

UNITED STATES OF AMERICA  
DEPARTMENT OF TRANSPORTATION  
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA	:	DECISION OF THE
UNITED STATES COAST GUARD	:	
	:	VICE COMMANDANT
	:	
	:	ON APPEAL
vs.	:	
	:	NO. 2634
	:	
	:	
	:	
LICENSE NO. 788553	:	
	:	
<u>Issued to: Veronica A. Barretta</u>	:	

This appeal is taken in accordance with 46 U.S.C. 7702, 46 U.S.C. 7704(c), 46 C.F.R. 5.701, and the procedures in 33 C.F.R. Part 20.

By a Decision and Order (D&O) dated June 18, 2002, an Administrative Law Judge (ALJ) of the United States Coast Guard at Norfolk, Virginia, revoked on a conditional basis the Respondent's above captioned license. The Respondent was charged under 46 U.S.C. 7704(c) with the use of a dangerous drug in a single specification based on a positive test for marijuana and the charge and specification were found proved by the ALJ. The ALJ, in issuing his conditional revocation, ordered the Coast Guard to temporarily return the Respondent's license for two months (July and August 2002) to allow the Respondent to work under the license providing launch service at a marina in Provincetown, Rhode, Island. [D&O at 10] The D&O allowed Respondent, during July and August 2002, to provide "launch service at Provincetown to and from the dock at Provincetown Marina." [D&O at 10] Pursuant to the conditional

revocation, the Respondent would continue with her drug rehabilitation program during and beyond this two-month period in order to prove she was cured in accordance with 46 U.S.C. 7704(c) and my decision in Appeal Decision 2546 (SWEENEY). The Respondent was also required to participate in a “random, unannounced drug-testing program for a minimum of one year following completion of the rehabilitation program” and be “subject to increased unannounced testing for up to 60 months.” [D&O at 8-9]

The D&O was served on the Respondent and the Coast Guard on June 18, 2002. The Coast Guard filed its appeal on June 26, 2002. In its appeal, the Coast Guard requested a stay of the D&O that I granted on June 28, 2002. The Coast Guard also requested a modification of the D&O to require outright and unconditional revocation of Respondent’s license. Respondent did not file a reply brief in this matter.

APPEARANCES: Christopher J. Snow, Esq., 90 Harry Kemp Way, Provincetown, Massachusetts 02657 for Respondent. The Coast Guard Investigating Officer was Lieutenant (Junior Grade) Joshua Pennington, stationed at Marine Safety Office Providence, 20 Risho Avenue, East Providence, Rhode Island 02914.

### FACTS

At all relevant times, Respondent held the above captioned license. On June 8, 2001, Respondent submitted to random urinalysis testing. [IO Exhibit A] Outer Cape Health Services of Provincetown, Massachusetts, collected her sample in accordance with Department of Transportation regulations. [IO Exhibit A] Respondent signed a federal Drug Testing Custody and Control Form in the presence of the collector. [Tr. at 13] Her sample was analyzed by SmithKline/Quest Diagnostics in Van Nuys, California, in

accordance with Department of Transportation procedures and tested positive for marijuana metabolite. [IO Exhibit A]

At the hearing on April 24, 2002, at Providence, Rhode, Island, the Respondent did not challenge the test conducted by the laboratory, the Medical Review Officer's (MRO) verification of a positive test result, or the collection process. [Tr. at 46] Respondent stipulated that the drug test was accurate and that the Coast Guard would not be required to prove the validity of the drug test. [Tr. at 46] Respondent admitted at the hearing to using marijuana prior to submitting to the random urinalysis test at which she tested positive. [Tr. at 55] Respondent admitted to smoking marijuana at a party. [Tr. at 55]

Respondent, through counsel, advised the ALJ that she had entered a drug counseling program one week prior to the hearing and wished to pursue cure in accordance with Appeal Decision 2546 (SWEENEY). Respondent advised the ALJ that she "was willing to complete the necessary requirements of the cure program and a long suspension of her license if she would be allowed to work for two months as operator of a launch only for the Provincetown Marina carrying passengers from the mooring there to and from the marina." [D&O at 3]

The ALJ found the charge and specification proved and revoked Respondent's license. The ALJ established a period from April 24, 2002, to June 30, 2003, with the exception of the months of July and August 2002, in which the Respondent could not serve under the authority of the license. [D&O at 7] When deciding to allow this deviation from the normal cure process the ALJ considered the limited work Respondent expected to do in July and August 2002. Respondent said she would be operating a

launch only in protected waters. [D&O at 6] The ALJ also considered the fact that the Respondent had enrolled in an intensive outpatient substance abuse program and had been removed from her position as a launch operator in June 2001 following the positive test result and had not served under the authority of her license since then. [D&O at 6] The ALJ explained that the suspension period cited above was longer than the usual 12-month period required in Appeal Decision 2546 (SWEENEY).

#### BASIS OF APPEAL

The Coast Guard appealed, arguing that the ALJ abused his discretion in ordering the conditional revocation of Respondent's license after finding a charge of use of a dangerous drug proven under 46 U.S.C. 7704(c). The Coast Guard asserts that the ALJ was statutorily required to revoke the Respondent's license unless the Respondent could sufficiently demonstrate "cure" as defined by Appeal Decision 2546 (SWEENEY).

#### OPINION

The purpose of suspension and revocation proceedings is to promote safety at sea. 46 U.S.C. 7701. Revocation of a merchant mariner's credentials is required when the holder has been shown to be a user of, or addicted to a dangerous drug, unless the mariner successfully demonstrates cure. 46 U.S.C. 7704(c). Congress enacted 46 U.S.C. 7704 with the express purpose of removing those individuals possessing and using drugs from service in the United States merchant marine. House Report No. 338, 98<sup>th</sup> Cong., 1<sup>st</sup> Sess. 177 (1983).

The Commandant has been delegated the authority to promulgate regulations to carry out suspension and revocation hearings at 49 C.F.R. 1.46. Under that delegation,

the Commandant promulgated 46 C.F.R. 5.59 which provides, in pertinent part, for revocation of licenses, certificates or documents where “the respondent has been a user of, or addicted to the use of, a dangerous drug.” 46 C.F.R. 5.59(b).

The burden of establishing “cure” is on the Respondent. Appeal Decision 2526 (WILCOX). In establishing cure under 46 U.S.C. 7704(c), the mariner must:

- (1) successfully complete a bona fide drug abuse rehabilitation program, and
- (2) demonstrate a complete non-association with drugs for a minimum of one year following the successful completion of the drug abuse program. Appeal Decision 2546 (SWEENEY). I reaffirmed and clarified these principles in Commandant Decision on Review #18 (CLAY), which is discussed below. In addition, Coast Guard regulations also require an MRO to verify that the mariner is drug-free and that the risk of subsequent use of dangerous drugs by that mariner is sufficiently low to justify his return to work before a mariner may return to work aboard a vessel. 46 C.F.R. 16.201(f).

An ALJ may grant a continuance to the hearing if the Respondent has demonstrated substantial involvement in the cure process by proof of enrollment in an acceptable rehabilitation program. Appeal Decision 2546 (SWEENEY). This continuance permits the ALJ to stay the revocation of a license, certificate or document while the Respondent completes the cure process.

The issue of whether an ALJ can permit a Respondent to retain possession of a license or document pending completion of cure was squarely addressed in Commandant Decision on Review #18 (CLAY). In that case, I held that once a *prima facie* case of illegal drug use is established to the satisfaction of the ALJ, the mariner poses a danger to public safety such that sufficient cause exists to withhold the license or

document until cure is complete. The CLAY decision recognized that once the Coast Guard has proven that a mariner used an illegal drug, his license or document must be revoked, or, in the alternative, the license or, withheld until the Respondent proves that he or she is cured. In this case, Respondent requested that the ALJ return her license during the process of cure. It is unclear from the record whether Respondent would still have been in the drug abuse rehabilitation program when her license was to be returned or whether she would have been in the post-treatment one-year non-association period. But, the distinction is unimportant. As was clearly explained in Commandant Decision on Review #18 (CLAY), “cure” is a two-step process and a mariner is deemed not to have attained “cure” until both steps have been completed. In this case, returning Respondent’s license before she completed both the drug abuse rehabilitation program and the one-year non-association period following the rehabilitation program was not appropriate.

I have stated in the past that an ALJ in a suspension and revocation proceeding involving illegal drug use is without discretion to issue an order less than revocation unless the Respondent had proven to the ALJ’s satisfaction that he is cured of drug use. Appeal Decisions 2476 (BLAKE); 2504 (GRACE); Commandant Decision on Review #5 (CUFFIE).

The ALJ is not authorized to permit a mariner to sail under the authority of the mariner’s credential until all the requirements of cure have been met. The ALJ can only find that cure has been established after the mariner has successfully completed a bona fide drug rehabilitation program, demonstrated a complete non-association with drugs for one year following completion of the drug rehabilitation program, and the MRO has

made a determination in accordance with 46 C.F.R. 16.201(f) that the mariner is drug-free and his risk of use of illegal drug use again is sufficiently low. During the period of cure, the ALJ may stay the order of revocation and continue the hearing to allow cure, but the ALJ cannot allow the mariner to work under the authority of the mariner's credential.

In the present case, I find that the ALJ erred in three instances. First, by revoking the Respondent's license on a "conditional basis," the ALJ recognized a sanction other than revocation. Second, he permitted Respondent to serve under the authority of her license during the period of cure rather than after cure had been completed. Third, he ignored the mandate of 46 C.F.R. 16.201(f) by ordering Respondent's license returned before the MRO determined Respondent was drug-free and that the risk of subsequent drug use was sufficiently low to justify her return to work in the maritime industry.

#### CONCLUSION

I find that the ALJ improperly permitted Respondent to impose conditions upon her entrance into the cure program and the resulting conditional revocation in the D&O was not in accordance with law or precedent. While the ALJ properly granted a continuance to enable Respondent to complete cure, the D&O should not have allowed Respondent to serve under the authority of her license during the cure process and before a determination was made by the MRO concerning her suitability to return to work in the maritime industry.

ORDER

The Administrative Law Judge's Decision and Order dated June 18, 2002, is MODIFIED consistent with the above opinion and conclusion. Respondent will be permitted to prove cure but will not be allowed to serve under the authority of her license during the cure process.

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T. J. BARRETT  
Vice Commandant

Signed at Washington, D.C., this 6<sup>TH</sup> day of September, 2002.