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

UNITED STATES COAST GUARD

Complainant

vs.

ROY ANDRE WARREN

Respondent

Docket Number 2013-0453
Enforcement Activity No. 4759739

ORDER GRANTING MOTION FOR SUMMARY DECISION

Issued: July 16, 2014

By Administrative Law Judge: Honorable Michael J Devine

Appearances:

LTJG KEITH HEINE

and

LT BRADLEY BERGAN

Sector Hampton Roads

For the Coast Guard

ROY ANDRE WARREN, *Pro se*

For the Respondent

PRELIMINARY STATEMENT

In discharge of its duty to promote the safety of life and property at sea, the United States Coast Guard (Coast Guard) initiated this administrative action seeking revocation of the Merchant Mariner Document (MMD) issued to Roy Andre Warren (Respondent). This action was brought pursuant to the legal authority contained in 46 U.S.C. §§ 7703 and 7704, and was conducted in accordance with the procedural requirements of 5 U.S.C. §§ 551-559, 33 C.F.R. Part 20, and 46 C.F.R. Part 5. The Coast Guard requests Summary Decision on the grounds there are no genuine issues of material fact in dispute. The undersigned Administrative Law Judge (ALJ) examined the entire record and determined there is no genuine issue of material fact and thus, the Coast Guard is entitled to summary decision as a matter of law.

The Coast Guard initiated this administrative action by filing a Complaint against Respondent on December 2, 2013, with the ALJ Docketing Center. The Complaint sought revocation of Respondent's Merchant Mariner Document for use of or addiction to dangerous drugs. Specifically, the Complaint alleges Respondent took a "follow-up" drug test on November 19, 2013, and that test came back positive for cocaine metabolites.

Respondent requested an extension of time to file his answer on January 27, 2014, and the Docketing Center granted Respondent's request, extending the due date for the answer until February 27, 2014. On March 7, 2014, the Coast Guard filed a Motion for Default pursuant to 33 C.F.R. § 20.310 because Respondent had yet to file an Answer to the Complaint. The ALJ scheduled a telephone conference before addressing the Coast Guard's Motion for Default because Respondent is representing himself, *pro se*.

The ALJ conducted the conference call on April 3, 2014. LT Bradley Bergan and CWO John Colon appeared on behalf of the Coast Guard and Respondent appeared on his own behalf. During the conference call, the ALJ and the Parties discussed the Coast Guard's Motion for

Default and Respondent's second request seeking an extension to file an answer and pursue settlement. At the conclusion of the conference call, the ALJ ordered the following:

1. The Coast Guard must submit by close of business on April 11, 2014, a status report on whether Respondent has submitted an Answer and whether the parties agreed to a settlement.

2. If a settlement is not reached, the ALJ will review all matters before him including the pending Motion for Default.

The Coast Guard filed a Notice of the Status of Settlement Discussion with Respondent's Answer attached on April 11, 2014. This Notice explained Respondent had informed LT Bergan that he was unable to enroll in a drug rehabilitation program at this time due to ongoing medical conditions and lack of resources. Accordingly, the Coast Guard stated they are unable to offer Respondent settlement, but informed Respondent about the Administrative Clemency process.

Respondent's Answer dated April 7, 2014, admitted to all jurisdictional and factual allegations, agreed with the proposed order and requested settlement discussions. Respondent also submitted a handwritten statement along with his Answer Form. Respondent's handwritten statement requested a settlement agreement, explained his inability to previously enroll in a drug program due to lack of insurance, and explained he now had insurance and was taking the necessary steps to get inpatient treatment.

On April 11, 2014, the Coast Guard submitted a Motion for Summary Decision. The Coast Guard asserts Summary Decision is appropriate in this case because there are no genuine issues of material fact. This assertion is based on Respondent's Answer wherein he admitted to all jurisdictional and factual allegations.

Upon review of the record, the ALJ determined supplemental information was needed before a decision could be made. Therefore, the ALJ issued an Order Requesting Supplemental Information. This Order requested clarification concerning the first allegation in the Complaint,

"[o]n 11/19/2013 Respondent took a follow-up drug test." Specifically, the ALJ inquired as to what type of drug test constituted a follow-up drug test.

The Coast Guard responded with a Supplemental Information Brief. In that Brief, the Coast Guard explained Respondent failed a follow-up test as articulated in the return to duty process found in 46 C.F.R. § 16.201(f). Specifically, 46 C.F.R. § 16.201(f)(2) states individuals are subject to increased unannounced testing for up to a total of 60 months. The Coast Guard outlined the Substance Abuse Professional's (SAP) recommended testing schedule, but did not provide the start and end date of the testing. The Coast Guard also alluded to some changes in the scheduling of the drug testing, but again failed to state any dates. Accordingly, the ALJ scheduled a conference call to further clarify the record.

The ALJ held a second conference call on June 10, 2014, to discuss the Coast Guard's Supplemental Information Brief and to allow Respondent a chance to respond to the Coast Guard's assertions contained in the Brief. During the conference call, the Coast Guard elaborated on the underlying facts relied upon in submitting their Supplemental Information Brief dated May 20, 2014. Specifically, the Coast Guard informed the ALJ that the follow-up drug test, the underlying reason for the Complaint, was actually conducted after the 60 month time frame listed in 46 C.F.R. § 16.201(f) expired. The Coast Guard explained the Substance Abuse Professional (SAP) scheduled the test for a date after the 60 month time period due to Respondent's schedule and Respondent's voluntary participation.

During the conference call, Respondent confirmed that he was the reason the SAP ordered follow-up drug tests after the 60 month period and acknowledged that he consented to the additional testing. Respondent also explained he recently sustained an injury and was waiting on medical insurance; he asserted both issues must be addressed before he could enroll in an approved drug rehabilitation program. Finally, Respondent admitted to making a mistake, to needing help, and again admitted to all the facts alleged in the Complaint.

With the conference call concluded and the Coast Guard and Respondent supplying all the additional facts needed, the record is now ripe for a decision.

FINDINGS OF FACT

1. At all relevant times Respondent, Roy Andre Warren, was the holder of Coast Guard Merchant Mariner Document Number 153266. (Respondent's Answer).
2. On November 19, 2013, Respondent took a follow-up drug test. (Respondent's Answer).
3. Mr. Bruce Kelly collected Respondents specimen. (Respondent's Answer).
4. Respondent signed the Federal Drug Testing Custody and Control Form. (Respondent's Answer).
5. Quest Diagnostics located in Norristown, PA analyzed Respondent's specimen using Department of Transportation approved procedures. (Respondent's Answer).
6. Respondent's specimen tested positive for cocaine metabolites. (Respondent's Answer).
7. Arthur Hayes, Medical Review Officer, verified Respondent's sample tested positive for cocaine metabolites. (Respondent's Answer).
8. Respondent admitted to using cocaine. (Respondent's Answer and Statement during June 10, 2014 Telephone Conference).

DISCUSSION

A. Burden of Proof

The Administrative Procedure Act (APA), 5 U.S.C. §§ 551-559, applies to Coast Guard Suspension and Revocation trial-type hearings before United States 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 regulations, the burden of proof is on the Investigating

Officer to prove that the charges are supported by a preponderance of the evidence. 33 C.F.R. §§ 20.701, 20.702(a).

The U.S. Supreme Court defined the term substantial evidence as "synonymous with preponderance of the evidence. . ." Appeal Decision 2477 (TOMBARI)(1988). 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 & Products of Cal., Inc. v. Constr, Laborers Pension Trust for Southern Cal., 508 U.S. 602, 622 (1993) (citing In re Winship, 397 U.S. 358, 371-72 (1970). (Harlan, J., concurring) (brackets in original)). Therefore, Investigating Officers must prove by reliable, probative, and credible evidence that Respondent more likely than not committed the violation charged.

B. Law and Analysis

Title 33 C.F.R. § 20.901(a) states a "party may move for a summary decision in all or any part of the proceeding on the grounds that there is no genuine issue of material fact and that the party is entitled to a decision as a matter of law." All competing inferences or reasonable doubts as to whether a genuine issue of material fact exists are viewed in a light most favorable to the non-moving party, Respondent in this case. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). Here, the Coast Guard is the moving party and bears the initial burden of identifying those portions of the pleadings, the material obtained by discovery or otherwise, or other material contained in the record that show an absence of a genuine issue of material fact. See generally 33 C.F.R. § 20.901(b); see also Anderson, Supra, 477 U.S. at 251-55.

Respondent's Answer admitted to all allegations in the Complaint including admitting to the proposed sanction of revocation, but requested settlement discussions. Respondent also admitted to making a mistake and needing help during the June 10, 2014 conference call. Respondent's admissions are a sufficient basis to find the allegations proved. See Appeal

Decision 2654 (HOWELL) (2005). Throughout the proceeding, the Coast Guard has complimented Respondent on his truthfulness and for taking responsibility for his actions. Even viewing the facts in the light most favorable to Respondent, the ALJ finds the admissions contained in Respondent's Answer prove all allegations in the Complaint, and therefore, there is no genuine issue of material fact and the Coast Guard is entitled to Summary Decision as a matter of law.

C. Application of 46 C.F.R. § 16.201(f) Time Requirement

Respondent entered into a return to work agreement as outlined in 46 C.F.R. § 16.201 (f) in August 2008. The drug testing schedule was outlined as follows:

- 12 tests the first year as return to duty testing;
- 9 follow-up tests in the second year;
- 7 follow-up tests in year three;
- 6 follow-up tests in year four; and
- 6 follow-up tests in the fifth year.

Therefore, completion of the return to work follow-up testing should have concluded in August of 2013, to be in compliance with the 60 month time requirement stated in 46 C.F.R. § 16.201(f)(2). Respondent took the drug test that is the subject matter of this proceeding on November 19, 2013, approximately three (3) months after the 60 month time expired.

Respondent stated both he and the SAP agreed to the testing schedule even though he knew it was beyond the 60 month time period described in 46 C.F.R. § 16.201(f). Appeal Decision 2668 (MERRILL) states if a mariner submits voluntarily to a drug test and the test is conducted in accordance with 49 C.F.R. Part 40, the failure to comply with 46 C.F.R. Part 16 is not a fatal flaw in proving a *prima facia* case of drug use. Here, Respondent agreed to the new

testing schedule and it was done for his convenience. Therefore, the ALJ finds the follow-up drug test is also a voluntary drug test for purposes of this matter.

Since Respondent admitted to the test being conducted in accordance with 49 C.F.R. Part 40 and Respondent voluntarily submitted to the test, the fact the 60 month time requirement in 46 C.F.R. § 16.201(f) was not followed is not fatal to the testing process in this case. Furthermore, there are no issues of jurisdiction and the Complaint is valid on its face.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent and the subject matter of this hearing are properly within the jurisdiction vested in the Coast Guard under 46 U.S.C. § 7704, 33 C.F.R. Part 20, and 46 C.F.R. Part 5.
2. Respondent is a holder of Merchant Mariner Document Number 153266.
3. The Coast Guard **PROVED** Respondent is a user of dangerous drugs based on Respondent's admissions.
4. Respondent's admissions show there is no genuine issue of material fact for the hearing, the Coast Guard is entitled to Summary Decision as a matter of law.
5. Pursuant to 46 U.S.C. § 7704(c) and 46 C.F.R. §§ 5.35 and 5.569, when use of or addiction to dangerous drugs is proven the appropriate sanction is revocation of Respondent's U.S. Coast Guard issued Merchant Mariner's Credentials.

SANCTION

One of the major purposes of suspension and revocation proceedings and trial-type hearings is to protect lives and properties against actual and potential dangers. 46 U.S.C. § 7701(a). Congress enacted 46 U.S.C. § 7704(c) and related statutes with the express intent of removing those individuals using a dangerous drug from service on board United States merchant marine vessels. See House Rep. 338, 98th Cong., 1st Sess. 177 (1983); see also Appeal

Decision 2634 (BARRETTA) (2002). Under 46 U.S.C. § 7704(c), revocation of a merchant mariner's credentials is required when it is shown on a motion or proceeding that the merchant mariner is a user of, or addicted to, a dangerous drug unless the mariner provides satisfactory evidence of cure of all dangerous drug use. See generally 46 C.F.R. § 5.569(b).[1]

In Appeal Decision 2535 (SWEENEY) (1992), the Commandant held that a Merchant Mariner could establish proof of cure by showing he had successfully completed a drug abuse rehabilitation program and that he had not had any associations with drugs for at least one year after completing the drug rehabilitation program as evidenced by successful participation in an active drug abuse monitoring or testing program which incorporates random, unannounced drug testing during that year. In later cases, the Commandant also held where a respondent demonstrates "substantial involvement in the cure process by proof of enrollment in an accepted [drug] rehabilitation program" a judge may stay the revocation and continue the hearing. Appeal Decision 2634 (BARRETTA) (2002); see also Commandant Review Decision 18 (CLAY). Where, as in this case, the Respondent has not provided any evidence of cure or substantial involvement in the cure process, revocation is the only proper order. See 46 C.F.R. § 5.569.

While revocation is a severe order, it is not necessarily permanent. The ALJ directs Respondent's attention to directed to 33 C.F.R. § 20.904(f), which allows a respondent within three (3) years or less after his Coast Guard issued license or document is revoked, to file a written motion to reopen this matter and seek modification of the order of revocation upon a showing that the order of revocation is no longer valid and the issuance of a new license, certificate, or document is compatible with the requirement of good discipline and safety of lives and property at sea. In cases such as this one, the revocation order may be modified upon a

[1] A "dangerous drug" is "a narcotic drug, a controlled substance, or a controlled-substance analog (as defined in section 102 of the Comprehensive Drug Abuse and Control Act of 1970 (21 U.S.C. 802))." See 46 C.F.R. § 16.105. By definition, marijuana (also known as "tetrahydrocannabinol" or "THC") is recognized as a "dangerous drug". See Id.; 21 U.S.C. §§ 802(6) and (16); 21 U.S.C. § 812(c)(17) (listing marijuana as a Schedule I controlled substance).

showing by Respondent that he: (1) has successfully completed a bona fide, acceptable drug abuse rehabilitation program; (2) has demonstrated complete non-association with dangerous drugs for a minimum of one year following completion of a drug rehabilitation program; and (3) is actively participating in a bona fide drug abuse monitoring or testing program. See generally 46 C.F.R. § 5.901(d). The drug abuse monitoring program must include random, unannounced testing during that year. Appeal Decision 2535 (SWEENEY).[2]

ORDER

IT IS HEREBY ORDERED that there being no genuine issues of material fact, the Coast Guard's Motion for Summary Decision is **GRANTED**.

IT IS FURTHER ORDERED that all licenses, documents and any other credentials issued by the Coast Guard to Respondent, Roy Andre Warren, are hereby **REVOKED**. Respondent must immediately surrender all credentials to the Investigating Officer LTJG Keith C. Heine, U.S. Coast Guard, Sector Hampton Roads, 200 Granby Street, Suite 700, Norfolk, VA 23510, telephone (757) 668-5540. If Respondent knowingly continues to use his credentials, he may be subject to criminal prosecution.

PLEASE TAKE NOTICE that service of this Order on the parties and/or parties' representatives(s) serves as notice of appeal rights set forth in 33 C.F.R. §§ 20.1001-20.1004. **(Attachment A)**.

Michael J Devine
US Coast Guard Administrative Law Judge

Date: July 16, 2014

[2] After three years, Respondent is required to apply directly with the Commandant of the U.S. Coast Guard in Washington, D.C. for issuance of a new license. See 46 C.F.R. 5.901 to 5.905.

ATTACHMENT A
33 C.F.R. PART 20
SUBPART J
APPEALS

§ 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.

§ 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.

§ 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.

§ 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.