

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. 2638
	:	
	:	
MERCHANT MARINER DOCUMENT	:	
ISSUED TO: Randy Pasquarella	:	
	:	
	:	
	:	

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.

An Administrative Law Judge (ALJ) of the Coast Guard found the charge of use of a dangerous drug proved during a hearing on July 30, 2001. At Mr. Pasquarella's (Respondent) request, the ALJ continued the hearing until January 30, 2002. On January 30, 2002, the ALJ directed the Coast Guard to return the Respondent's merchant mariner document. In a Decision and Order (D&O) dated February 19, 2002, the ALJ at Alameda, California, revoked the Respondent's merchant mariner document pursuant to 46 U.S.C. 7704(c), but the ALJ stayed his order of revocation pending Respondent's completion of the cure requirements set forth in Appeal Decision 2535 (SWEENEY).

The Coast Guard filed its notice of appeal on March 1, 2002, and received an extension to file its brief by June 25, 2002. The Coast Guard filed a timely brief on May 30, 2002. In its appeal, the Coast Guard requested a reversal of the D&O, a remand of

the case to the ALJ to properly apply the cure process as described in SWEENEY, and instructions to the ALJ to have Respondent deposit his document with the Coast Guard.

Respondent did not file a reply brief in this matter. This appeal is properly before me.

APPEARANCES: Respondent, Randy Pasquarella, *pro se*. The Coast Guard Investigating Officers were Lieutenant Benjamin Benson, Petty Officer Rachel Lynn, and Petty Officer Laura Barkins, stationed at Marine Safety Office (MSO) San Diego, 2716 North Harbor Drive, San Diego, California 92101.

FACTS

At all relevant times, Respondent held a merchant mariner document. On February 28, 2001, Respondent took a pre-employment drug test, signed a Federal Drug Testing Custody and Control Form, and had his urine sample collected by J.T. Plander of Quest Diagnostics, Inc. [Government Exhibit 1] His urine sample was analyzed by Greystone Health Sciences in accordance with Department of Transportation procedures and tested positive for marijuana metabolite. [Government Exhibit 1]

Coast Guard MSO San Diego charged Respondent on May 31, 2001, with use of a dangerous drug in violation of 46 U.S.C. 7704(c) and sought revocation of Respondent's merchant mariner document. In his answer of June 12, 2001, Respondent admitted all jurisdictional and factual allegations and stated in his own handwriting that he used marijuana while drinking alcohol. [Government Exhibit 2]

At the hearing on July 30, 2001, at San Diego, California, Respondent did not challenge the test conducted by the laboratory, the positive test result, or the collection

process. [Tr. at 5-6] At the hearing, the ALJ found the charge of use of a dangerous drug proved. [Tr. at 6]

Respondent, at the hearing, requested leniency and sought a continuance in order to prove cure. [Tr. at 34-35] The ALJ granted a continuance until January 30, 2002, to consider whether Respondent should have his merchant mariner document returned. [Tr. at 23]

At a hearing on January 30, 2002, Respondent produced evidence that he completed a drug abuse rehabilitation program. [Tr. at 38] He also produced a letter from a Medical Review Officer (MRO) that indicated he was of low risk to return to using illegal drugs. [Tr. at 39] At that time, Respondent requested return of his merchant mariner document. [Tr. at 41-42]

The ALJ found that Respondent made a *prima facie* showing that he was not a danger to life and property at sea and that the burden shifted to the Coast Guard to demonstrate that he did pose such a danger. [Tr. at 46] The Coast Guard did not offer any evidence in surrebuttal. [D&O at 4] The ALJ found that Respondent had shown he was of low risk to return to illegal drug use and was not a danger to life and property at sea. [Tr. at 45]

In his D&O, the ALJ found that 46 C.F.R. 5.521(b) provides that when a hearing is continued pending a determination of cure, the ALJ must return a license or document unless a *prima facie* case has been established that the mariner would pose a definite danger to public health, interest or safety at sea. [D&O at 6]

The ALJ stayed the revocation of Respondent's merchant mariner document, and ordered Respondent to prove cure as described in SWEENEY by demonstrating complete

non-association with drugs for a minimum of one year following completion of the drug abuse rehabilitation program. [D&O page 9] The ALJ ordered Respondent to attend Alcoholics Anonymous/Narcotics Anonymous meetings for twenty-six weeks. [D&O page 9] The ALJ ordered the Coast Guard to immediately return Respondent's document to him. [D&O at 10]. The ALJ ordered that a finding of cure will be entered if Respondent successfully establishes cure under the requirements as described in SWEENEY.

BASIS OF APPEAL

The Coast Guard argues that the ALJ improperly reopened the hearing on January 30, 2002, at the request of Respondent to permit Respondent to demonstrate why he should have his document returned prior to the one-year non-association period established by SWEENEY. The Coast Guard argues that Respondent had not completed cure and the ALJ failed to find that Respondent had completed cure. The Coast Guard argues that the ALJ acted *ultra vires* by directing MSO San Diego to return Respondent's merchant mariner document prior to completion of all cure as described in 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 credential 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 or

using drugs from service in the United States merchant marine. House Report No. 338, 98th Cong., 1st 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(b) which provides, in pertinent part, for revocation of licenses, certificates of registry or merchant mariner documents where “the respondent has been a user of, or addicted to the use of, a dangerous drug.”

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 bonafide 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.* (emphasis added) Appeal Decision 2546 (SWEENEY). I reaffirmed and clarified these principles in Commandant Decision on Review #18 (CLAY) 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 aboard a vessel. 46 C.F.R.16.201(f).¹

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. While the proceeding is stayed, the Coast Guard continues to hold the document.

¹ 46 C.F.R. 16.201(f) was formerly 46 C.F.R. 16.370(d)

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, the Commandant 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. CLAY recognized clearly that once it is proved that the mariner used an illegal drug, the license or document must be revoked, or, in the alternative, the license or document must be withheld until the Respondent proves that he or she is cured. In this case, Respondent's document was returned upon completion of a drug abuse rehabilitation program but prior to Respondent's demonstrated completion of non-association with drugs for a minimum of one year following completion of the drug abuse rehabilitation program. As was clearly explained in CLAY, "cure" is a two step process and a mariner is deemed not to have attained "cure" until both steps have been completed.

In CLAY, I held that the proven use of a dangerous drug establishes that a Respondent is a danger to public safety until cured. The ALJ's reliance in this case upon the provisions of 46 C.F.R. 5.521(b), permitting Respondent to submit proof of not posing a threat to public safety, is misplaced. 46 C.F.R. 5.65 was promulgated at the same time as 46 C.F.R. 5.521(b) and takes official notice of Commandant Decisions on Appeal. In pertinent part, 46 C.F.R. 5.65 states that Commandant Decisions on Appeal "are officially noticed and the principles and policies enunciated therein are binding upon all Administrative Law Judges..." In addition, the CLAY decision occurred subsequent to and specifically referred to 46 C.F.R. 5.521(b). The CLAY decision resolved the

applicability of 46 C.F.R. 5.521(b) to cases of the use of a dangerous drug brought under 46 U.S.C. 7704(c).

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).

I recently held that the ALJ is not authorized in a case brought under 46 U.S.C. 7704(c), to permit a mariner to sail under the authority of her credential until she had completed all the requirements of cure. Appeal Decision 2634 (BARRETTA). Under BARRETTA, the ALJ is authorized to revoke the mariner's credentials outright if the use of a dangerous drug has been proved or to continue the hearing until cure has been proved. Under BARRETTA, the ALJ may stay the order of revocation and continue the hearing to allow time for the mariner to prove cure, but the ALJ cannot allow the mariner to work under the authority of the mariner's credentials prior to completion of cure. This is accomplished by the Coast Guard retaining possession of the document. BARRETTA reaffirmed and expanded upon CLAY by recognizing the provisions of 46 C.F.R. 16.201(f), which requires the mariner to obtain a determination from an MRO that he or she is drug-free and that the risk of subsequent use of dangerous drugs is sufficiently low to justify their return to work. Additionally, BARRETTA clearly reaffirmed the SWEENEY and CLAY requirements for a mariner to show cure.

The elements of cure are:

- (1) successful completion of a drug abuse rehabilitation program; and,
- (2) complete non-association with drugs for a minimum of one year following completion of a drug abuse rehabilitation program.

In BARRETTA, the mariner did not complete both steps of the SWEENEY and CLAY cure process and had failed to obtain an MRO determination that she was a low risk to return to using drugs in accordance with 46 CFR 16.201(f) before the ALJ returned her license. In this case, Respondent did obtain an MRO determination in accordance with 46 CFR 16.201(f), but failed to complete the second step of the SWEENEY and CLAY cure requirements before the ALJ returned his merchant mariner document.

To be clear on this issue, an ALJ cannot direct the return of a mariner's credentials until the mariner has obtained an MRO determination in accordance with 46 CFR 16.201(f) and both steps of the SWEENEY and CLAY cure process have been satisfied.

Finally, in this case the ALJ reconvened his hearing and required the Coast Guard to prove that Respondent remained a threat to public health, public safety, and safety of life at sea *after* Respondent had completed a drug abuse rehabilitation program (Step 1 of the SWEENEY and CLAY cure process) and Respondent had received an MRO determination in accordance with 46 CFR 16.201(f), *but before* Respondent finished the mandatory one-year non-association period (Step 2 of the SWEENEY and CLAY cure process). When the Coast Guard did not produce evidence to that end, the ALJ ordered the Coast Guard to return the mariner's document. The ALJ was wrong. In SWEENEY and CLAY, the Commandant determined that when the Coast Guard proves use of an illegal drug, the mariner poses a threat to public health, public safety, and safety of life at sea until he has proven he is cured. For the ALJ to call that issue into question before the

mariner has completed the SWEENEY and CLAY cure process and has received an MRO determination in accordance with 46 CFR 16.201(f) is contrary to established authority and precedent.

CONCLUSION

Under 33 C.F.R. 20.1004, I am authorized to affirm, modify, or reverse the decision of the ALJ or remand the case for further proceedings.

I find that the ALJ improperly directed the Coast Guard to return Respondent's merchant mariner document before the SWEENEY and CLAY cure process was complete.

ORDER

The Administrative Law Judge's Decision and Order dated February 19, 2002, is REVERSED consistent with the above OPINION and CONCLUSION. Respondent shall be directed to immediately deposit his merchant mariner's document at Coast Guard Marine Safety Office San Diego. The case is REMANDED to the ALJ with instructions to amend his D&O consistent with the above OPINION, CONCLUSION and ORDER and to continue the case until the cure requirements as described in SWEENEY and later explained in CLAY have been satisfied.

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THOMAS J. BARRETT

Signed at Washington, D.C., this 6TH day of March, 2003.