

UNITED STATES OF AMERICA
U.S. DEPARTMENT OF HOMELAND SECURITY
UNITED STATES COAST GUARD

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Complainant

vs.

DONALD ROBERT BOTTONE

Respondent

Docket Number 2009-0329
Enforcement Activity No. 3549396

DECISION AND ORDER

Issued: September 22, 2009

By Administrative Law Judge: Honorable Walter J. Brudzinski

Appearances:

For Complainant

**LT Lineka Quijano
PO Thomas J. Bremer
U.S. Coast Guard Sector New York**

For Respondent

DONALD ROBERT BOTTONE, *Pro se*

DECISION AND ORDER

This Order is issued in accordance with 33 CFR sections 20.710 and 20.902 (c) in that the undersigned rendered his initial decision orally from the bench at the close of the hearing on September 22, 2009 in New York, NY. Finding that Respondent and the subject matter of this hearing are within the jurisdiction vested in the Coast Guard under 46 U.S.C. §§ 7703 and 7704 and that the Coast Guard proved the allegations in the Complaint, I revoked Respondent's document at the close of the hearing.

LT Lineka Quijano and Petty Officer First Class Thomas J. Bremer, both of USCG Sector New York, represented the Coast Guard. Respondent, Donald Robert Bottone was self represented.

The Coast Guard presented the testimony of three (3) witnesses and introduced eight (8) exhibits. The Respondent testified in his own behalf and introduced four (4) exhibits.

The record shows that the Coast Guard initiated its Complaint on August 3, 2009 alleging 3 Counts, with Count 3 containing two (2) specifications. The first count alleges use of or addiction to the use of dangerous drugs in that on or about December 21, 2005, Mr. Bottone took a pre-employment drug test. He provided a urine sample, which was collected by Chad Goonewardene of Quest Diagnostics. Mr. Bottone signed a federal drug testing custody and control form. His specimen was analyzed by Quest Diagnostics Inc. at Norristown, PA using procedures approved by the Department of Transportation. Mr. Bottone's specimen subsequently tested positive for cocaine metabolites, as determined by the Medical Review Officer, Dr. Randy Barnett.

The second count alleges a Conviction under the National Driver Register Act. On or about March 25, 2008, Respondent was convicted of driving while intoxicated by the Criminal

Court of the City of New York, County of Richmond. The Complaint originally reflected that Respondent was convicted on March 25, 2009 so the undersigned amended the Complaint to reflect the correct date of March 25, 2008, as noted on the judgment of conviction which was previously provided to Respondent.

The first specification of the third count alleges Misconduct in that on or about May 10, 2009, Mr. Bottone submitted a signed CG-719B “Application for Merchant Mariner Document (MMD), License, or Certificate of Registry” to Coast Guard Regional Examination Center, New York, New York. The Respondent knowingly misrepresented a certain material fact by indicating that he has never been a user of/or addicted to a dangerous drug by checking “NO” to the following question: “Have you ever been a user of or addicted to a dangerous drug, including marijuana?” Respondent tested positive for cocaine metabolites following a pre-employment drug test provided on December 21, 2005.

The second specification of the third count alleges that also on May 10, 2009 Respondent submitted the CG-719B form and that he wrongfully misrepresented a certain material fact by indicating that he had no criminal convictions for violating a dangerous drug law by checking “NO” to the following question: “Have you ever been convicted of violating a dangerous drug law of the United States, District of Columbia, or any state, or territory of the US (This includes marijuana).” On May 14, 1996, Respondent was convicted of criminal possession of a controlled substance by the Criminal Court of the City of New York, County of Richmond. The Respondent wrongfully submitted a fraudulent application. The undersigned subsequently dismissed this count.

In his timely Answer, Respondent denied the jurisdictional and factual allegations and asked to be heard. Respondent also indicated that he had previously disclosed his May 14, 1996 drug conviction on his last application.

On August 18, 2009, the parties and the undersigned participated in a pre-hearing teleconference during which I explained the allegations to the Respondent and asked him if he intended to be represented by counsel. He responded “no.” We then established a date for the hearing, September 22, 2009, and a schedule for completing discovery which was September 11, 2009.

On August 24, 2009, the CG motioned to withdraw with prejudice the second specification to count three (3) – failure to disclose a previous dangerous drug law violation – because the regulations at 46 C.F.R. § 10.211(b) had been recently amended to reflect that an applicant for the issue or renewal of an MMC must disclose all previous criminal convictions not previously disclosed. (Emphasis added). The regulation, dated March 16, 2009 at 74 Fed. Reg. 11,222, became effective April 15, 2009. Since Respondent had previously disclosed the drug conviction on a prior CG -719B, I dismissed with prejudice the second specification to count three.

After stating the findings of fact and conclusions of law on the record, the undersigned found that the Coast Guard **PROVED** counts one, two, and the first specification of count three; the second specification of count three having been dismissed. Since a finding of **PROVED** on count one requires Revocation unless the Respondent provides satisfactory proof that he is cured, the Respondent submitted evidence that he had undergone alcohol treatment at the South Beach Alcoholism Treatment Center in Staten Island, New York in January 1997 and intensive outpatient treatment at the Camelot Counseling Center, also in Staten Island, New York in April and May of 2008. Respondent also submitted evidence that he successfully participated in Counseling Service at the YMCA of Greater New York from May 6, 2008 to April 23, 2009. A letter dated May 4, 2009 from the YMCA of Greater New York shows that Respondent’s “drug and alcohol dependence has been in remission as evidence [sic] by all negative toxicology on site test results since date of admission.” The undersigned found that Respondent’s evidence of cure

was not satisfactory because it did not meet the DOT standards; therefore I Revoked Respondent's merchant mariner's document in accordance with the law.

The undersigned further stated that although the sanctions for counts two and three would automatically be subsumed in the Revocation sanction for count one, the circumstances surrounding Respondent's apprehension and arrest for drunk driving on count two and the fact that Respondent fraudulently submitted his CG-791B reapplication in count three would justify Revocation on each count independently.

WHEREFORE,

ORDER

IT IS HEREBY ORDERED that Respondent, Donald Robert Bottone's merchant mariner's document and all other documents and certificates held by Respondent are **REVOKED**.

PLEASE TAKE NOTICE that Respondent's merchant mariner's document was held by the Administrative Law Judge during the hearing and turned over to the custody of the Coast Guard when the hearing adjourned this date.

PLEASE TAKE FURTHER NOTICE that this Order serves as notice of the parties' appeal rights as set forth in 33 C.F.R. §§ 20.1001 – 20.1004, enclosed as **Attachment B**. The thirty (30) time period within which to file the Notice of Appeal shall commence on the day following express carrier shipment of the transcript.

Walter J. Brudzinski
Administrative Law Judge
United States Coast Guard

Date: September 22, 2009

ATTACHMENT A

COAST GUARD EXHIBITS

CG-01 Respondent's Merchant Mariner Document – Admitted

CG-02 Custody and Control Form – Admitted

CG-03 Litigation Package – Admitted

CG-04 Final MRO Report – Admitted

CG-05 Judgment of DWI Conviction – Admitted

CG-06 Affidavit of Arresting Officer David Fekety – Admitted

CG-07 Renewal Application Date 5/10/09 – Admitted

CG-08 Arrest and Conviction Records – Not Introduced

CG-09 Certification of Collector – Admitted

RESPONDENT EXHIBITS

R-A Letter from YMCA for Completion of Outpatient Program – Admitted

R-B Letter from Camelot Outpatient Program – Admitted

R-C South Beach Alcoholism Treatment Center Letter – Admitted

R-D Letter from YMCA stating all drug tests were negative – Admitted

ALJ EXHIBITS

ALJ-I New York Traffic Law Section 1192(2) – Official Notice Taken