U N I T E D S T A T E S O F A M E R I C A

DEPARTMENT OF TRANSPORTATION

UNITED STATES COAST GUARD

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	
vs.	DECISION OF THE
MERCHANT MARINER'S LICENSE No. 625165 and MERCHANT MARINER'S DOCUMENT No.(REDACTED)	COMMANDANT ON APPEAL NO. 2552
Issued to: Joseph G. FERRIS	

This appeal has been taken in accordance with 46 U.S.C. 7702 and 46 C.F.R. 5.701.

BACKGROUND

By order dated January 29, 1992, an Administrative Law Judge of the United States Coast Guard at Portland, Maine, revoked Appellant's seaman's documentsupon finding proved the charge of "USE OF A DANGEROUS DRUG." The supporting specification found proved alleges that Appellant, "being the holder of the above captioned license and merchant mariner's document, were, on or about 20 February 1991, in the City of Boston, Massachusetts, tested and found to be a user of a dangerous drug, to wit: Tetrahydrocannabinols (THC)."

The hearing was held at Portland, Maine on October 11, 1991. Appellant was represented at the hearing byprofessional counsel. At the hearing, Appellant entered ananswer of "deny" to the

specification and charge of use of a dangerous drug. The Investigating Officer introduced in evidence ten exhibits, and the testimony of three witnesses. In defense, Appellant offered in evidence five exhibits.

Appellant was fully advised by the Administrative Law Judge that if the charge was found proved, an order of revocation would be required unless Appellant provided satisfactory evidence of cure. After the hearing, the Administrative Law Judge rendered a written decision and order in which he concluded that the charge and specification had been found proved and that Appellant did not provide satisfactory evidence of cure. His order, dated January 29, 1992, revoked the above captioned documents issued to Appellant by the Coast Guard.

On February 4, 1992, Appellant timely submitted a completed appeal in accordance with 46 C.F.R. 5.703(c). Therefore, this matter is properly before the Commandant for review.

FINDINGS OF FACT

At all times relevant, Appellant Joseph G. Ferris was the holder of Merchant Mariner's License 625165 and Merchant Mariner's Document [redacted]. Appellant's license authorizes his service as Third Assistant Engineer of Steam and Motor Vessels of any Horsepower.

On February 20, 1991, Appellant, for license renewal purposes, gave a specimen of his urine for drug testing at Health Resources, a specimen collection facility in Boston, Massachusetts. Ms. Kathryn A. Reynolds, a medical assistant and urine specimen collector at Health Resources, collected Appellant's urine specimen in a sample bottle. She then sealed, labelled and identified the bottle with DOT Number 0071810. Appellant signed the appropriate section of the Drug Testing Custody and Control Form ("DTCCF") in Ms. Reynolds presence. Ms. Reynolds then packed the specimen for shipment to Nichols Institute Substance Abuse Testing, a certified laboratory in California.

The Nichols Institute received Appellant's urine specimen intact and properly identified, and conducted the prescribed tests. The specimen tested positive for the marijuana metabolite, THC. Nichols Institute then forwarded its laboratory report and one copy of the DTCCF, the laboratory part, to Greystone Health Sciences Corporation, La Mesa California, where Dr. David M. Katsuyama, the Medical Review Officer ("MRO") assigned to the case, reviewed the results. The MRO subsequently interviewed the Appellant via telephone and determined that Appellant's urine specimen tested positive for the marijuana metabolite, THC.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge revoking Appellant's seaman's documents.

Appellant sets forth the following bases for his appeal:
(1) Joseph G. Ferris is not a chronic or habitual user of any dangerous drug.
(2) Joseph G. Ferris is a professional and a man of good character. He never was at any time a danger to his profession or to his fellow employees.
(3) Joseph G. Ferris does not have a history of drug use nor a record of any criminal activity.
(4) The respondent took it upon himself to have repeated tests for drug use and all three tests were negative for drug use.
(5) The law under which the respondent is charged allows for discretion of the Judge both in terms of the meaning of cure and the administration of punishment.
(6) The weight of the evidence as established in the hearing on October 11, 1991 met the minimum requirements of "cured" as used in 46 U.S.C. 7704(c).
(7) Each case should be adjudicated on an individual basis.
(8) The phraseology of 46 U.S.C. 7704(c) is vague and overly broad.
(9) The order of revocation is excessive.

APPEARANCE: James W. Bagnell of Hunt & White,
One Union Street, Boston, Massachusetts 02108

OPINION

I.

By Appellant's first six bases of appeal, he asserts no more than the same objections as were pressed to the Administrative Law Judge at the hearing. However, he makes no effort to demonstrate why the Administrative Law Judge's resolution of his various contentions should not prevail.

The Administrative Law Judge found that Appellant was a user of a dangerous drug, i.e., marijuana, and that he was not cured. (Finding Nos. 19-20 at p. 5). His findings will not be reversed unless based upon inherently incredible evidence. **Appeal** Decision Nos. 2452(MORGANDE) and 2333(AYALA). At the hearing, the Investigating Officer presented a prima facie case of dangerous drug use against the Appellant based on the test results of Appellant's urine specimen (Finding No. 16 at p. 4). 46 C.F.R. 16.201(b).

In rebuttal, Appellant introduced into evidence five letters of recommendation, written by various individuals familiar with the Appellant. The letters taken as a whole stated that Appellant (1) is not a chronic or habitual user of any dangerous

drug, (2) is a professional and a man of good character, (3) he never was at any time a danger to his profession or to his fellow employees, and (4) does not have a history of drug use nor a record of any criminal activity.

Appellant also submitted into evidence three drug tests, taken subsequent to the positive test result, all of which showed negative results. Appellant took the first of these tests on March 11, 1991 three weeks after the positive test result. He took the second test on June 3, 1991. He took the last of the tests on September 3, 1991, six weeks before the hearing in the instant case.

Appellant attempted to use the letters and negative drug test results as rebuttal to the positive test and, in the alternative, as evidence of "cure" (Finding No. 18). The regulations require the respondent to make one of three specific answers to a charge and specification. 46 C.F.R. 5.527. Alternative responsive pleading is not authorized in these proceedings. Furthermore, even if alternative pleading was allowed, the same evidence that Appellant submitted to establish that he did not use drugs cannot logically be used to established that Appellant is "cured" of his drug use. The issue of "cure" arises only after dangerous drug use has been found proved. The record indicates that after the Administrative Law Judge informed Appellant of this inconsistency, Appellant decided to focus on the issue of cure. (Tr. at 105-109.) Nonetheless, Appellant continues to seek, on appeal, dismissal of the charge rather than merely mitigation of the order revoking his license and merchant mariners document.

Appellant contends that since the term cure is undefined, the Administrative Law Judge has flexibility in deciding what it means to be "cured." Since the regulations contained at 46 C.F.R. 16.370(d) allow the Medical Review Officer to determine if an individual is drug free, Appellant claims the three subsequent negative drug tests established his "cure." Assuming, arguendo, that the Administrative Law Judge considered the argument that Appellant now raises on appeal, he obviously rejected it.

Appellant is correct that the term "cure" is not defined in 46 U.S.C. 7704(c). At the time of the hearing, the Administrative Law Judge had discretion to find cure based upon his evaluation of the evidence. Appeal Decision 2494 (PUGH). According to the Administrative Law Judge here, satisfactory proof of cure required more than letters of good character for the Appellant, it required competent medical or expert testimony coupled with proof of his rehabilitation. I recently defined the factors necessary to establish cure. Appeal Decision 2535 **(SWEENEY)**. However, **Sweeney** was issued after the decision and order in the instant case. Consequently, those factors do not apply here. However, since the Administrative Law Judge's

requirements were less than the standard established in **Sweeney**, the proof required by the Administrative Law Judge was not unreasonable. Since Appellant did not produce evidence meeting that lower standard, it was not unreasonable for the Administrative Law Judge to find the Appellant did not establish evidence of cure.

Even if Appellant had established satisfactory proof of cure, such proof would not require dismissal of the case as the Appellant suggests. Proof of cure is not an affirmative defense to the charge of dangerous drug use. Proof of cure gives the Administrative Law Judge discretion to order a sanction less than revocation. Appeal Decision 2476 (BLAKE), *aff'd sub nom*, **Commandant v. Blake**, NTSB Order EM-156 (1989), *aff'd sub nom*, **Blake v. Department of Transportation, NTSB**, No. 90-700013 (9th Cir. 1991). However, because the Administrative Law Judge found that the Appellant was a user of a dangerous drug, and since Appellant failed to established satisfactory proof of cure, the only sanction available under the law was revocation. Therefore, Appellant's first six bases of appeal are without merit.

II.

Appellant next asserts that each case should be adjudicated on an individual basis. I agree. However, Appellant makes no argument as to how this case was not adjudicated on such a basis. Therefore, I find this basis of apppeal has no merit.

III.

In his eighth basis of appeal, Appellant makes a two-pronged constitutional attack on the language of 46 U.S.C. 7704(c), asserting that it is vague and overly broad. Even though Appellant cites no authority for his proposition, as required by 46 C.F.R. 5.703(d), this issue is easily resolved. An agency charged with the administration of an act of Congress lacks authority to decide its constitutionality. *See* 4 Davis, **Administrative Law Treatise** 26.6 (1983); Appeal Decision Nos. 2433 (BARNABY) and 2202 (VAIL). Therefore, Appellant's assertions of the statute's unconstitutionality are improperly raised in these proceedings and are, thus, without merit.

IV.

Appellant last asserts that the "punishment outweighs the crime" and that to revoke Appellant's license based on "one test" is almost unreasonable punishment. I disagree. For the reasons discussed above, I find that the Administrative Law Judge

followed the statutory mandate. Since Appellant again takes issue with the language of the statute which is not within the purview of this agency to address, his assertion is without merit here.

CONCLUSION

The findings of the Administrative Law Judge are supported by substantial evidence of a reliable and probative nature. The hearing was conducted in accordance with applicable laws and regulations.

ORDER

The decision of the Administrative Law Judge dated January 29, 1992 is AFFIRMED.

J. W. Kime

Admiral, U.S. Coast Guard

Commandant

Signed at Washington, D.C. this 9th day of **September**, 1993.

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