SERVED: May 11, 1992

NTSB Order No. EM-165

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 6th day of May, 1992

J. W. KIME, Commandant,
United States Coast Guard,

v.

ME-152

MICHAEL J. SWEENEY,

Appellant.

OPINION AND ORDER

Appellant seeks interlocutory review of a decision of the Vice Commandant (acting by delegation, Appeal No. 2535, dated February 18, 1992) remanding a case to Coast Guard Administrative Law Judge H. J. Gardner for further proceedings.[1] The law judge had sustained a charge that appellant had used a dangerous drug and had ordered that appellant's Merchant Mariner's License (No. 645588) and Document (No. ZXXX XX XXXXD2) be suspended outright

[1]A copy of the decision of the Vice Commandant is attached.

for six months with six additional months suspension remitted on twelve months' probation. Without reaching the merits of the appellant's legal objections to the law judge's decision,[2] the Vice Commandant, concluding that the law judge's order on sanction contravened a statutory mandate for revocation in such cases unless the seaman establishes that he has been cured of drug use, remanded the matter to the law judge so that the appellant could make a showing on that issue. For reasons to be discussed in detail below, appellant contends that the Vice Commandant's decision is unlawful in that it, inter alia, operates to impose on him a penalty of "greatly increased severity" over that ordered by the law judge.[3] We agree with appellant's position.

Until shortly after the Vice Commandant's decision, the appellant had been in possession of a temporary license and document.[4] However, even though the Vice Commandant's decision did not reach the merits of the appellant's appeal from the law judge's decision and order, it was construed, in subsequently

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[2]Among other things, appellant's appeal to the Vice Commandant raises issues concerning the validity of the drug test on which the Coast Guard's charge against him is predicated.

[3]The Coast Guard has filed a response in opposition to the interlocutory appeal.

[4]The law judge had issued a temporary license and document to appellant on July 3, 1991, and the Commandant had renewed it on or about January 3, 1992. By their express terms, these temporary authorizations would expire either at the end of a six month period or on the date the appellant received from the Commandant his decision on the appeal from the law judge's decision and order.

issued Coast Guard correspondence dated March 11 and 12, 1992, to have had the effect of voiding the temporary license and document appellant then held.[5] The decision was further construed to prohibit the issuance of temporary papers to a seaman such as appellant prior to a demonstration that he had been "cured" of his drug use, a condition precedent which meant that, even if the law judge on remand ordered no sanction, an unlikely disposition, appellant could not qualify for a temporary license any sooner than May, 1993.[6] The appellant argues, in effect, that because the Vice Commandant's decision will bar him from marine employment for at least a year before the law judge can rule again on the question of sanction, it cannot be reconciled with the assurance in 46 CFR §5.805(b) that "[i]n no case will the review by the Commandant be followed by any order increasing the severity of the Administrative Law Judge's original order." We agree.

The Vice Commandant's assertion (Decision at 6) that without evidence of cure in the record he cannot affirm the sanction imposed by the law judge will not withstand analysis.[7] 46 USC

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[5]Copies of the March 11 and 12 documents are attached.

[6]This was so because appellant would not complete his drug rehabilitation program before May 7, 1992, and the Vice Commandant had determined that proof of a cure required a showing of non-association with drugs for a minimum of one year following the completion of such a program.

[7]The Coast Guard suggests that the appellant may not appeal to the Board because the Commandant's decision to void appellant's temporary license was based on "the terms and conditions under which the license was issued and 46 C.F.R.

§7704 does not set forth standards for determining whether a seaman has successfully proved that he is cured of a drug addiction or of the use of drugs.[8] Rather, it is the Vice Commandant, not the statute, who has defined evidence of cure to include what amounts to at least a one-year waiting period after the date of completion of an approved program of drug rehabilitation.[9] Given that assumption of authority and

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§5.707" and did not "sustain any order issued" by the law judge. See Reply Brief at 2. We perceive no merit in the suggestion.

In the first place, taking the Coast Guard's second point first, the Board's review authority is not limited to Commandant decisions that "sustain" the decisions of Coast Guard administrative law judges. Rather, under 49 U.S.C. §1903(a)(9)(B), the Board may review on appeal "the decisions of the Commandant of the Coast Guard, on appeals from the orders of any administrative law judge revoking...a license [or a]...document...." The Commandant's order of remand is such an order.

In the second place, the assertion that the voiding of appellant's temporary license was consistent with its terms and the regulation authorizing its issuance is incorrect. The temporary license and document contemplate that it will expire on the date the appellant receives the Commandant's decision on his appeal. The Commandant has not, to date, reached a decision on appellant's appeal. Moreover, since the original temporary authorization was issued under the provisions of 46 CFR §5.707, appellant presumably had been found qualified under that regulation for the issuance. Since no circumstance warranting any new conclusion about his fitness to serve at sea has been identified, the same regulation cannot now logically be cited as the basis for taking his temporary authority away.

[8]Section 7704(c), 46 USC, provides as follows:

"§7704. **Dangerous drugs as grounds for revocation**

* * * *

(c) If it is shown that a holder has been a user of, or addicted to, a dangerous drug, the license, certificate of registry, or merchant mariner's document shall be revoked unless the holder provides satisfactory proof that the holder is cured."

[9]It should also be observed in this connection that it is

discretion under the statute, there is no legal basis for the Vice Commandant to maintain that he is powerless to affirm the six-month sanction the law judge ordered here. Similarly, since the Vice Commandant had not previously established what a seaman must show to prove that he is cured, within the meaning of the statute, his conclusion that the law judge's ruling contravened the statute is clearly untenable. That the evidence accepted by the law judge may not be sufficient under the criteria set by the Vice Commandant some 8 months later does not mean that it was not enough to satisfy the requirements of a statute that makes no attempt to define what was intended by the term "cure". We perceive no reason, and the Vice Commandant's decision supplies none, for differing with the law judge's conclusion that appellant had met his evidentiary burden by the submission of evidence that he was not addicted to marijuana and that subsequent testing was negative for marijuana use.[10]

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far from clear what the drafters of the statute contemplated would be sufficient proof of cure by a seaman who, like the appellant in this case, demonstrates that he is not addicted to the drug (to wit, marijuana) he was found, through testing, to have used.

[10]We intimate no view on the validity of the Vice Commandant's proposed definition of cure under the statute in other cases, and we fully recognize that rulemaking through adjudication is an acceptable method of interpreting legislation. That approach is not available in this case, however, for the simple reason that the meaning of the statute was not litigated by the parties, that is, it was neither a point of controversy at the hearing nor fairly raised by the appellant's objections to the law judge's decision. The Vice Commandant is thus not free, under the guise of statutory interpretation, to impose at the appeal stage additional evidentiary burdens on the appellant, without regard to the punishment augmenting aspects of the

In sum, as it appears that the law judge's rulings both on the adequacy of appellant's evidentiary showing and on sanction are consistent with the terms of the statute under which the charge against the appellant was brought, we think the appellant is entitled to the protection against an increased sanction on appeal that the Coast Guard regulation purports to insure him.

In view of the foregoing we will reverse the Vice Commandant's decision to remand the case to the law judge and direct that appellant's temporary license and document be returned to him, and renewed as necessary, pending the Vice Commandant's decision on the merits of his appeal from the law judge's June 21, 1991 Decision and Order.[11]

ACCORDINGLY, IT IS ORDERED THAT:

1. The appellant's interlocutory appeal is granted,

2. The Vice Commandant's February 18, 1992 decision is reversed, and

3. The temporary license and document issued to appellant on July 3, 1991, and renewed on January 3, 1992, be returned to him and, barring any evidence of drug use in the interim, continued in force pending decision on the merits on his appeal to the Vice

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proposed interpretation.

[11]Appellant had been allowed to operate under the authority of his permanent or temporary papers from his positive drug test in December, 1990 until March, 1992. The Vice Commandant's belated efforts to establish evidentiary standards for cases such as this one and to educate his law judges as to when the issuance of temporary papers is appropriate do not provide a basis in this proceeding for altering the status quo before the Vice Commandant has decided the appeal.

Commandant.

COUGHLIN, Acting Chairman, LAUBER, KOLSTAD, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.