

**UNITED STATES OF AMERICA
U.S. DEPARTMENT OF TRANSPORTATION
U.S. COAST GUARD**

UNITED STATES COAST GUARD)	
Complainant)	
)	
vs.)	Docket Number: 99-0425
)	PA Number: 99001839
RICKY D. GUILLORY, SR)	
Respondent)	
_____)	

BEFORE: THOMAS E. MCELLIGOTT
 Administrative Law Judge

DECISION & ORDER

I. PRELIMINARY STATEMENT

This suspension and revocation hearing is brought pursuant to the legal authority contained in 46 U.S.C. Chapter 77, including §§ 7703-04 (West Supp. 1999); U.S. Administrative Procedure Act, 5 U.S.C. §§ 551-59 (1996); Personnel Action, 46 C.F.R. Parts 4 and 5 (1998); Chemical Testing, 46 C.F.R. Part 16 (1998) and Rules of Practice, Procedure, and Evidence for Formal Administrative Proceedings of the Coast Guard, 33 C.F.R. Part 20 (1998).

This administrative proceeding and hearing was commenced against the captioned Respondent, Ricky Dale Guillory, Senior, (Respondent) through personal service on Respondent of two Complaints by the Investigating Officer (IO) Douglas C. Wootten, Senior Chief, at the time stationed at the U.S. Coast Guard Marine Safety Office, 2875 Jimmy Johnson Boulevard, at Freeway 69, in Port Arthur, Texas. The Investigating Officer advised the Respondent of his rights and served Respondent with the two Complaints.

One Complaint alleged a statutory violation of 46 U.S.C. 7704(b), "Conviction for a Dangerous Drug Law Violation." The second Complaint alleged "Misconduct," violating 46 U.S.C. 7703 and 46 C.F.R. 5.27. The Complaints were dated November 17, 1999.

With regard to the Complaint regarding the Conviction for a Dangerous Drug Law Violation, the Coast Guard made jurisdictional allegations which were admitted by the Respondent as to his residence, address and telephone number, and that he possessed Coast Guard issued credentials, namely U.S. Coast Guard issued U.S. Merchant Mariner's License Number 845582.

Respondent's formal legal Answer to the Complaints denied the factual allegations regarding:

CONVICTION FOR A DANGEROUS DRUG LAW VIOLATION, in which the Coast Guard alleged that: (1) on October 21, 1993, Respondent was convicted by Harris County Texas District Court for possessing cocaine, an illegal dangerous drug. (2) On November 9, 1999, U.S. Coast Guard Marine Safety Office Port Arthur, Texas obtained certified copies of these court records for admission to this proceeding. These documents revealed Respondent signed an admission of guilt for the dangerous drug law charges.

Respondent admitted the last sentence, but denied the first sentence.

Again with regard to the Complaint regarding Misconduct, Respondent in his Answer to this Complaint admitted the jurisdictional allegations in that he was serving under the authority of his Coast Guard License on July 2, 1999, by serving as Relief Captain aboard the M/V AUDREY as required by law or regulation.

The factual allegations of Misconduct were denied by the Respondent in his formal Answer to this Complaint. Respondent denied the following:

MISCONDUCT, in which (1) the Coast Guard alleges that on July 2, 1999, aboard the M/V AUDREY the Respondent: (2) wrongfully refused to submit to a random drug screening test by substituting and/or adulterating the urine specimen, as determined by a Medical Review Officer.

The Investigating Officer's Proposed Order on both Complaints was "Revocation."

Respondent acknowledged the receipt of both Complaints by signing his name and also by filing his formal legal two Answers to both of the Complaints. He dated both of his Answers to the Complaints November 29, 1999.

The two Complaints, together with the Respondent's two written Answers to those Complaints, were filed with the U.S. Coast Guard Administrative Law Judge (hereinafter ALJ), Docketing Center in Baltimore and were docketed. A hearing was scheduled by the ALJ and held as requested by both sides on January 11, 2000, at the hearing room located at the U.S. Attorney's Office in Beaumont, Texas. The Judge sent out a Scheduling Order and Notice of Hearing dated December 14, 1999 to Respondent's last known residence address.

The U.S. Coast Guard was represented at the hearing by Investigating Officers Robert W. Mitchum, Lieutenant (Junior Grade), and Douglas C. Wootten, Senior Chief, both at the time stationed at the Marine Safety Office Port Arthur, Texas.

The U.S. Coast Guard submitted nineteen (19) exhibits, eighteen (18) of which were admitted into evidence by the Administrative Law Judge. Only exhibit six (6) was not admitted by the Judge. In addition, the Investigating Officers called the following

witnesses to testify: the collector of the urine specimen, Mr. Victor R. Smith, Jr., employed by International Drug Detection of Harahan, Louisiana; and from the laboratory, Mr. Samuel Anthony Titone, a supervisor from the tested and certified laboratory, Advanced Toxicology Network (ATN) of Memphis, Tennessee, which is a U.S. Department of Health and Human Services and Substance Abuse and Mental Health Services Administration (SAMSHA), tested and certified laboratory. In addition, the Medical Review Officer, Dr. Brian N. Heinen, M.D., was called by the Investigating Officers and testified. The testimony of these witnesses was offered by the Investigating Officers. Respondent, after being given due and adequate notice, did not appear for the hearing nor send any attorney to represent him. (See Appendix A, List of Witnesses and Exhibits.)

In light of the serious charges, the request for "Revocation" and the matters of aggravation, the Coast Guard presented their three witnesses and their documentary evidence.

II. FINDINGS OF FACT BASED UPON THE ENTIRE RECORD CONSIDERED AS A WHOLE

1. At all relevant times herein mentioned, and specifically on and about July 7, 1999, the Respondent was a holder in possession of U.S. Coast Guard License No. 845582, issued by the U.S. Coast Guard Regional Examination Center in the Port of Houston, Texas. On October 21, 1993, Respondent was a possessor of said License or his predecessor U.S. Coast Guard License on that date.

2. The captioned Respondent, while being the holder of a valid U.S. Coast Guard License, did provide a substituted and/or adulterated urine specimen that contained no "creatinine," found in all human urine specimens, which constitutes a refusal to test on July 7, 1999. The laboratory also found that "the specific gravity" of normal human urine was not present in this specimen provided by the Respondent as well.

3. It was further proven that the captioned Respondent has been convicted of violating a dangerous drug law on October 21, 1993 for the possession of cocaine. At this trial in Harris County, Texas, which includes the city and port of Houston, Texas, the captioned Respondent was represented by an attorney and was found guilty of such possession. He was initially given four years probation and a fine as a result of this and put on deferred adjudication, if he properly carried out his probation. Because of violations of his probation, his probation has been extended ten (10) years from the date of the judgment by the 174th District Court of Harris County, Texas, located in or near Houston, Texas.

4. The Respondent provided a urine specimen on or about July 7, 1999 in accordance with the random drug testing requirements of 46 C.F.R. Part 16, including § 16.230. Respondent's urine specimen was collected by a Mr. Victor Smith, employed by International Drug Detection, LLC. This specimen was identified by Respondent's unique Social Security Number 453-94-2233 on the "Federal Drug Testing Custody and Control Form," as well as by the unique specimen identification (ID) number. The specimen was carefully and properly collected in accordance with the regulatory procedures and sealed with tamperproof seals in Respondent's presence, as indicated by Respondent's signature and certification on the "Federal Drug Testing Custody and Control Form." The urine specimen was sealed in his presence and sent later that day for testing to the tested and certified laboratory, Advanced Toxicology Network (ATN) of Memphis, Tennessee. This laboratory was prior tested and certified by the U.S. Department of Health and Human Services, or by its sub-agency called the "Substance Abuse and Mental Health Services Administration" (SAMSHA). This specimen was found to have no "creatinine" at all, which constituted a substituted specimen, as found by the said laboratory and by Dr. Brian N. Heinen, M.D., the Medical Review (MRO) in

this case. The laboratory test results analytically established purposeful substitution of the Respondent's urine sample by Mr. Guillory.

5. The U.S. Coast Guard Investigating Officers were notified by the Human Resource Manager for Hollywood Marine, Inc., Respondent's chartered marine employer, that their designated Medical Review Officer (MRO), Dr. Brian N. Heinen, M.D., and the laboratory verified Mr. Guillory's urine specimen as a substituted sample because of no presence of creatinine. The certified laboratory and Dr. Brian N. Heinen determined that the test was not completely performed because the specimen was substituted, which constituted a refusal by Respondent to provide Respondent's urine sample for a drug test.

6. The second Complaint against the captioned Respondent is a conviction for violating a state dangerous drug law in the District Court of Harris County, Texas, in or near Houston, Texas. The captioned Respondent was convicted on October 21, 1993 for possession of a controlled substance, namely cocaine. The captioned Respondent has been operating under his U.S. Coast Guard License since that date.

7. The testimony of the three witnesses called by the Coast Guard, after carefully listening to and comparing it with the eighteen (18) exhibits admitted into evidence by the Judge, are found to be credible. Mr. Victor Smith, the collector, testified that Mr. Guillory's urine specimen was collected in accordance with the U.S. Department of Transportation and the U.S. Coast Guard rules and regulations. It was properly sent to the certified and tested laboratory, Advanced Toxicology Network, for testing. This is a tested and certified laboratory by the U.S. Department of Health and Human Services or by its sub-agency, Substance Abuse and Mental Health Services Administration. The witnesses testified credibly that the laboratory's usual tests were not performed due to ~~the specimen being initially found substituted by the laboratory, which constituted a~~

refusal to test by the Respondent. The specimen did not contain "creatinine" and was not of "the specific gravities" found by the certified laboratory in normal human urine.

III. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The captioned Respondent and the subject matter of this hearing and his License are properly within the jurisdiction of the United States Coast Guard and the U.S. Administrative Law Judge in accordance with 46 U.S.C. Chapter 77, including §§ 7703 and 7704 (West Supp. 1999); 46 C.F.R. Part 4, 5 and 16; and 33 C.F.R. Part 20 (1998).

2. At all relevant times, the captioned Respondent was the holder and acting under the authority of his U.S. Coast Guard Merchant Mariner's License while serving as a Relief Captain on or about July 7, 1999 and at the time of his conviction in a District Court of Harris County, Texas on or about October 21, 1993 when he was represented by an attorney, Respondent was a possessor of a U.S. Coast Guard License.

3. The drug test was carefully and satisfactorily performed in accordance with all chemical and urine testing rules, including 46 C.F.R. Part 16 (1998).

4. The Complaint entitled "**Misconduct**" is found **PROVED** by a preponderance of the reliable, probative and substantial evidence.

5. The Complaint for "**Conviction of a Dangerous Drug Law Violation**" is found **PROVED** by a preponderance of the credible evidence of a substantial, reliable and probative nature.

IV. OPINION

The above Preliminary Statement, Findings and Conclusions are incorporated herein as if set forth in full.

One underlying purpose of suspension and revocation hearings and proceedings by the U.S. Coast Guard and the U.S. Administrative Law Judge is to promote safety at

sea and in national navigable waters and harbors. See 46 U.S.C. Chapter 77, including § 7701 (West Supp. 1999). A U.S. Merchant Mariner's License may be suspended or revoked when an individual acts under the authority of that document or is in a position or a holder of that document and violates or fails to comply with the applicable laws that apply to that document. See id. 46 U.S.C. Chapter 77. The holder of a U.S. Merchant Mariner's License shall be tested for use of alcohol and dangerous drugs. The testing shall include periodic, random and reasonable cause testing. See id. § 7702 (2). The refusal to comply with a random drug test is a violation of a formal, duly established statute and rule and represents misconduct on the part of the holder of a U.S. Merchant Mariner's License. See Commandant's Appeal Decision 2578 (CALLAHAN).

Misconduct is "human behavior which violates some formal, duly established rule.... It is an act which is forbidden or a failure to do that which is required." 46 C.F.R. § 5.27 (1998).

The captioned Respondent is required, as a holder of a U.S. Merchant Mariner's License, to properly submit to a drug test as requested by his marine employer.

Respondent is in violation of the statutes and laws applicable to his U.S. Merchant Mariner's License when he fails to provide his own proper normal urine specimen as required by law. See Commandant's Appeal Decision 2578 (CALLAHAN). The U.S. Coast Guard alleged and proved that the Respondent substituted something for his urine specimen in an attempt to prevent or conceal a positive drug test result. A federally approved, tested and certified commercial testing laboratory analyzed and tested Respondent's urine specimen. It determined in its final report that the Respondent's urine sample was not consistent with human urine, as shown by its litigation package,

now IO Exhibit 9. The Respondent's provided alleged specimen had a verified unbroken chain of custody. The laboratory under carefully approved procedures performed the tests and analysis to verify its results. The results were reviewed by a qualified Medical Review Officer (MRO), Dr. Brian N. Heinen. The laboratory witness and the MRO testified that the Respondent's submitted urine specimen had been "substituted." The U.S. Coast Guard Investigating Officers presented credible testimony and documentation to prove that the Respondent submitted a urine specimen that was not consistent with normal human urine. Thus, the Respondent by his actions has refused to properly submit to a drug test requested by his marine employer and the applicable law.

The Commandant approving and affirming revocation on a prior appealed case has recognized that the underlying important policies of the U.S. Coast Guard, the U.S. Congress and Administration could be seriously damaged when a Respondent refuses by his actions to submit to chemical testing and face a lesser charge. See Commandant's Appeal Decision 2578 (CALLAHAN).

The Coast Guard has requested revocation of Respondent's U.S. Coast Guard Merchant Mariner's License in the two Complaints. It is found that the U.S. Guard has by a preponderance of the evidence proved that the Respondent refused to submit to a random drug screening test by substituting and/or adulterating his supposed urine specimen as determined by both the tested and certified laboratory and by the Medical Review Officer, Dr. Brian N. Heinen, M.D. After finding the U.S. Coast Guard has by the preponderance of the evidence proved Misconduct on the part of this Respondent in failing to provide Respondent's own urine specimen as required by the rules and laws

governing his U.S. Merchant Mariner's License, revocation of his license is an appropriate sanction.

46 U.S.C. § 7704 is entitled Dangerous drugs as grounds for revocation (1995).

Paragraph (b) reads as follows:

“(b) If it is shown at a hearing under this chapter that a holder of a license, certificate of registry, or merchant mariner's document issued under this part, within 10 years before the beginning of the proceedings, has been convicted of violating a dangerous drug law of the United States or of a State, the license, certificate, or document shall be revoked.”

A JUDGMENT OF CONVICTION BY A STATE COURT IS CONCLUSIVE

The captioned Respondent was convicted in a State court in Harris County, Texas.

33 C.F.R. Part 20 (1999), including § 20.1307, is entitled Use of judgments of conviction. Parts (c), (d) and (e) state in relevant part:

“(c) A judgment of conviction by a Federal or State court for a violation is conclusive in the proceeding if a suspension and revocation (S&R) proceeding alleges conviction for –

- (1) A violation of a dangerous-drug law;
- (2) An offense that would prevent the issuance or renewal of a merchant mariner's license, certificate of registry, or document; or
- (3) An offense described in subparagraph 205(a)(3)(A) or (B) of the National Driver Register Act of 1982 (23 U.S.C.S. 401, note).”

“(d) If the respondent participates in the scheme of a State for the expungement of convictions, and if he or she pleads guilty or no contest or, by order of the trial court, has to attend classes, contribute time or money, receive treatment, submit to any manner of probation or supervision, or forgo appeal of the finding of the trial court, the Coast Guard regards him or her, for the purposes of 46 U.S.C. 7703 or 7704, as having received a conviction. The Coast Guard does not consider the conviction expunged without proof that the expungement is due to the conviction's having been in error.”

“(e) No respondent may challenge the jurisdiction of a Federal or State court in any proceeding under 46 U.S.C. 7703 or 7704.”

33 C.F.R. Part 20 became effective as of June 1999. Prior to that, the procedural rules for these Coast Guard S&R proceedings before U.S. Administrative Law Judges was provided for in 46 C.F.R. Part 5, which also contains a subsection 5.547, entitled Use of judgment of conviction. 46 C.F.R. Part 5 was in effect for approximately the last 29 years, prior to June 1999.

Upon consideration of the whole record of the proceedings, including the hearing and the applicable law, the complaint of “**MISCONDUCT**” involving 46 U.S.C. § 7703 and 46 C.F.R. 5.527 is found **PROVED**. The Complaint involving “**CONVICTION OF A DANGEROUS DRUG LAW VIOLATION**” under 46 U.S.C. 7704(b) and 46 C.F.R. 5.535 is also found **PROVED**.

Under the statute 46 U.S.C. 7704, where there is a proved conviction for a violation of a dangerous drug law in a State or Federal court, no discretion to give a lesser order is given to the Administrative Law Judge or the Commandant. The law states we must revoke. See NTSB Decision and Order EM-125, entitled Commandant v. CAIN (1985) and Commandant’s Appeal Decision 2428 (NEAT) (August 7, 1986).

It is further held that where there is proof of a conviction for a violation of a dangerous drug law, the order must be one of revocation. It states an order of revocation is required once a properly convened hearing establishes proof of conviction in a State or Federal court for violating a dangerous drug law under 46 U.S.C. 7704. That is the holding in Commandant’s Appeal Decision 2408 (BROWN).

It was further stated in Commandant’s Appeal Decision 2428 (NEAT) that revocation is proper, and if proven, it is statutorily required under 46 U.S.C. 7704. In short, it is required by law that Respondent’s captioned documents be revoked.

This Decision and Order becomes effective immediately upon service on this ~~captioned Respondent or upon notice to the captioned Respondent.~~

At the close of the hearing, the U.S. Coast Guard filed its motion for a Default Order under 33 C.F.R. 20.310. It stated in relevant part that the Coast Guard issued an administrative proceeding seeking to revoke Respondent's License Number 845582 by filing a Complaint on November 17, 1999.

The Coast Guard served Respondent with a copy of both Complaints in this action by personal service on November 17, 1999. Proof of service is attached as IO Exhibits 9 and 10, which are the signed Complaints signed by Mr. Guillory. One is for his conviction for violating a dangerous drug law. The second Complaint was also signed for by Mr. Guillory showing the receipt for the charge of Misconduct, for wrongfully refusing to submit to a random drug test. In addition, IO Exhibits 11 and 12 include Respondent's legal Answers to both Complaints. The motion is made on the grounds that Respondent has failed to appear at the administrative hearing before the U.S. Administrative Law Judge on January 11, 2000 in Beaumont, Texas. The default constitutes an admission of all facts, allegations and complaints and a waiver of the Respondent's right to a hearing. Therefore, the Investigating Officers have requested that the Administrative Law Judge issue a Default Order against the Respondent that imposes the Revocation Order requested in the Complaint. The Coast Guard proposes an order of revocation in accordance with 46 C.F.R. Table 5.569. Table 5.569 has a suggested range of an appropriate order and states the only proper order for a charge under 46 U.S.C. 7704 found proved is revocation.

The motion for Default Order is **GRANTED**.

V. ORDER

IT IS HEREBY ORDERED that the captioned Respondent's U.S. Coast Guard issued U.S. Merchant Mariner's License Number 845582 and all other licenses or

documents or their duplicates that are still effective and that have not expired, including licenses, certificates and/or authorizations whatsoever by the U.S. Coast Guard are hereby **REVOKED**.

Any party has a further right to appeal from a U.S. Administrative Law Judge's decision within thirty (30) days after the issuance of the decision under 33 C.F.R. Part 20.

IT IS FURTHER ORDERED that the captioned Respondent, Ricky Dale Guillory, Sr., immediately deliver by return receipt mail or in person, his original U.S. Merchant Mariner's License Number 845582 and all other U.S. Merchant Mariner's Documents or duplicates and licenses to the Senior Investigating Officer of the Marine Safety Office of the U.S. Coast Guard, 2875 Jimmy Johnson Boulevard, at Freeway 69, Port Arthur, Texas 77640, telephone number (409) 723-6509, and fax number (409) 723-6541.

Procedures are provided by which a person, or a Respondent, whose U.S. Merchant Mariner's License or Document have been revoked, may apply to any Commanding Officer of any Marine Safety Office of the U.S. Coast Guard, such as the one in Port Arthur, Texas, for the issuance of a new license or document. This is known as applying to "The Coast Guard Administrative Clemency Review Board." These rules and conditions are found in 46 C.F.R. Subpart L and are referred to as the Coast Guard's Clemency Procedures. They are found within 46 C.F.R. sections 5.901, 5.903 and 5.905 entitled "Issuance of New Licenses, Certificates or Documents After Revocation or Surrender," and in the Coast Guard's Marine Safety Manual, Volume V, Chapter II (Commandant Instruction M16000.10).


THOMAS E. MCELIGOTT
Administrative Law Judge

Dated: March 24, 2000