UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT NO. (REDACTED)
ISSUED TO: Georges P. HENNARD Appellant

DECISION OF THE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2518

Georges P. HENNARD

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

By an order dated 17 October 1989, an Administrative Law Judge of the United States Coast Guard at Houston, Texas, revoked Appellant's Merchant Mariner's Document, having found proved the charges of misconduct and use of dangerous drugs. The charge relating to dangerous drug use was supported by a single specification alleging that Appellant, under the authority of the above-captioned merchant mariner's document, was on 1 June 1989 found to be a user of dangerous drugs, to wit: marijuana, as a result of a drug screen test conducted by the Institute of Forensic Sciences Toxicology Laboratory in Oakland, California. The charge of misconduct was supported by a single specification which alleged that Appellant, while serving aboard the M/V GREEN WAVE, under the authority of the above-captioned document, did, on or about 11 May 1989, wrongfully have marijuana in his possession. The hearing was held at Houston, Texas on 3 August 1989. Appellant was represented by professional counsel and entered a response of admit to the two charges and accompanying specifications.

The Investigating Office introduced in evidence nine exhibits. As a result of Appellant's formal admissions, the Investigating Officer did not call any of the three witnesses he would otherwise have called. A summary of the proposed testimony of the witnesses was entered into the record. For the purpose of showing rehabilitation, Appellant introduced in evidence one exhibit, the testimony of one witness, and his own testimony.

On 17 October 1989, the Administrative Law Judge revoked Appellant's merchant mariner's document upon finding proved the charges and specifications. The Decision and Order was served on the Appellant on 23 October 1989. On 26 October 1989, Appellant submitted a Notice of Appeal. After being granted a 30-day extension, Appellant perfected his appeal by filing a brief on 20 February 1990. Accordingly, this appeal is properly before the Commandant for review.

FINDING OF FACT

At all relevant times, Appellant was serving aboard the M/V GREEN WAVE under the authority of Merchant Mariner Document No. [redacted]-D1. The M/V GREEN WAVE is a merchant vessel of the United States.

Appellant's formal admissions in open hearing to the charges and specifications, with his counsel present, established the following facts: (1) that Appellant did, on or about 11 May 1989, have marijuana in his possession on board the M/V GREEN WAVE, and (2) that Appellant was on 1 June 1989 found to be a user of dangerous drugs as a result of a drug screen test conducted by the Institute of Forensic Sciences Toxicology Laboratory in Oakland, California. Subsequently, Appellant participated in a 17-day inpatient drug rehabilitation program at St. Joseph's Hospital in Houston, Texas. At the time of the hearing, Appellant continued to be under the care of a physician for drug rehabilitation treatment on an outpatient basis.

BASES OF APPEAL

This appeal has been taken from the order of the Administrative Law Judge. On appeal, Appellant asserts that:

(1) It was clear error for the Administrative Law Judge to base his ultimate findings on the application of two regulations, 46 C.F.R. 5.201 and 5.205, which have no relation to the charges against the Appellant.

(2) The record clearly established facts which showed that Appellant was rehabilitated. This showing should have resulted in a penalty less severe than revocation, pursuant to 46 C.F.R. 5.59(a).

(3) Policy considerations that encourage rehabilitation efforts mandate reversal or modification of the Administrative Law Judge's decision.

OPINION

I

Appellant argues that it was clear error for the Administrative Law Judge to base his ultimate findings on the application of two regulations, 46 C.F.R. 5.201 and 5.205, which have no relation to the charges against the Appellant. Although error may have been committed in this case, I do not agree that the error was prejudicial.

Appellant was charged with *misconduct* and use of dangerous drugs. Appellant is correct in his assertion that nothing is the record supports the claim that an allegation of incompetence was ever made or contemplated. Therefore, the Administrative Law Judge's reference to 46 C.F.R. 5.201 and 5.205, which apply to voluntary deposits of a license, certificate or document in the event of mental or physical incompetence, was in error.

This error, however, was not prejudicial. In his written opinion, the Administrative Law Judge primarily relied on 46 U.S.C. 7703 and 7703 states that the Secretary may suspend or revoke a merchant mariner's document "if . . . the holder . . . has committed an act of incompetence, misconduct, or negligence." 46 U.S.C. 7703(2). The Commandant has been delegated the authority to prescribe regulations to carry out the suspension and revocation hearings in 49 C.F.R. 1.46. Pursuant to the delegation, the Commandant has duly promulgated 46 C.F.R. 5.59.

Under 46 U.S.C. 7704, and Administrative Law Judge is required to order revocation in cases of dangerous drug use or addiction, or if the respondent is convicted for a violation of the dangerous drug laws. Appeal Decision 2476 (BLAKE), *affirmed sub. nom. Commandant v. Blake*, NTSB Order EM-156 (1989). A narrow exception to mandatory revocation exists in cases of addiction or use, if the respondent has not been convicted of a violation of a dangerous drug law, where the respondent shows satisfactory proof of cure. 46 U.S.C. 7704(c).

Accordingly, although the Administrative Law Judge mentioned inapplicable regulations in his opinion, his primary reliance was on the relevant, operative law and he considered the proper factors in reaching his decision. Accordingly, I hold that the error was not prejudicial to the Appellant.

II

Appellant argues that the record clearly established facts which showed that Appellant was rehabilitated and that this showing should have resulted in a penalty short of revocation, pursuant to 46 C.F.R. 5.59(a). I disagree.

Appellant states that the charges in this case motivated him to seek drug abuse treatment, requiring a major commitment of his time and money. He also asserts that his psychiatrist testified that there would not be any danger to the public interest in putting Appellant back on a ship.

[TR pp. 74-75]. Finally, Appellant asserts that a determination of rehabilitation should be made in the absence of any evidence of current impairment of inability to function due to marijuana use.

The Commandant has been delegated the authority to prescribe regulations to carry out suspension and revocation hearings in 49 C.F.R. 1.46. Pursuant to that delegation, the Commandant promulgated 46 C.F.R. 5.59, which lists the offenses for which revocation of licenses, certificates of documents is mandatory. These offenses include "misconduct for wrongful possession, use, sale, or association with dangerous drugs." 46 C.F.R. 5.59(a). This regulation also provides for revocation where "[t]he respondent has been a user of, or addicted to the use of, a dangerous drug." 46 C.F.R. 5.59(b).

Since Appellant *admitted* the wrongful use and possession of a dangerous drug, 46 C.F.R. 5.59 applies to the instant case.

46 C.F.R. 5.59(a) also provides that:

> "In those cases involving marijuana, the Administrative Law Judge may enter an order less than revocation when satisfied that the use, possession or association, was the result of experimentation by the respondent and that the respondent has submitted evidence that he or she is cured of such use and that the possession or association will not recur."

In order to be included under this exception, Appellant must show to the satisfaction of the Administrative Law Judge that:

(a) marijuana was the only drug involved in the case;

(b) the use, possession, or association was the result of only experimentation;

(c) he is cured of such use, and;

(d) the possession or association will not recur.

Applying the regulation to the facts of this case, the following conclusions are reached:

a. The record is uncontroverted that marijuana is the only drug involved in the charges brought against the Appellant. Therefore, Appellant meets the first test of the regulation.

b. Appellant must show that his use, possession, or association with the drug was only experimental. By use of the term "experimentation," the regulation encompasses, at most, only infrequent, occasional or short-term use and certainly no more than a very limited number of instances in which drugs are used. Experimentation, as used in this regulation, means use that is less extensive than addiction or recreational use.

However, by his own admission, Appellant was *addicted* to marijuana for a "*long time*." [TR pp. 81-82]. Accordingly, Appellant has failed to show that his use of marijuana was merely experimental.

Based on the foregoing, Appellant's assertion, that his drug use was only experimental and subsequently cured, fails. A discussion of "cure" need not be made since Appellant's drug use, by his own, sworn testimony, constituted addiction rather than experimentation.

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 the requirements of applicable law and regulations.

ORDER

The decision and order of the Administrative Law Judge dated 17 October 1989, at Houston, Texas is AFFIRMED.

MARTIN H. DANIELL
Vice Admiral, U.S. Coast Guard
Acting Commandant

Singed at Washington, D.C., this 6th day of February, 1991.

***** END OF DECISION NO. 2518 *****

Top__