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

UNITED STATES COAST GUARD
Complainant

vs.

RONALD R. TUCHOLSKI
Respondent

Docket Number 2013-0330
Enforcement Activity No. 4654691

DECISION AND ORDER

Issued: May 30, 2014

By Administrative Law Judge: Honorable Dean C. Metry

Appearances:

LT John Nee &
CWO Greg E. Cable
Sector Jacksonville

For the Coast Guard

Ronald R. Tucholski, *Pro se*

For the Respondent

PRELIMINARY STATEMENT

The United States Coast Guard (Coast Guard) initiated this Suspension and Revocation proceeding seeking revocation of Respondent Ronald R. Tucholski's Merchant Mariner's Credential (MMC) Number 000109954. This action is brought pursuant to the authority contained in 46 U.S.C. § 7704(c) and its underlying regulations codified at 46 C.F.R. Part 5 and 33 C.F.R. Part 20.

On September 4, 2013, the Coast Guard issued a Complaint charging Respondent with violating 46 U.S.C. § 7704(c), alleging one count of Use of, or addiction to the use of dangerous drugs pursuant to 46 C.F.R. § 5.35.[1] Specifically, the Coast Guard alleged that on June 28, 2013, Respondent participated in a post-accident drug screening and tested positive for marijuana metabolites.

A hearing on this matter was held on March 20-21, 2014 in DeLand, Florida. The hearing was conducted in accordance with the Administrative Procedure Act (APA) as amended and codified at 5 U.S.C. §§ 551-59, and Coast Guard procedural regulations set forth in 46 C.F.R. Part 5 and 33 C.F.R. Part 20. Lieutenant John Nee and Chief Warrant Officer Greg Cable represented the Coast Guard. Respondent appeared *pro se*.

At the hearing, the Coast Guard presented testimony of six (6) witnesses and offered thirteen (13) exhibits, all of which were admitted into the record. Respondent presented the testimony of two (2) witnesses, but did not offer any exhibits into the record. The list of witnesses and exhibits is contained in **Attachment A.**

After careful review of the entire record, including witness testimony, applicable statutes, regulations and case law, the undersigned finds the Coast Guard **PROVED** one count of Use of, or addiction to the use of dangerous drugs pursuant to 46 C.F.R. § 5.35. Accordingly,

Respondent's MMC is **REVOKED.** 46 U.S.C. 7704(c); 46 C.F.R. 5.569; Appeal Decision 2535 (SWEENEY) (1992).

FINDINGS OF FACT

The Findings of Fact are based on a thorough and careful analysis of the documentary evidence, testimony of witnesses, and the entire record taken as a whole.

The Serious Marine Incident

1. At all relevant times herein, the M/V ARABELLA was required to be under the control of a credentialed master. (Tr. at 26, 36-37) (CG Ex. 1).

2. On June 27, 2013, Respondent was the master of the M/V ARABELLA. (CG Ex. 3) (See Tr. at 13, 17).

3. On June 27, 2013, the M/V ARABELLA stopped for a swim call during which time the passengers aboard the vessel engaged in recreational swimming. (Tr. at 11-12, 14-15, 20-21) (CG Ex. 3, CG Ex. 4).

4. While engaged in recreational swimming, one of the passengers aboard the M/V ARABELLA suffered a heart attack and drowned. (CG Ex. 4).

5. The death of the swimmer constituted a serious marine incident which triggered mandatory drug and alcohol testing for all involved parties. (Tr. at 15-16, 19). 46 C.F.R. § 4.06(b)(1); 46 C.F.R. § 4.03-2(a); 46 C.F.R. § 16.240.

6. Vernon Kuftic, the owner of the M/V ARABELLA, ordered Respondent to submit to drug testing following the serious marine incident. (Tr. at 45) (CG Ex. 3, CG Ex. 5).

The Collection Process

7. Anne Brevney Hagler collected Respondent's urine sample on June 28, 2013 in New Smyrna Beach, Florida. (Tr. at 78) (CG Ex. 7).

8. Charles Sullivan, a manager for the Collection Network of Quest Diagnostics (Quest), testified Ms. Hagler should have taken a refresher training course for Department of Transportation (DOT) urine collections in 2012, but there is no record her taking such a course. (Tr. at 60-61, 66-67, 70) (CG Ex. 6).

9. Ms. Hagler was initially certified as a DOT collector approximately twenty-five (25) years ago; however, she was not DOT certified on June 28, 2013. (Tr. at 76, 85-87).

[1] On September 17, 2013, the Coast Guard issued an Amended Complaint indicating the date of the drug test on the Complaint was incorrect. The Complaint indicated the test took place on June 28, 2014; the Amended Complaint corrected the date to reflect the test took place on June 28, 2013.

10. On June 28, 2013, Ms. Hagler was up-to-date on her non-DOT training. (Tr. at 61) (CG Ex. 6).

11. Non-DOT collections mirror DOT collections, except for the split specimen process. (Tr. at 61-62, 64, 88-89).

12. Ms. Hagler testified she recalled Respondent's drug test because it was the only post-accident test she has had. (Tr. at 77, 90).

13. Ms. Hagler collected Respondent's urine in accordance with DOT procedures. (Tr. at 78-81). 49 C.F.R. Part 40.

14. Ms. Hagler forgot to complete the specimen temperature section of the Custody and Control Form; she later completed an affidavit indicating the specimen temperature was within the normal range. (Tr. at 83-84, 110-12) (CG Ex. 7).

The Testing Process

15. Dr. Vinnette Batiste, a Manager and Certified Scientist for Quest Diagnostics (Quest), testified Quest received Respondent's urine specimen with the bottle seals intact. (Tr. at 110).

16. Quest Diagnostics is a Substance Abuse and Mental Health Services Administration (SAMHSA) certified lab. (Tr. at 107-08). See 78 Fed. Reg. 33429 (June 2, 2013).

17. Quest extracted an aliquot from Bottle A of Respondent's specimen for initial testing on an Olympus immunoassay machine; the specimen tested presumptively positive for marijuana. Because the specimen was presumptively positive, Respondent's specimen was submitted for further testing. (Tr. at 119-120, 124-25, 127, 159) (CG Ex. 8).

18. Another aliquot of Respondent's urine was extracted and tested using Gas Chromatography/Mass Spectrometry (GCMS). (Tr. at 127-28, 135, 153) (CG Ex. 8).

19. Dr. Batiste testified GCMS testing is a very selective test; the test separates the different molecules in marijuana then identifies and quantifies the molecule. (Tr. at 143, 153).

20. The confirmatory cutoff for marijuana metabolites is 15 ng/ml. (Tr. at 131, 135, 201).

21. Respondent's specimen yielded a result of 34 ng/ml of marijuana metabolites. (See Tr. at 131, 143, 197, 201). (CG Ex. 8).

22. Quest maintained the chain of custody of the specimen throughout the testing process. (See Tr. at 114-15, 118-19, 130) (CG Ex. 8).

23. Ellean White, the certifying scientist, reviewed the data and confirmed the specimen as positive for marijuana metabolites. (Tr. at 112) (CG Ex. 8).

24. Dr. Seth Portnoy, the Medical Review Officer (MRO), testified he received the results from Quest via secured fax and reviewed the lab copy of the Chain of Custody Form, the MRO copy of the Chain of Custody Form, and the lab report result. (Tr. at 196).

25. Dr. Portnoy reviewed the chain of custody of the specimen and contacted Respondent on July 3, 2013. Respondent did not have a medical justification for his positive test. (Tr. at 198-99) (CG Ex. 11).

26. Dr. Portnoy verified the result as positive for marijuana. (Tr. at 202) (CG Ex. 10).

Respondent's Defense

27. Teresa Clarke testified she has known Respondent for five (5) years and has employed him on numerous occasions. Ms. Clarke testified Respondent is a well-qualified captain and she has never known him to be a marijuana user. (Tr. at 170-71).

28. Penny Tucholski, Respondent's wife, testified Respondent is not a marijuana user. She further testified Respondent may have tested positive because she sometimes uses marijuana in their residence. (Tr. at 175-76).

29. Ms. Tucholski testified she smokes marijuana in the residence she shares with Respondent approximately once or twice a week. (Tr. at 181-82).

DISCUSSION

a. Background

The purpose of Coast Guard Suspension and Revocation proceedings is to promote safety at sea. 46 U.S.C. § 7701(a). In furtherance of this goal, Administrative Law Judges have the authority to revoke a mariner's license, certificate or document for violations arising under 46 U.S.C. § 7704. See 46 C.F.R. § 5.19(b). Under 7704(c), a Coast Guard issued license, certificate or document shall be revoked if the holder of that license or certificate has been a user of or addicted to dangerous drugs, unless the holder provides satisfactory proof that the holder is cured. See also Appeal Decision 2634 (BARETTA) (2002); Appeal Decision 2535 (SWEENEY) (1992) (*rev'd on other grounds*); see also Appeal Decision 2546 (SWEENEY) (1992) (reaffirming the definition of cure established in Appeal Decision 2535 (SWEENEY)).

b. Chemical Drug Testing

The Coast Guard chemical drug testing laws and regulations require maritime employers to conduct pre-employment, periodic, random, serious marine incident, and reasonable cause drug testing to minimize the use of dangerous drugs by merchant mariners. See 46 C.F.R. Part 16. Additionally, the marine employer's drug testing program must be in accordance with the applicable statutes, regulations, and Appeal Decisions. See generally 49 C.F.R. Part 40 and 46 C.F.R. Part 16. If an employee fails a chemical test by testing positive for a dangerous drug, the individual is then presumed to be a user of dangerous drugs. 46 C.F.R. § 16.201(b).

However, in order to establish the 46 C.F.R. § 16.201(b) presumption, the Coast Guard must prove (1) that the respondent was the person who was tested for dangerous drugs, (2) that the respondent failed the test, and (3) that the test was conducted in accordance with 46 C.F.R. Part 16. Appeal Decision 2603 (HACKSTAFF) (1998). See also Appeal Decision 2584 (SHAKESPEARE) (1997).

In the instant case, the Coast Guard filed a Complaint alleging Use of, or addiction to the use of dangerous drugs pursuant to 46 C.F.R. § 5.35. Specifically, the Complaint alleges that Respondent took a post-accident drug test which yielded a positive result for marijuana metabolites.[2] 46 C.F.R. § 16.240.

c. Serious Marine Incident Drug Testing

Title 46 C.F.R. § 16.240 states as follows: "[t]he marine employer shall ensure that all persons directly involved in a serious marine incident are chemically tested for evidence of dangerous drugs and alcohol in accordance with the requirements of 46 CFR 4.06." Title 46 C.F.R. § 4.06, in turn, provides that "[d]rug testing must be conducted on each individual

[2] Although Respondent did not raise this, the undersigned notes the Complaint alleges Respondent took a "post-accident" drug test instead of a "serious marine incident" drug test. 46 C.F.R. § 16.240. The undersigned finds this linguistic distinction immaterial. See Appeal Decision 2585 (COULON) (1997) (explaining administrative proceedings require only notice pleadings).

engaged or employed on board the vessel who is directly involved in the [serious marine incident]." 46 C.F.R. § 4.06-3(b)(1). The definition of "serious marine incident" includes the following:

> (1) One or more deaths;
> (2) An injury to a crewmember, passenger, or other person which requires professional medical treatment beyond first aid, and, in the case of a person employed on board a vessel in commercial service, which renders the individual unfit to perform routine vessel duties; 46 C.F.R. § 4.03-2(a).

Burden of Proof

The Administrative Procedure Act (APA), Title 5 U.S.C. §§ 551-559, applies to Coast Guard Suspension and Revocation hearings before Administrative Law Judges. 46 U.S.C. § 7702(a). The APA authorizes sanctions if, upon consideration of the entire record as a whole, the charges are supported by reliable, probative, and substantial evidence. 5 U.S.C. § 556(d).

Under Coast Guard procedural rules and regulations, the burden of proof is on the Coast Guard to prove that the charges are supported by a preponderance of the evidence. 33 C.F.R. §§ 20.701, 20.702(a). "The term substantial evidence is synonymous with preponderance of the evidence as defined by the U.S. Supreme Court." Appeal Decision 2477 (TOMBARI) (1988). See also Steadman v. Securities and Exchange Commission, 450 U.S. 91, 107 (1981). The burden of proving a fact 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)).

Therefore, the Coast Guard Investigating Officer must prove by credible, reliable, probative, and substantial evidence that Respondent more likely than not committed the violation charged.

Prima Facie Case of Use of a Dangerous Drug

The Coast Guard bears the burden of proof and must prove the allegations by a preponderance of the evidence to prevail. 33 C.F.R. §§ 20.701, 20.702(a). Generally, in a drug case based solely on urinalysis test results, a prima facie case of the use of a dangerous drug is made when the following three elements are established: 1) the respondent was the person who was tested for dangerous drugs; 2) the respondent failed the drug test; and 3) the test was conducted in accordance with 46 C.F.R. Part 16.[3] Appeal Decision 2603 (HACKSTAFF) (1998). See also Appeal Decision 2653 (ZERINGUE) (2002).

a. Compliance with 46 C.F.R. Part 16

In the instant case, the Coast Guard demonstrated Respondent's drug test was conducted in accordance with 46 C.F.R. Part 16, specifically 46 C.F.R. § 16.240. Title 46 C.F.R. § 16.240 provides that "[t]he marine employer shall ensure that all persons directly involved in a serious marine incident are chemically tested for evidence of dangerous drugs and alcohol in accordance with the requirements of 46 CFR 4.06."

Title 46 C.F.R. § 4.06, in turn, requires that drug testing "be conducted on each individual engaged or employed on board the vessel who is directly involved in the [serious marine incident]." 46 C.F.R. § 4.06-3(b)(1). The drug testing must be conducted in accordance with 49 C.F.R. Part 40. 46 C.F.R. § 4.06-20(b)(1).

As discussed above, a serious marine incident includes the following: (1) a death and (2) an injury to a crewmember, passenger, or other person which requires professional medical

[3] 46 C.F.R. Part 16 requires, in part, that chemical testing of personnel be conducted in accordance with the procedures detailed in 49 C.F.R. Part 40.

treatment beyond first aid. 46 C.F.R. § 4.03-2(a). In the instant case, a death occurred aboard the M/V ARABELLA. (CG Ex. 3, CG Ex. 4). Accordingly, the incident constituted a serious marine incident, and Respondent was properly ordered to submit to the drug test.

b. Compliance with 49 C.F.R. Part 40

The Coast Guard also demonstrated Respondent's specimen was both collected and tested in accordance with 49 C.F.R. Part 40.

1. The Collection Process

As discussed above, the specimen collector, Ms. Anne Brevney Hagler, was not DOT certified on June 28, 2013. (Tr. at 76, 85-87). However, Ms. Hagler's lack of DOT certification on the date of the collection is not fatal.

Title 49 C.F.R. Part 40 provides as follows:

> (a) Collectors meeting the requirements of this subpart are the only persons authorized to collect urine specimens for DOT drug testing.
> (b) A collector must meet training requirements of § 40.33. 49 C.F.R. § 40.31(a)-(b).

The section also mandates each collector perform a specific initial proficiency demonstration, and, if necessary, error collection training. 49 C.F.R. § 40.33(c); 49 C.F.R. § 40.33(e).

While 49 C.F.R. § 40.31 and § 40.33 mandate specific training requirements for collectors, 49 C.F.R. § 40.209(b)(3) specifically lists "[t]he collection of a specimen by a collector who is required to have been trained (see §40.33), but who has not met this requirement;" as a flaw that should not result in the cancellation of a test. 49 C.F.R. § 40.209. See also 65 Fed. Reg. 79462, 79472 (Dec. 19, 2000) ("…we specify in § 40.209 that a test is not invalidated because a collector has not fulfilled a training requirement. For example, suppose someone collects a specimen correctly but has not completed required training or retraining."). Thus, 49 C.F.R. Part 40 does not mandate test cancellation due to a collector's lack of DOT-

specific training so long as the test was otherwise conducted in accordance with 49 C.F.R. Part 40. See 49 C.F.R. § 40.209(b)(3).

In the instant case, although the collector, Ms. Hagler, was not DOT-certified on the date of Respondent's collection, she had previously been DOT-certified. (Tr. at 76, 85-87). Additionally, Ms. Hagler was certified as a non-DOT collector on the date of the test; DOT and non-DOT collections mirror one another except for the split specimen process. (CG Ex. 6) (Tr. at 61). Ms. Hagler was knowledgeable as to the collection process, and testified that she conducted the test in accordance with 49 C.F.R. Part 40. (See Tr. at 77-79). She further testified that no one else handled or had access to Respondent's specimen during the process. (Tr. at 79).

While testifying, Ms. Hagler acknowledged she failed to record the temperature of Respondent's urine specimen on the Custody and Control Form. (CG Ex. 7) (Tr. at 83). However, the failure to record a specimen temperature is not a fatal flaw. See 40 C.F.R. § 40.199(b). Instead, the regulations provide that if the specimen temperature is not indicated, the laboratory must attempt to correct the problem in accordance with § 40.208. 49 C.F.R. § 40.83(f). (See Tr. at 110-12). In the instant case, Ms. Hagler corrected the problem by completing an affidavit certifying she had read the specimen temperature and that it was within the normal range. (CG Ex. 7) (See Tr. at 83).

Thus, although Ms. Hagler was not DOT certified on the date of the test, the specimen was nonetheless collected without any flaws mandating cancellation of the test. See 65 Fed. Reg. 79462, 79472 (Dec. 19, 2000). As such, the undersigned finds the specimen collection was conducted in accordance with 49 C.F.R. Part 40.

2. Laboratory Testing

The Coast Guard also demonstrated Respondent's specimen was tested in accordance with 49 C.F.R. Part 40. At the hearing, Dr. Vinnette Batiste, a Manager and Certified Scientist for Quest, testified as to the laboratory process. (Tr. at 110). Quest, a SAMHSA certified lab,

first tested an aliquot of Respondent's specimen using an Olympus immunoassay machine. (CG Ex. 8) (Tr. at 107-08, 119-20).

Dr. Batiste explained the laboratory uses a ratio to determine whether a specimen is positive for marijuana during initial testing; if the ratio is greater than 1.000, the sample is presumptively positive. (Tr. at 124). That is, while the cutoff of marijuana metabolites for initial testing is 50 ng/ml, the laboratory converts this cutoff level to a number representing 50 ng/ml. 49 C.F.R. § 40.87(a). (See Tr. at 124-25). The laboratory then calculates the ratio by dividing the absorbance of the patient's specimen, in this case 1451, by the calibrate absorbance representing 50 ng/ml, 1121. (1451/1121 = 1.29). (Tr. at 123). Since the ratio was greater than 1.000, Respondent's initial test was presumptively positive for marijuana. (See Tr. at 125-26).

For confirmatory testing, the laboratory extracted a second aliquot from Respondent's urine and tested it using Gas Chromatography/Mass Spectrometry (GCMS). (Tr. at 127-28, 153). The confirmatory GCMS test yielded a result of 34 ng/ml for marijuana metabolites; the confirmatory cutoff for marijuana metabolites is 15 ng/ml. 49 C.F.R. § 40.87(a). (Tr. at 131, 143, 197, 201). Quest maintained the chain of custody of the specimen throughout the testing process. (CG Ex. 8) (See Tr. at 114-15).

Thereafter, Quest transmitted the results to the Medical Review Officer (MRO), Dr. Seth Portnoy. (Tr. at 196). Dr. Portnoy, a certified MRO, reviewed the chain of custody of the specimen and contacted Respondent on July 3, 2013. (CG Ex. 9, CG Ex. 11) (Tr. at 198-99). Respondent was unable to provide a medical justification for his positive marijuana result. (Tr. at 198-99). Accordingly, Dr. Portnoy verified the result as positive for marijuana. (Tr. at 202) (CG Ex. 10).

Accordingly, the undersigned finds the Coast Guard demonstrated Respondent was tested for dangerous drugs in accordance with 49 C.F.R. Part 40 and 46 C.F.R. Part 16, and tested

positive for use of a dangerous drug. Appeal Decision 2603 (HACKSTAFF) (1998). See also Appeal Decision 2653 (ZERINGUE) (2002).

As such, Respondent is presumed to be a user of dangerous drugs. 46 C.F.R. § 16.201(b). Respondent may rebut this presumption by producing evidence that (1) calls into question any of the elements of the prima facie case, (2) indicates an alternative medical explanation for the positive test result, or (3) indicates the drug use was not wrongful or not knowing. Appeal Decision 2560 (CLIFTON) (1993).

Respondent's Rebuttal

At the hearing, Respondent provided argument suggesting the drowning did not qualify as a serious marine incident because the passenger aboard the M/V ARABELLA was still alive when he arrived on shore. See 46 C.F.R. § 16.240. (Tr. at 38-39). However, this argument is unavailing.

As discussed above, the definition of "serious marine incident" includes the following:

> (1) One or more deaths;
> (2) An injury to a crewmember, passenger, or other person which requires professional medical treatment beyond first aid, and, in the case of a person employed on board a vessel in commercial service, which renders the individual unfit to perform routine vessel duties; 46 C.F.R. § 4.03-2(a).

Thus, any injury to a passenger requiring "professional medical treatment beyond first aid," qualifies as a serious marine incident; a death aboard the vessel is not required. 46 C.F.R. § 4.03-2(a). In the instant case, the passenger on board the M/V ARABELLA indisputably required professional medical treatment beyond first aid. (CG Ex. 4). Accordingly, the incident qualified as a serious marine incident and Respondent was properly ordered to submit to a drug test in accordance with 46 C.F.R. § 16.240.

Respondent also provided evidence and argument suggesting any marijuana in his system may have been the result of second-hand smoke. (See Tr. at 175-76). Specifically,

Respondent's wife testified she smokes marijuana in their shared residence approximately once or twice a week. (Tr. at 181-82). However, Dr. Portnoy's testimony indicated passive inhalation of this variety would likely not account for the levels of marijuana seen in the instant case. (Tr. at 212-13).

To this end, Dr. Portnoy explained that if two people were in close quarters with one another and one person was continually blowing marijuana smoke into the other person's face for thirty (30) days, then a positive result from passive inhalation would be possible. (Tr. at 213). However, a positive result from simply being in the same room as another person smoking marijuana would be "highly unlikely." Id. Instead, a person would need to be "in a close, close relation to that individual for an extended period of time and… inhaling all their exhaled marijuana smoke." Id.

Thus, Respondent's wife's marijuana usage would not account for the level of marijuana in Respondent's system. As discussed, Respondent's level of marijuana was more than two times the confirmatory cutoff level of 15 ng/ml. 49 C.F.R. § 40.87(a). (CG Ex. 8). Respondent's wife testified that she used marijuana only "on occasion…in [the] residence," approximately once or twice a week. (Tr. at 176, 181).

Based on Dr. Portnoy's testimony, the undersigned finds, by a preponderance of the evidence, that passive inhalation of this variety could not account for the positive test results in the instant case. See Appeal Decision 2584 (SHAKESPEARE) (1997) (noting cutoff limits are set high to avoid positive readings from extraneous causes such as passive inhalation).

Dr. Portnoy further testified that if the marijuana level was high enough to produce a result greater than twice the confirmatory cutoff level, as in the instant case, then the inhalation of marijuana, whether smoked or inhaled, would have been so strong that the person would be considered intoxicated by the drug. (Tr. at 203-04, 213-14). Accordingly, the undersigned finds Respondent's second-hand smoke argument unpersuasive.

Last, Respondent sought evidence tending to show that none of his previous drug tests have been positive. (Tr. at 48-49). Additionally, two employers testified that Respondent is a well-qualified captain who is not known to be a marijuana user. (Tr. at 49, 170-71). However, such evidence does not call into question any element of the prima facie case, indicate an alternative medical explanation for the positive test result, or indicate the drug use was not wrongful or not knowing. Appeal Decision 2560 (CLIFTON) (1993). Accordingly, Respondent has failed to rebut the Coast Guard's prima facie case.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At all relevant times, Respondent was a holder of Coast Guard issued Merchant Mariner Credential.

2. Respondent and the subject matter of this hearing are properly within the jurisdiction vested in the Coast Guard under 46 U.S.C. § 7704(c); 46 C.F.R. Parts 5 and 16; 33 C.F.R. Part 20; and the APA codified at 5 U.S.C. §§ 551-59.

3. Respondent submitted to a drug test following a serious marine incident. See 46 C.F.R. § 16.240.

4. The drug test, which was conducted in accordance with 49 C.F.R. Part 40 and 46 C.F.R. § 16.240, was positive for marijuana.

5. The Coast Guard **PROVED** by a preponderance of reliable, probative, and credible evidence that Respondent is a user of or addicted to dangerous drugs. 46 U.S.C. § 7704(c); 46 C.F.R. § 5.35.

SANCTION

When the Coast Guard proves that a mariner has used or is addicted to dangerous drugs, any Coast Guard issued licenses, documents, or other credentials must be revoked unless cure is proven. See 46 U.S.C. § 7704(c); 46 C.F.R. § 5.569; Appeal Decision 2535 (SWEENEY) (1992). Absent evidence of cure or substantial involvement in the cure process, an ALJ must revoke a respondent's license and document under 46 U.S.C. 7704(c). See also Appeal Decision 2634 (BARRETTA) (2002), Appeal Decision 2583 (WRIGHT) (1997).

In the instant case, Respondent did not present any evidence of cure or substantial involvement in the cure process. Accordingly, the undersigned is precluded from issuing an Order other than revocation.

ORDER

IT IS HEREBY ORDERED THAT the allegations as set forth in the Complaint are found **PROVED.**

IT IS FURTHER ORDERED THAT Respondent Ronald R. Tucholski's Merchant Mariner's Credential Number 000109954 is hereby **REVOKED.**

IT IS FURTHER ORDERED THAT Respondent shall immediately surrender any and all of his Coast Guard-issued credentials to the Coast Guard Investigating Officer.

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 C.F.R. §§ 20.1001 – 20.1004. (**Attachment B**).

SO ORDERED.

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Dean C. Metry
U.S. Coast Guard Administrative Law Judge

Date: May 30, 2014

Attachment A

Coast Guard's Witnesses

1. Chief Warrant Officer Daniel Sammons
2. Vernon Kuftic
3. Charles Sullivan
4. Anne Brevney Hagler
5. Dr. Vinnette Batiste
6. Dr. Seth Portnoy

Respondent's Witnesses

1. Teresa Clarke
2. Penny Tucholski

Coast Guard's Exhibits

1. Certificate of Inspection for the M/V ARABELLA
2. NOT OFFERED OR ADMITTED
3. CG-2692, Report of Marine Accident, Injury, or Death
4. Medical Examiner Report
5. APCA Drug Consortium Certificate
6. Brevney Hagler Training Certificates
7. Collector Custody and Control Form
8. Laboratory Litigation Package
9. Dr. Seth Portnoy MRO Certification
10. MRO Custody and Control Form
11. MRO Notes
12. NOT OFFERED OR ADMITTED
13. Resume of Dr. Vinnette Batiste, Ph.D.
14. NOT OFFERED OR ADMITTED
15. Resume of Dr. Seth Portnoy, D.O.
16. NOT OFFERED OR ADMITTED
17. Copy of Respondent's MMC

Attachment B

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.