

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

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UNITED STATES COAST GUARD  
Complainant

vs.

ELDON WAYNE RUSSELL  
Respondent

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Docket Number 2021-0628  
Enforcement Activity No. 7346291

**DECISION AND ORDER**

**Issued: September 20, 2022**

**By Administrative Law Judge: Honorable George J. Jordan**

**Appearances:**

JENNIFER MEHAFFEY, ESQ., S&R National Center of Expertise  
LT CARL M. ESCHLER, Marine Safety Unit Portland OR  
**For the Coast Guard**

ELDON W. RUSSELL, *Pro se*  
**For the Respondent**

## I. PROCEDURAL HISTORY

The United States Coast Guard (Coast Guard) initiated these proceedings on November 17, 2021, by filing a Complaint alleging Eldon Wayne Russell (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 credential (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 argues he is neither a user nor abuser of dangerous drugs, but uses hemp-based CBD products for pain relief. Respondent sought a hearing on the merits of the case.

The Chief Administrative Law Judge (ALJ) assigned this case to me for adjudication, and I held a hearing on May 3, 2022, in Portland, Oregon. The Coast Guard presented testimony from six witnesses, and entered 18 exhibits into evidence. Respondent testified on his own behalf and did not offer any exhibits. During the pendency of this proceeding, Respondent also proactively sought to establish cure, as defined in Appeal Decision 2535 (SWEENEY) (1992). At the conclusion of the hearing, the Coast Guard moved for me to hold Respondent's credential pending the issuance of a decision. See Appeal Decision 2729 (COOK) (2020). I granted the Coast Guard's request and retained Respondent's MMC. Several weeks after the hearing, Respondent provided a single negative drug test, a return-to-work letter from the Medical Review Officer (MRO), and a letter from his employer. The Coast Guard did not object, and I admitted them into evidence.

For the reasons detailed below, I find the Coast Guard **PROVED** Respondent used a dangerous drug. I also find Respondent has made efforts toward demonstrating cure, but has not

satisfied all the requirements. Thus, **REVOCATION** is the only available sanction in this matter.

## II. FINDINGS OF FACT

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

1. Respondent holds Coast Guard MMC No. [REDACTED], issued on September 28, 2021. (Ex. CG-01).
2. Respondent is an instructor in the Maritime Science Department at Clatsop Community College.
3. Respondent's position requires him to hold an MMC and to serve as captain of the college's training vessel. (Tr. at 63-68, 70; Ex. CG-2).
4. Clatsop Community College uses Bio-MED Testing Services, a third-party administrator, to administer its DOT drug testing program. (Tr. at 15-18, 20; Ex. CG-05).
5. On October 12, 2021, Bio-MED's software randomly selected Respondent for drug testing and generated a notice for the college's Designated Employee Representative (DER) to provide to Respondent. (Tr. at 25-27; Ex. CG-07, CG-08).
6. [REDACTED] is a HR generalist at Clatsop Community College and serves as the DER. (Tr. at 50).
7. When Ms. [REDACTED] received the notification from Bio-MED regarding Respondent's selection for random testing, she sent the notification document by email to the Maritime Science Department's program assistant, [REDACTED], so she could notify Respondent of the test. (Tr. at 56).
8. Ms. [REDACTED] received the notification document and provided it to Respondent. (Tr. at 77).
9. Respondent reported for drug testing on October 13, 2021 to Helena's Drug Screening Services, LLC. (Ex. CG-09).
10. Helena Graves, a certified collector, administered the urinalysis drug test using the protocol specified in 49 C.F.R. Part 40, including checking Respondent's ID, securing the restroom, ensuring the specimen numbers on the collection vials are correct and sealing the specimens in Respondent's presence, and documenting the collection on a Federal Custody and Control Form (CCF) signed by Respondent. (Tr. at 40-46; Ex. CG-09, CG-10).

11. Legacy Laboratory Services, a SAMHSA-certified laboratory, analyzed the urine sample for dangerous drugs, using the DOT protocols in 49 C.F.R. Part 40. (Tr. at 85-87, 95-106; Ex. CG-11, CG-13).
12. The urine sample was positive for THC-A metabolites at a level of 35 nanograms per milliliter, above the federal cutoff level of 15 nanograms per milliliter. (Tr. at 102; Ex. CG-09).
13. Products labeled as containing CBD may also contain THC, as they are unregulated. (Tr. at 111).
14. Legacy Laboratory Service's equipment can distinguish between the molecular structure of CBD metabolites and THC metabolites, as required by federal regulations. (Tr. at 107).
15. Dr. Matthew Noble, the Medical Review Officer (MRO), reviewed the laboratory results from Respondent's October 13, 2021 urine sample. (Tr. at 119-21).
16. Dr. Noble contacted Respondent by telephone and determined there was no legitimate medical reason for the positive result. (Tr. at 123, 125-26; Ex. CG-18).
17. Dr. Noble advised Respondent of his right to have a split sample tested, but Respondent did not request split sample testing. (Tr. at 134; Ex. CG-18).
18. Dr. Noble reported the positive result to the Coast Guard. (Ex. CG-17).

### **III. 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. Use of Dangerous Drugs**

The Coast Guard uses the procedures found in the Federal Transportation Workplace Drug Testing Programs and has implemented regulations to that effect. See 46 C.F.R. Part 16; 49 C.F.R. Part 40. 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) and 2697 (GREEN) (2011). 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.

Here, the Coast Guard alleges Respondent used marijuana. 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 Notice, available at [https://www.transportation.gov/sites/dot.gov/files/2020-02/ODAPC\\_CBD\\_Notice.pdf](https://www.transportation.gov/sites/dot.gov/files/2020-02/ODAPC_CBD_Notice.pdf). 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.*, see also Marine Safety Advisory (MSA) 01-20, available at [https://www.dco.uscg.mil/Portals/9/DCO%20Documents/5p/CG-5PC/INV/Alerts/USCGMSA\\_0120.pdf?ver=2020-02-10-150127-240](https://www.dco.uscg.mil/Portals/9/DCO%20Documents/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.” MSA 01-20.

In order to establish a *prima facie* case of drug use based on a mandated urinalysis test, “the Coast Guard must prove three elements: (1) Respondent was tested for a dangerous drug, (2) Respondent tested positive for a dangerous drug, and (3) the test was conducted in accordance with 46 C.F.R. Part 16.” Appeal Decision 2697 (GREEN). However, “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).

If the Coast Guard establishes a *prima facie* case of drug use, the “burden then shifts to the Respondent to produce persuasive evidence to rebut the presumption.” Appeal Decision 2632 (WHITE) (2002). If the respondent’s evidence is insufficient to rebut the presumption of use, the ALJ may find the allegations proved based on the presumption itself. *Id.*

### **1. The Coast Guard Proved a Prima Facie Case of Drug Use**

Here, the evidence establishes that Bio-MED properly selected Respondent for a random drug test. (Tr. at 25-27; Ex. CG-07, CG-08). Clatsop Community College personnel properly notified Respondent of the need to test, and Respondent promptly reported for testing at Helena’s Drug Screening Services, LLC. (Tr. at 56, 77; Ex. CG-09). Respondent provided a urine sample on October 13, 2021, and the sample subsequently tested positive for THC. (Ex. CG-09).

Respondent did not assert any testing irregularities or chain-of-custody issues, and the collector testified she followed the regulatory procedures. (Tr. at 47).

The Coast Guard called Dr. Dave Roberts, the manager and scientific director of the Toxicology Section of Legacy Lab Services, and Dr. Matthew Noble, the MRO, to testify about the testing and certification processes. Both witnesses testified that the laboratory analyzed the specimen in compliance with the DOT regulations, and Dr. Noble reported it as a positive test because Respondent did not have a medically valid reason for the positive result. I find the testimony credible and serves as additional evidence of the test's validity.

Accordingly, I find the Coast Guard met its burden to establish that Respondent took a random drug test, the test was positive for THC, and the test was conducted in accordance with 46 C.F.R. Part 16. Accordingly, the Coast Guard established its *prima facie* case and Respondent is presumed to be a user of dangerous drugs.

## **2. Respondent Did Not Rebut the Presumption of Use**

The burden now shifts to Respondent to rebut the presumption of use established through the Coast Guard's *prima facie* case. Respondent asserts he is neither a "user of" nor "addicted to" dangerous drugs; rather, he intended to use only products containing less than 0.3% THC, which are considered federally legal under the Farm Bill, and therefore, any ingestion of higher levels of THC was accidental or unintentional. (Tr. at 137-38). He has used the same product to ease his joint pain for approximately two years. (Tr. at 137, 139). Further, the company that makes the product is permitted to sell in Oregon, and he purchases it online. (*Id.*)

I find the weight of the evidence supports Respondent's contention that he did not intend to use marijuana and sought a product he thought complied with current law. However, regardless of the reason Respondent used these products and his good intentions to follow the



law as he understood it, the results of his random drug test show the product did, indeed, contain sufficient levels of THC to exceed the threshold for a positive result. Respondent was not tricked or coerced into using the products; rather, he voluntarily obtained and consumed them.

Unfortunately for Respondent, his reliance on statements from the manufacturer that it tests each batch to ensure the THC levels are compliant was misplaced and does not excuse him of the need to exercise extreme caution in the use of CBD products. See Appeal Decision 2729 (COOK) (2020). Consequently, I find Respondent failed to rebut the presumption he used dangerous drugs, specifically marijuana.

### **3. Respondent Did Not Prove Cure**

After the hearing, Respondent submitted a return-to-work letter from Dr. Noble (Ex. Resp.-A), a negative drug test result (Ex. Resp.-B), and a letter from his employer (Ex. Resp.-C). These documents are intended as evidence he is working to establish cure. Although Respondent did not submit an evaluation from a Substance Abuse Professional (SAP), Dr. Noble received and reviewed the SAP's assessment that Respondent could be considered for return to safety-sensitive duties and issued the return-to-work letter. (Ex. Resp.-A).

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 have reviewed the evidence and find it does not meet the requirements of Sweeney, as he submitted only a single negative drug test dated June 17, 2022. (Ex. Resp.-B). A respondent proves non-association through a combination of after-care treatments (such as documented AA/NA meetings) and drug testing. See 46 C.F.R. § 5.901. Thus, he has not demonstrated a complete non-association with dangerous drugs for a period of one year and, although the MRO provided a return-to-work letter, this is not enough to prove cure under Coast Guard policy. The current return-to-work letter permits Respondent to perform only duties that do not require a Coast Guard-issued credential.

#### **IV. SANCTION**

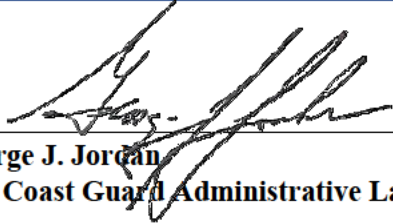
Having found the allegations in the Complaint proved, I am required to issue a decision and appropriate order against Respondent. 33 C.F.R. § 20.902(a)(2). When the Coast Guard proves a mariner used or is addicted to the use of dangerous drugs, the only appropriate sanction is revocation, unless the mariner has proven cure. See 46 U.S.C. § 7704(c); 46 C.F.R. § 5.569; Appeal Decision 2535 (SWEENEY) (1992). As Respondent has not satisfactorily demonstrated cure, I order his MMC **REVOKED**. If Respondent completes the requirements of the cure process, he may file a motion to reopen with the ALJ Docketing Center within three years of this Order. The motion must clearly state why the basis for the order of revocation is no longer valid and how issuance of a new MMC is compatible with good discipline and safety at sea. 33 C.F.R. § 20.904(f).

**Wherefore,**

**ORDER**

**IT IS HEREBY ORDERED** that Respondent, Eldon Wayne Russell's MMC and all other documents and certificates held by Respondent are **REVOKED**. I will forward Respondent's MMC, which I retained at the hearing, to the Coast Guard Marine Safety Unit Portland, Oregon.

**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. Subpart J, § 20.1001 – § 20.1004. (Attachment A).

  
George J. Jordan  
U.S. Coast Guard Administrative Law Judge  
Date: September 20, 2022

**ATTACHMENT A**

**TITLE 33 - NAVIGATION AND NAVIGABLE WATERS  
CODE OF FEDERAL REGULATIONS**

**PART 20 RULES OF PRACTICE, PROCEDURE, AND EVIDENCE FOR FORMAL  
ADMINISTRATIVE PROCEEDINGS OF THE COAST GUARD**

**SUBPART J - APPEALS**

**33 C.F.R. § 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 C.F.R. § 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 C.F.R. § 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 C.F.R. § 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.

## WITNESS AND EXHIBIT LISTS

### Coast Guard's Witnesses:

1. [REDACTED]
2. Helena Graves
3. [REDACTED]
4. [REDACTED]
5. David Roberts
6. Matthew Noble

### Coast Guard's Exhibits:

<u>Exhibit</u>	<u>Description</u>
CG – 01	A copy of Respondent's Merchant Marine Credential (MMC).
CG – 02	Respondent's Teaching Assignment Designation Letter and Court Syllabus From Clatsop Community College.
CG – 03	Instructor Assignments, CCC Marine Science Department, September and October 2021.
CG – 04	Certificate of Inspection for vessel Forerunner.
CG – 05	Certificate of Respondent's Enrollment random selection with Bio-MED Testing Services..
CG – 06	Scanlon Associates DrugPak statement of scientific randomness for computer-generated random selections.
CG – 07	Respondent random selection.
CG – 08	Notice to Respondent on selection for controlled substance test with USCG test request form.
CG – 09	Federal Drug Testing Custody and Control Form (FCCF) Copy 3 (Collector Copy), Specimen ID F881394578.
CG – 10	DOT Drug Screen Collection Technician Certificate for Helena Graves.
CG – 11	Laboratory Litigation Package.
CG - 12	FCCF Copy 1 (Test Facility Copy), Specimen ID F881394578.
CG – 13	Federal Register Notice of Certified Testing Facilities Labs.
CG – 14	Legacy Laboratory Services Report for positive results.

CG – 15	FCCF Copy 2 (MRO Copy), Specimen ID F881394578.
CG - 16	Medical Review Officer Certification for Dr. Noble.
CG – 17	Drug test results certified by the MRO.
CG – 18	MRO notes regarding Respondent’s verified positive drug test for marijuana.

**Respondent’s Witnesses:**

1. Eldon Russell, Respondent

**Respondent’s Exhibits:**

<b><u>Exhibit</u></b>	<b><u>Description</u></b>
Resp.-A	MRO Return to Work Letter
Resp.-B	Negative drug test results, June 12, 2022
Resp.-C	Letter from Clatsop Community College regarding Respondent’s return to work