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

UNITED STATES COAST GUARD
Complainant

vs.

Alan A Arnesen
Respondent

Docket Number 2019-0368
Enforcement Activity No. 5770364

DECISION AND ORDER
Issued: November 03, 2021

By Administrative Law Judge: Honorable George J. Jordan

Appearances:

Jennifer Mehaffey, Esq.
N&R National Center of Expertise
LT Robert B. Norcott
Sector Puget Sound
For the Coast Guard

James W. Alcantara, Esq.
For the Respondent

I. PROCEDURAL HISTORY

The United States Coast Guard (Coast Guard) initiated these proceedings on September 19, 2019, by filing a Complaint alleging Alan Arnesen (Respondent) is a user of, or addicted to the use of dangerous drugs. Specifically, the Coast Guard alleges Respondent took a urinalysis drug test which tested positive for marijuana metabolites (THC). Accordingly, the Coast Guard seeks revocation of Respondent's merchant mariner credentials (MMC). See 46 U.S.C. § 7704(c); 46 C.F.R. § 5.35.

Respondent filed a timely Answer admitting the jurisdictional and certain factual allegations. He does not disagree that the drug test yielded a positive result, but argues he is neither a user nor abuser of dangerous drugs. Respondent asserts the positive test resulted from his use of CBD products for pain. Respondent also argues that the collection facility erred in reporting his results to the Coast Guard because the drug test he took was intended to be voluntary and confidential. He contends he was not required to take a drug test in connection with his employment, and indeed, was on leave from his job as a mariner at the time of the positive test. Respondent sought a hearing on the merits of the case.

The Chief Administrative Law Judge (ALJ) assigned this case to me for adjudication on October 23, 2020. I held a hearing on February 2, 2021, using Zoom for Government software.[1] The Coast Guard presented testimony from seven witnesses and entered 15 exhibits into evidence. Respondent testified on his own behalf and entered 25 exhibits into evidence. During the pendency of this proceeding, Respondent also proactively sought to establish cure, as defined in Appeal Decision 2535 (SWEENEY) (1992). At the time of the hearing, he had completed a SAP-recommended drug education program, received an MRO return-to work letter, and submitted negative drug tests to demonstrate 12 months of non-association with drugs.

[1] The use of Zoom for Government was necessitated by the ongoing COVID-19 pandemic, which precluded an in-person hearing. The parties agreed a video hearing was appropriate in this case.

At the conclusion of the presentation of witnesses and evidence at the December 7, 2020 Zoom hearing, the Coast Guard moved for me to hold Respondent's credential pending the issuance of a decision. See Appeal Decision 2729 (COOK) (2020). However, I determined I required more time to analyze whether the Coast Guard proved a *prima facie* case of drug use. I also noted the Coast Guard had possession of Respondent's credential from September 2019 to March 2020, but returned it to him prior to the hearing. Consequently, I denied the motion.

For the reasons detailed below, I find the Coast Guard **PROVED** Respondent used a dangerous drug. However, I also find Respondent satisfactorily demonstrated cure. Revocation is therefore no longer an appropriate sanction. The period of deposit will be converted to an **OUTRIGHT SUSPENSION** and I find no further sanction is warranted.

II. FINDINGS OF FACT

The following Findings of Fact are based on a thorough analysis of the parties' Joint Stipulation, other documentary evidence, the witness testimony, and the record as a whole.

1. Respondent holds Coast Guard MMC No. [redacted], issued on January 3, 2017. (Ex. CG-01).

2. Respondent has no history of actions against his MMC. (Tr. at 166).

3. In August 2019, following a motorcycle accident, Respondent was being treated by his physician who prescribed opioids for pain. (Tr. at 167-68; Ex. R-28).

4. Respondent's physician eventually refused to continue prescribing opioids and instead recommended Respondent try hemp-based canniboid (CBD) products. (Ex. R-08, R-27).

5. At the time, Respondent was on leave from his position as the first engineer aboard the vessel MATSON KODIAK. (Tr. at 165).

6. While on leave, Respondent sought several drug tests at Occupational Health Clinic of Tacoma (OHCT) to determine whether the opioids and CBD were still in his system before he returned to work. (Tr. at 169).

7. OHCT has a policy of only conducting drug tests if a positive result would be reported to an employer or other overseeing entity. (Tr. at 61-62).

8. OHCT personnel did not inform Respondent of the policy, and he would have gone elsewhere if he had known. (Tr. at 180).

9. OHCT personnel were unaware that Respondent was seeking private testing and considered the tests to be required periodic tests under 46 C.F.R. Part 16. (Tr. at 62).

10. [redacted] collected a urine sample from Respondent on August 14, 2019, using the DOT protocols in 49 C.F.R. Part 40. (Ex. CG-04, CG-08, CG-10).

11. Pathology Associates Medical Laboratories (PAML), a SAMHSA-certified laboratory, analyzed the urine sample for dangerous drugs, using the DOT protocols in 49 C.F.R. Part 40. (Ex. CG-05; CG-07).

12. The urine sample was positive for THC-A metabolites. (Ex. CG-09).

13. Dr. Dale Fine, the Medical Review Officer (MRO), contacted Respondent by telephone and determined there was no legitimate medical reason for the positive result. (Tr. at 108).

14. Respondent requested the split sample be tested. (Tr. at 110).

15. Quest Diagnostic Laboratory, a SAMHSA-certified laboratory, tested the split sample and determined it was also positive for THC-A metabolites. (Ex. CG-12; CG-15)

16. Dr. Fine reported the positive result to Paul Tramm, a Coast Guard Investigating Officer. (Ex. CG-14).

I. DISCUSSION

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, ALJs have the authority to suspend or revoke Coast Guard-issued credentials or endorsements. See 46 C.F.R. § 5.19(b). These proceedings are conducted under the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.* 46 U.S.C. § 7702(a). Administrative actions against a mariner's credentials "are remedial and not penal in nature," and are intended to maintain the necessary standards of conduct for safety at sea. 46 C.F.R. § 5.5.

A. Burden of Proof

Section 7(c) of the APA places the burden of proof on the proponent of a rule or order, unless otherwise provided by statute. Accordingly, in a suspension or revocation hearing, the Coast Guard bears the burden of proof. 33 C.F.R. § 20.702(a). Under the APA, the fact-finder

must consider the "whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence" before assessing a sanction. 5 U.S.C. § 556(d). The standard of proof in administrative proceedings is the "preponderance of the evidence" standard, meaning a party must prove that "a fact's existence is more likely than not." Steadman v. SEC, 450 U.S. 91, 98 (1981); Greenwich Collieries v. Dir., Office of Workers' Comp. Programs, 990 F.2d 730, 736 (3d. Cir. 1993); see also Dir., Office of Workers' Comp. Programs v. Greenwich Collieries, 512 U.S. 267 (1994).

B. Jurisdiction

Respondent admitted to all jurisdictional elements relating to the allegations. However, the burden of establishing jurisdiction nevertheless remains. See, e.g., Appeal Decision 2656 (JORDAN). Pursuant to 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 . . . or merchant mariner's document shall be revoked unless the holder provides satisfactory proof that the holder is cured." Id.; see also Appeal Decision 2668 (MERRILL) (2007).

The record before me clearly establishes Respondent was the holder of an MMC at the time he submitted the urine sample in question. Here, the Coast Guard alleged Respondent is a user of, or addicted to the use of dangerous drugs in violation of 46 U.S.C. § 7704(c); therefore, Respondent's status as the holder of an MMC establishes jurisdiction for this suspension and revocation proceeding. See Appeal Decision 2668 (MERRILL).

C. The Coast Guard Proved Respondent Used Dangerous Drugs

Title 46 U.S.C. § 7704(c) mandates revocation of a Coast Guard-issued credential when the Coast Guard proves by reliable, credible, and probative evidence that the holder of an MMC has used dangerous drugs. A respondent who is shown to have used drugs may avoid revocation by providing reliable, credible, and probative evidence of cure. Id., see also Appeal Decision 2535 (SWEENEY) (1992).

1. Nature of the Drug Test

In an effort to "safeguard the constitutional rights of affected mariners" the Coast Guard mandates only pre-employment, periodic, random, serious marine incident, and reasonable cause drug testing. See Appeal Decisions 2704 (FRANKS), 2014 WL 4062506 (2014) and 2697 (GREEN) (2011). When mariner submits to a drug test for one of these reasons, the test complies with the procedures found in the Federal Transportation Workplace Drug Testing Programs (49 C.F.R. Part 40), and the result is positive, the Coast Guard is entitled to a rebuttable presumption that the mariner has used a dangerous drug. See 46 C.F.R. § 16.201(b).

However, Part 16 drug tests are not the only way for the Coast Guard to establish drug use in violation of 46 U.S.C. § 7704; other admissible evidence may include admissions by a respondent, observation, medical treatment for use or addiction and drug testing. See, e.g., Appeal Decision 2542 (DeFORGE) (1992). The Commandant has long held that voluntary drug tests are admissible in suspension and revocation cases. Appeal Decisions 2545 (JARDIN) (1992) and 2633 (MERRILL) (2002). In these circumstances, there is no government involvement, and thus, no potential for the constitutional harms Part 16 seeks to avoid. See FRANKS at *9. However, the regulatory presumption does not arise and the Coast Guard is required to provide "modest additional evidence" showing that the presence of metabolite means the mariner used dangerous drugs, by linking the mariner to the test and proving the test's reliability. Id.

Here, the OHTC personnel initially considered Respondent's drug test to be a periodic test, which is one of the allowable reasons for conducting a Part 16 test. The regulations require mariners to pass a periodic drug test when applying for an original MMC; a new endorsement or raise of grade; a reissued MMC with new expiration date; and as part of an annual physical examination if applicable. 46 C.F.R. § 16.220. Respondent argues the test should be inadmissible

in this proceeding, as it was not a Coast Guard-mandated test and was intended to be solely for his own use. Thus, he argued that the clinic erred in sending his results to the Coast Guard.

To determine the nature of the test, I must reconcile the parties' conflicting evidence. Savannah Ernst, the clinic manager at Occupational Health Clinic of Tacoma, testified that the clinic performs more company-ordered drug tests for local manufacturing companies than Federally-mandated tests, but does a fair number of Federal collections each year. (Tr. at 61). OHCT's policy is to only perform tests that will be reported to an employer or other overseeing entity, such as the Coast Guard, and not to perform tests where the results are provided only to the donor. (Tr. at 61-62). At the request of the MRO, OHCT started providing all mariners with a Form 719P when they came in seeking tests for reasons other than pre-employment, post-casualty, or random testing. (Tr. at 65). Her understanding is that most of these mariners are planning license upgrades, but the clinic does not ask them if they are upgrading when they come in. Rather, "[w]e just assume that they know that's what they need, so we do that for them, and that's the form the MRO said needs to be filled out, and it needs to be called a periodic." (Id.)

The collector used a Federal Custody and Control Form (FCCF) to document the test and followed the Part 40 procedures for collecting a urine sample. See Ex. CG-02, CG-03, CG-04. The letters "PVT" written on the top of the form designate that Respondent paid for the test himself, rather than using insurance or having an employer billed for it. (Tr. at 66). Respondent, however, claims the test was intended for personal use only, and the results never should have been supplied to the Coast Guard. He argues that the collection facility erred in marking it a periodic drug test, and did not inform him of their policy to only conduct workplace testing and not private testing. He also testified he only showed his driver's license as identification at the clinic when he first started going there and does not recall any discussions about his employer. (Tr. at 170). He did not show his MMC on August 14, 2019 and does not know how the clinic knew he was a credentialed mariner. (Tr. at 178). However, the clinic always used an FCCF to

document the collection each time he went there. (Tr. at 170, 172). Finally, Respondent alleges someone must have forged his name on a Form 719P, used for periodic testing, as he did not sign the form and does not recognize the signature as his own. (Tr. at 178).

The Coast Guard initially alleged this was a Part 16 test. However, in light of Respondent's testimony, counsel clarified the Coast Guard "is not relying on the 46 C.F.R. 16.201(b) regulatory presumption of use to establish a prima facie case of drug use, and is instead relying on the facts in evidence to show the Respondent voluntarily took a DOT drug test, he tested positive for marijuana, and the testing was conducted in accordance with the regulatory requirements of 49 C.F.R. Part 40." (CG Brief at 10). I will therefore treat this as a voluntary test, which may constitute evidence of drug use but does not give rise to the regulatory presumption.

I also consider the Coast Guard to have amended the Complaint to conform to the evidence, which is permitted under 33 C.F.R. § 20.305, provided a respondent has notice and opportunity to defend against the new charges. Here, where the facts underlying the old and new allegations are the same and the Coast Guard is no longer claiming the regulatory presumption of use, I see no issue in amending the Complaint to remove the reference to a required periodic test. See, e.g., Appeal Decision 2703 (WEBER) (2013) (an amendment that narrowed the issues, rather than broadened them, did not surprise or mislead any party).

I disagree with Respondent's argument that the drug test should not be admissible here because of the collector's error in using an FCCF and marking it as a periodic test. Respondent and the collector appear to have miscommunicated about his reasons for seeking the test: OHCT would not have conducted the test if clinic personnel knew it was for personal use, while Respondent incorrectly assumed the marking "PVT" on the forms delineated a confidential test, rather than private payment by the donor instead of payment from an employer. However, based on the testimony from both the collector and Respondent, I find it was reasonable under the

circumstances for the collector to treat this as a periodic test. The Coast Guard did not engage in any wrongdoing in obtaining the results, which were sent to the IO by a third party, and reasonably acted on the information it received. Moreover, the Commandant is clear that "minor technical infractions of the drug testing regulations do not violate due process unless the infraction breaches the chain of custody or violates the specimen's integrity." Appeal Decision 2685 (MATT) (2010).

Likewise, the Form 719P from the August 14, 2019 test, which Respondent alleges was forged, is not necessary to prove the allegation of drug use when the test is considered as a voluntary test. If the Coast Guard had maintained this was, in fact, a periodic test despite Respondent's denials, the Form 719P would have been relevant. As this was a voluntary test, however, the form is superfluous. Since I am giving no evidentiary weight to this document, I find it unnecessary to resolve the question of its authenticity; if Respondent wishes to litigate that matter, he may do so in an appropriate forum.

2. Respondent Was Tested for a Dangerous Drug

The record establishes that Respondent submitted a urine sample for drug testing purposes at OHCT on August 14, 2019. Respondent admits to having given the sample in question. (Tr. at 177). He raised no arguments about the chain of custody during the testing process, and there is no reason to believe from the evidence in the record that any chain of custody issues occurred. I therefore find Respondent was tested for a dangerous drug.

3. Respondent's Urine Sample Tested Positive for a Dangerous Drug

Drug tests conducted pursuant to 49 C.F.R. Part 40 screen for five types of drugs: (a) marijuana metabolites; (b) cocaine metabolites; (c) amphetamines; (d) opiate metabolites; and (e) Phencyclidine (PCP). 49 C.F.R. § 40.85. Here, the Coast Guard alleges Respondent used marijuana. Respondent denies using marijuana but admits to having taken, at his physician's

direction, both opioid painkillers and CBD products to treat pain. Respondent was on leave from his job as a mariner at the time, and contends he sought a confidential drug test so he would know whether he could safely attempt to resume working.

The definition of "dangerous drug" in 46 U.S.C. § 2101(8a) 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))." This Act defines a "controlled substance" as "a drug or other substance . . . included in schedule I, II, III, IV, or V of part B of this subchapter" but not distilled spirits, wine, malt beverages, or tobacco. 21 U.S.C. § 802(6). Marijuana is controlled under Schedule I of the Act (21 U.S.C. § 812) and is a dangerous drug for the purposes of 46 U.S.C. § 7704(c).

In 2018, however, Congress removed certain hemp products from the definition of marijuana under the Controlled Substances Act. See Agricultural Improvement Act of 2018, Pub. L. 115-334 (Farm Bill). Consequently, "hemp-derived products containing a concentration of up to 0.3% tetrahydrocannabinol (THC) are not controlled substances," but any product containing more than 0.3% THC—including those derived from hemp—remain classified as marijuana. See DOT Office of Drug and Alcohol Policy and Compliance "CBD" Notice, available at https://www.transportation.gov/odapc/cbd-notice. Both the DOT and the Coast Guard have cautioned persons in safety-sensitive positions who are subject to DOT drug testing regulations that product labeling can be misleading, as there is no federal oversight or certification for CBD products. Id.; Marine Safety Advisory 01-20: Potential for Positive Drug Test Result for Use of Hemp-Plant Products, available at https://www.dco.uscg.mil/Portals/9/DCO_Documents/5p/CG-5PC/INV/Alerts/USCGMSA_0120.pdf?ver=2020-02-10-150127-240. The Coast Guard has also warned mariners of its position that "Claimed use of hemp products or CBD products is not an acceptable defense for a THC-positive drug test result." See Marine Safety Advisory 01-20.

Here, there is sufficient evidence Respondent's urine sample tested positive for THC during a screening and confirmatory test, and the MRO reported a positive result. Respondent testified he never smoked marijuana or knowingly used any product with THC in it, such as edibles. (Tr. at 173). However, when his doctor declined to renew the opioid painkiller he was prescribed, the doctor recommended he try CBD products as a safer alternative to ease his pain. (Tr. at 173-74; Ex. R-8). Respondent was not concerned about using CBD products because his research showed the federal government had legalized the sale and use of hemp-based CBD. (Tr. at 174).

Although Respondent contended the THC likely came from CBD products, as he did not use marijuana, he did not argue he was somehow tricked or coerced into using the products; rather, he voluntarily obtained and used them. While he testified this was at the suggestion of his physician, he did not present evidence of a valid prescription for any drug that would result in a positive test for THC. Mariners must exercise extreme caution in the use of CBD products, see Appeal Decision 2729 (COOK) (2020), and none of the evidence in the record here absolves Respondent of that responsibility.

4. The Drug Test was Reliable

The Coast Guard presented credible evidence that Respondent's urine sample was collected, analyzed, and reported according to the Part 40 protocol. Barring any contradictory evidence, such tests are considered reliable evidence of drug use.

First, [redacted], a trained certified DOT collector and the employee at Multi-Care who collected Respondent's sample, testified. (Tr. at 26; Ex. CG-02). She explained that, when Respondent arrived at the clinic for the collection, the front desk attendant verified his identity and reason for the test, filled out an FCCF (Ex. CG-04), and provided a Coast Guard Form 719P, Periodic Drug Testing form for Respondent to sign. (Tr. at 29-31; Ex. CG-02). Ms.

[redacted] did not see who filled out the information on the Form 719P and did not witness Respondent's signature. (Tr. at 42). The top of the CCF used that day is marked "PVT," indicating it was paid for privately and not by an employer. (Tr. at 39). However, as far as Ms. [redacted] knew, the Respondent was seeking the test as a required periodic test and the agency requiring the test was the Coast Guard. (Tr. at 41).

Ms. [redacted] then brought him into the testing lab, verified the information on his FCCF, and directed him to remove his outer clothing and empty his pockets. (Tr. at 32-33). She placed bluing in the toilet and provided him with a specimen collection cup. (Tr. at 33). After Respondent returned with the sample, she checked the temperature, dispensed the proper amounts into the split sample cups, and sealed them with initialed, dated tamper-proof labels. (Tr. at 33-34). She then directed Respondent to read and sign Step 5, Copy 2 of the FCCF and completed Step 4 of the form herself. (Tr. at 34). Ms. [redacted] prepared and sealed the specimen bag and gave Respondent Copy 5 of the FCCF to take with him. The sample was taken by courier to PAML, the testing laboratory, at the end of the day. (Tr. at 35). Based on Ms. [redacted] unrebutted testimony, I find the collection was substantially in compliance with Part 40.

The Coast Guard also called Will Collie, who is the laboratory supervisor and Responsible Person designate for MedTox Laboratories (formerly at PAML),[2] to testify about the drug screening process. He testified PAML was a SAMHSA-certified laboratory when it conducted Respondent's drug test, so it was approved to perform such testing for the Department of Transportation and the Department of Health and Human Services. (Tr. at 77). Mr. Collie explained the contents of the lab litigation package and the chain of custody showing how Respondent's sample was tracked through the testing process. (Tr. at 74-75; Ex. CG-15).

Specific to Respondent's test, he stated the chain of custody was properly tracked and he saw no abnormalities in the litigation package. (Tr. at 83-85).

Mr. Collie testified about the laboratory's standard practices for receiving, opening, and labeling urine samples. (Tr. at 79-80). He explained how an aliquot is taken from Split Sample A for initial testing, which screens for presumptive positives and for validity. (Tr. at 80, 82). If a sample is presumptively positive or if there are questions about validity, a confirmatory test is performed on a separate aliquot from the same sample. (Tr. at 81, 82-83). In the confirmatory test, called gas chromatography mass spectrometry, the specific metabolite being tested for is isolated from the sample and the amount of the metabolite in each milliliter of urine is reported. (Tr. at 81, 91-93). In Respondent's sample, the laboratory isolated THC-A metabolite at 23.4 ng/ml, which is above the federal cutoff of 15 ng/ml. (Tr. at 81). After testing was complete, the laboratory placed Split Sample A and the aliquots they tested, as well as the still-sealed Split Sample B container, in long-term frozen storage. (Tr. at 81-82).

Mr. Collie also testified that the laboratory performed both DOT and non-DOT testing. (Tr. at 87). These batches were always handled separately, but the only major difference in the testing methods is that DOT testing is limited to five enumerated types of drugs while non-DOT tests can screen for additional types of drugs. (Tr. at 88).

At Respondent's request, his urine sample was retested after he received the positive result. Michael Shane Morris, a laboratory manager at Quest Diagnostics, identified the laboratory litigation package and testified about the process of retesting. (Ex. CG-07). For a reconfirmation test, the Split Sample B container is opened and sent directly through gas chromatography mass spectrometry testing. (Tr. at 131). The level of THC-A in the sample was

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[2] PAML was the laboratory that conducted the drug screening for Respondent's positive result. Both MedTox and PAML are owned by the same parent corporation, LabCorp. Mr. Collie worked at PAML but transferred to MedTox when LabCorp decided to stop conducting urine drug testing at the PAML facility. (Tr. at 73).

above the federal cutoff of 15 ng/ml, confirming the results of the initial test. (Tr. at 132). Quest reported this result to the MRO. (Tr. at 133).

Based on Mr. Collie's testimony, I find Respondent's urine sample was initially analyzed for dangerous drugs according to the procedures in Part 40. Mr. Morris's testimony confirmed the result, and also showed that the split sample was properly analyzed in accordance with the regulations.

Dr. Dale Fine, the MRO, received Respondent's initial positive result electronically and called Respondent to conduct an interview designed to determine whether there was a legitimate medical reason for the result. (Tr. at 103; Ex. CG-10). Dr. Fine verified Respondent's identity, notified him of the results of the test, and asked if Respondent was currently taking any medications. (Tr. at 108; Ex. CG-13). Respondent was unable to provide a legitimate medical explanation, and requested that the split sample from the collection be tested. (Tr. at 108-10). After the split sample was tested and also yielded a positive result, he notified Respondent and the Coast Guard (Tr. at 110-14; Ex. CG-12, CG-14). Respondent told Dr. Fine this was a private test, not a Coast Guard test, but because it was documented on an FCCF, Dr. Fine had no discretion to invalidate it. (Tr. at 113-14).

Dr. Fine testified he would have proceeded the same way even if this was not a DOT test and the results were erroneously sent to him for verification, because he does not have the authority to determine the reason for testing. (Tr. at 118). However, he was under the mistaken impression that Respondent was a Coast Guard employee and Paul Tramm, a Coast Guard Investigating Officer, was the Designated Employer Representative. (Tr. at 117). Dr. Fine was also unfamiliar with the Coast Guard's specific drug testing requirements and the procedures and requirements for establishing cure after a finding of drug use and has never assisted or referred mariners for this purpose. (Tr. at 119). Even so, he was familiar with the duties assigned to

MROs under the DOT regulations at 49 C.F.R. Part 40, and the evidence shows he was in substantial compliance with those duties.

After considering all the testimony and documentary evidence, I conclude Respondent's urine sample was collected, analyzed, and reported in accordance with the protocols in Part 40 and is therefore considered reliable. Consequently, the Coast Guard **PROVED** the alleged violation of 46 U.S.C. § 7704(c) and 46 C.F.R. § 5.35.

II. SANCTION

Having found the allegations in the Complaint proved, I am required to issue a decision and appropriate order against Respondent. 33 C.F.R. § 20.902(a)(2). When the Coast Guard proves a mariner used or is addicted to the use of dangerous drugs, the only appropriate sanction is revocation, unless the mariner has proven cure. See 46 U.S.C. § 7704(c); 46 C.F.R. § 5.569; Appeal Decision 2535 (SWEENEY) (1992). However, at the time of the hearing, Respondent presented substantial evidence of involvement in the cure process. The Coast Guard acknowledged the authenticity of the evidence but took no position on whether it was sufficient to establish cure.

Respondent's documentary evidence contains twelve negative drug tests, spanning the time period from October 31, 2019 through September 25, 2020. These tests appear to be valid and conducted in accordance with Part 40. However, in post-hearing briefing, the Coast Guard argued Respondent had not presented sufficient evidence of cure, saying "Respondent only submitted test results starting in April 2020 and continuing through September 2020. Resp. Ex. 39, 40, 41, 42, 43, 44." (CG Brief at 25). It is unclear why the Coast Guard did not acknowledge the other five tests (Ex. R-12, R-13, R16 through R-18, and R-37) after having agreed to their admission during the hearing. I therefore find no merit to the Coast Guard's argument that

Respondent has taken too few drug tests over too short a span of time to properly demonstrate non-association with dangerous drugs.

The record also shows Respondent initially deposited his MMC with the Coast Guard as part of the settlement process, but the parties ultimately did not effectuate such an agreement. (Tr. at 209). Respondent filed a motion for immediate return of his MMC on March 3, 2020, but withdrew that motion on March 7, 2020, following discussions with Coast Guard counsel in which they "agreed this is the best resolution of the MMC issue." However, at some point following the MRO's issuance of a return-to-work letter, the Coast Guard did return Respondent's credential.[3] (Tr. at 210). The Coast Guard did not explain why it returned Respondent's MMC if it believes Respondent is a threat to maritime safety, but now argues that the credential should be revoked because the180 days Respondent's MMC was on deposit is "significantly shorter than the time mariner [sic] is ineligible to work under his MMC while undergoing the cure process." However, precedent clearly indicates that it is not the length of time a mariner is unable to work under his or her credential, but rather the mariner's completion of the cure process that determines whether the mariner can again hold a credential. See, e.g., COOK at 12 (mariners are not required to complete the entire twelve-month non-association period while deprived of their credentials); SWEENEY at 5 (a mariner can make progress toward cure prior to hearing, though in most cases the hearing will be held before the mariner can complete the process).

1. Respondent Proved Cure

Respondent presented evidence that he was initially evaluated by Jeremy Wekell, a Substance Abuse Professional, on September 9, 2019. (Tr. at 154-55; Ex. R-5). Mr. Wekell did

[3] The parties appear not to have notified my office of the Coast Guard's decision to return the MMC.

not diagnose Respondent with a substance use disorder[4] and recommended a basic drug and alcohol education course, as he does for anyone he evaluates. (Tr. at 157-58). Respondent completed the course and the course provider sent Mr. Wekell a certificate verifying completion. (Tr. at 158). Mr. Wekell saw Respondent for a follow-up assessment on September 19, 2019, and was satisfied Respondent had achieved the goals of the course. (Tr. at 159; Ex. R-4). His only recommendation was to undergo 12 months of additional, random drug testing, as required for Coast Guard-credentialed mariners. (Tr. at 160). Mr. Wekell believed it was safe for Respondent to return to work at that time, and Respondent obtained a return-to-work letter from the MRO on February 18, 2020. (Tr. at 161-62; Ex. R-3, R-4).

The Commandant explained the requirements for cure in Appeal Decision 2535 (SWEENEY) (1992). There are two parts to the cure standard: first, the mariner must successfully complete a bona fide drug abuse rehabilitation program, and second, must demonstrate a complete non-association with drugs for a minimum of one year following the successful completion of the drug abuse program. SWEENEY at 5. Sweeney derived this standard from 46 C.F.R. § 5.901(d), which prescribes requirements for waiving the three-year waiting period that applies when a mariner whose credential was revoked as a result of use or simple possession of dangerous drugs seeks a new credential. See COOK at 9.

I find the evidence in this matter establishes that Respondent is cured of his association with dangerous drugs. He completed a bona fide drug abuse rehabilitation program, as prescribed by his SAP, on January 7, 2020. He has also demonstrated a complete non-association with dangerous drugs for one year after completing the program, as evidenced by twelve random drug tests all yielding negative results. Additionally, the MRO has provided a return-to-work letter.

[4] The Diagnostic Statistical Manual for Mental Disorders (DSM-5) uses specific criteria to establish if a person is a "substance abuser." This is a separate standard than the terms "user of, or addicted to dangerous drugs" as set out in Coast Guard law and regulations. A person who is not a "substance abuser" according to the DSM-5 may nevertheless be a "user" under Coast Guard law.

The Coast Guard argues for revocation because it held Respondent's MMC for less than the time it would generally take for a mariner to complete the cure process. As discussed above, this is not in accord with law and precedent, as Respondent has provided satisfactory proof of cure. See 46 C.F.R. § 7704(b); COOK at 17. I therefore find no further sanction is warranted and will therefore convert the period during which his MMC was on deposit to an **OUTRIGHT SUSPENSION**. See COOK, supra.

ORDER

IT IS HEREBY ORDERED that the appropriate sanction in this matter is **180 DAYS of OUTRIGHT SUSPENSION**, reflecting the period the MMC was on deposit with the Coast Guard.

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).**

George J. Jordan
US Coast Guard Administrative Law Judge

Date: November 03, 2021