. Wright, NTSB Order ME-164 (1999), at page 8, footnote 12, affirming Appeal Decision 2583 (WRIGHT) (1997). In this matter it is undisputed that Respondent's actions were in good faith. In addition to SWEENEY, the Coast Guard relies on Appeal Decision 2634 (BARRETTA) (2002) and Appeals Decision 2639 (PASQUARELLA) (2003) in asserting that the Respondent's MMD should be revoked. However, neither BARETTA nor PASQUARELLA are directly on point with the facts of this case. In those cases the individual was allowed to keep their mariner credential while pursuing cure. Respondent has been without his document for approximately two years while taking the actions to effect cure. Respondent accepted responsibility for his actions and the Coast Guard has not disputed that he proceeded in good faith to effect cure. In comparison with 46 CFR 5.205 a Respondent that has voluntarily surrendered his document may seek its return if the requirements for its return are met. Here, there is no dispute that (1) Respondent successfully completed a drug rehabilitation program with an acceptable SAP; (2) Respondent complied with the drug testing program that he

was advised to complete by the SAP; and (3) Respondent submitted documentation of his efforts in regard to the urinalysis testing and participation in a follow up program with AA meetings. The Coast Guard's reliance on Appeals Decision 2619 (LEAKE) (2008) is also not persuasive. In LEAKE the respondent sought to have his agreement set aside claiming duress. Here Respondent is seeking the benefit of the bargain and contends that any error in meeting the testing requirements should be considered substantial compliance; that the Coast Guard should not require him to undergo another set of testing that would result in the loss of his document for three years instead of the time agreed upon in the settlement agreement. While Respondent's efforts may not have met the exact requirements for DOT testing as expected by the Coast Guard, he followed the advice of an approved substance abuse professional and acted in good faith. When he sought advice on whether he was on the right track with his actions to get his document back a previous Coast Guard Investigating Officer declined to provide any guidance. Since it has been held to be reasonable to allow technical errors to be insufficient to void a drug test, HENSLEY, it is likewise reasonable to allow a merchant seaman to prove cure without having the technical precision of a lawyer. While the undersigned recognizes Respondent should be held to meet the requirements of the agreement a reasonableness standard may also be appropriate in limited circumstances. In addition to completing a required drug rehabilitation program Respondent submitted evidence of completing 12 random urinalysis tests with negative results and documentation of participation in an AA aftercare program. The only problem the Government has with his submission is that the chemical tests submitted did not meet the specific requirements of DOT testing. There is no evidence that Respondent was trying to avoid meeting any requirement, and his request for guidance from the Coast Guard was rejected. Under the limited circumstances of this case, I find that Respondent has sufficiently proved "cure" under the standard identified in SWEENEY and this constitutes substantial compliance with the terms of the settlement agreement. In the limited circumstances presented in this

particular case, an inflexible insistence on completion of only DOT tests is not consistent with the previously argued flexible standard described in WRIGHT. This applies to analysis by an MRO as well. The MRO also agreed that Respondent had acted in good faith and stated that the only reason he had not provided a return to work letter is because the testing conducted was not a DOT approved testing program, but he considered that at least 3 months credit could be given Respondent for his prior good faith. The MRO's reliance on that factor alone to demonstrate non-association with drugs for a year is not required by SWEENEY or the regulations. "Chemical test" is defined by the regulations to include other types of testing. 46 CFR 16.105. Neither SWEENEY nor 46 CFR 5.205 nor even 46 CFR 16.201 requires completion of 12 DOT tests as a prerequisite to be allowed to return to work. Respondent was willing to proceed under any probationary status and noted that upon return to work he would be subject to additional random testing for up to 60 months in keeping with the agreement. The regulations require a minimum of 6 unannounced tests during the first year after an individual returns to work and for up to 60 months thereafter. 46 CFR 16.201(f). Although the regulations may provide for a MRO return to work letter, the regulations are to be construed to secure a just determination and a single provision does not control when the standard is set by other authority. See Appeal Decision 2678 (SAVOIE) (2008). Additionally, the determination of compliance with the settlement agreement is committed to the ALJ by the terms of paragraphs 3 and 4 of the agreement and in keeping with 33 CFR 20.502. In this case 46 USC 7704(c) requires proof of cure and SWEENEY provides the definition. The purpose of administrative actions against a mariner's credentials is remedial and not penal in nature. 46 CFR 5.5 and the procedural regulations are to be construed to secure a just, speedy, and inexpensive determination. 33 CFR 20.103. Requiring additional testing in this circumstance would appear to be punitive. The Rehabilitation program and testing that occurred meet the remedial intent of the regulations and the requirements of SWEENEY. Moreover, the interests of maritime safety are satisfied since

Respondent will be subject to return to work urinalysis testing and the terms of the settlement agreement also expressly require that he be subject to additional random testing for an extended period. At this point Respondent is well aware of the costs associated with the use of dangerous drugs.

The review of this matter was conducted in accordance with Administrative Procedure Act, amended and codified at 5 U.S.C. 551-59, Coast Guard Administrative Procedure statute codified at 46 U.S.C. 7702, and the procedural regulations codified at 33 CFR Part 20. Respondent admitted to jurisdiction in the settlement agreement. The Coast Guard presented a Motion in Support of its Notice of Failure to Complete Settlement Agreement as its final argument. The Respondent submitted an additional letter as a final argument and attached another letter from Ms. Ireland (SAP) in support of his position that he had sufficiently demonstrated non-association with dangerous drugs for a year.

The findings of fact and conclusions of law may be summarized as follows:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent Kevin Patrick Fitzsimmons and the subject matter of this proceeding are within the jurisdiction of the Coast Guard under the authority of 46 U.S.C. Chapter 77 and as an individual acting under the authority of a merchant marine credential under 46 CFR 5.57.

2. At all relevant times, Respondent Kevin Patrick Fitzsimmons was the holder of the Merchant Mariner's Document at issue in this case.

3. On September 15, 2009, a Consent Order was issued approving the settlement agreement agreed to by Respondent and the Coast Guard on September 14, 2009.

4. Paragraph 2 of the agreement includes requirements that Respondent will participate in a random, unannounced drug-testing program for a minimum period of one year following successful completion of the drug rehabilitation program.

5. Respondent successfully completed the drug rehabilitation program.

6. Respondent participated in and completed a random urinalysis testing program as directed by the approved Substance Abuse Professional.

7. The testing program did not meet all of the specific requirements of the DOT regulations.

8. Respondent presented documentation showing that he attended a substance abuse monitoring program (AA/NA) as required by the agreement.

9. In keeping with Paragraph 2.f. of the settlement agreement Respondent remains subject to increased unannounced testing for a period of up to 60 months in accordance with 46 CFR 16.201(f)(2).

10. The actions and information submitted by Respondent have demonstrated cure in keeping with Appeal Decision 2535 (SWEENEY) (1992).

CONCLUSION

I carefully reviewed the record and considered all of the evidence presented in this matter beginning with the Complaint and including the settlement agreement and all of its terms. The proposed sanction of revocation is permitted within the suggested range of sanctions contained in Table 5.569 of 46 CFR 5.569. There was no evidence of Respondent having any other violations or incidents and there was considerable evidence that Respondent acted in good faith and substantially complied with the requirements of the settlement agreement. Although some technical requirements may not have been met I find that there has been substantial compliance with the provisions of the settlement agreement and the evidence presented of non-association with dangerous drugs is sufficient to demonstrate "cure" under SWEENEY.

The purpose of the regulations for suspension and revocation proceedings is remedial and intended to maintain standards for competence and conduct essential to the promotion of safety at sea. 46 CFR 5.5. Based on the evidence of record as a whole, I find that Respondent has provided sufficient evidence to support proof of cure by completing an approved drug rehabilitation program and demonstrating non-association with dangerous drugs for a period of one year and therefore his Merchant Mariner document should be returned by the Coast Guard.

WHEREFORE,

ORDER

IT IS HEREBY ORDERED THAT the Merchant Mariner's Document and all other Coast Guard licenses, certificates and documents issued to Respondent Kevin Patrick Fitzsimmons shall be **RETURNED**.

IT IS HEREBY FURTHER ORDERED THAT in keeping with Paragraph 9 of the settlement agreement Respondent is subject to return to work testing requirements and to complete six (6) additional random urinalysis tests during the first 12 months after return to duty.

PLEASE TAKE FURTHER NOTICE that Service of this Order on the parties and/or parties' representatives serves as notice of a final decision. In keeping with 33 CFR 20.502(c) and Paragraph 4 of the settlement agreement the undersigned ALJ's ruling on this respondent's request for review of the determination is final. However, the parties are given notice that they may be able to petition for review by the Commandant in keeping with 33 CFR 20.902(a).

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Michael J Devine
US Coast Guard Administrative Law Judge

Date: August 12, 2011