

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

UNITED STATES COAST GUARD)	
Complainant)	DECISION & ORDER
)	
vs.)	Docket Number: 00-0122
)	PA Number: 99000350
JASON O. BRUSO)	
Respondent)	
_____)	

PRELIMINARY STATEMENT

This adversary hearing was initiated by the U.S. Coast Guard while performing its missions to protect lives and properties at sea and on navigable waters, enforce national laws and treaties, preserve marine natural resources, and/or promote national security interests.

It was brought pursuant to the legal authority contained in 46 U.S. Code (U.S.C.) Chapter 77, including 46 U.S.C. 7701 through 7705; the U.S. Administrative Procedure Act, 5 U.S.C. 551 through 559; the U.S. Coast Guard Drug Testing Rules included in 46 CFR Parts 4, 5 and 16, as amended; the U.S. Department of Transportation Drug Testing Rules of 49 CFR Part 40; and the Mandatory Guidelines for Federal Workplace Drug Testing Programs, published in 53 Federal Register 11970 on 11 April 1998.

At the signing and service of the "Complaint" upon the captioned Respondent, the U.S. Coast Guard was represented by Investigating Officer (IO) Gregory L. Crettol, Lieutenant (Junior Grade), at the time stationed at the U.S. Coast Guard Marine Safety Office for the ports and region of Port Arthur, Texas, 2875 Jimmy Johnson Boulevard, Port Arthur, Texas 77640-2099.

The "Complaint" dated February 11, 2000 was served upon the Respondent, as shown by his signature on the U.S. Postal Domestic Return Receipt Form with a date stamp of February 16, 2000.

The Respondent was advised in the "Complaint" that The Coast Guard has initiated an administrative proceeding against his U.S. Coast Guard license, certificate and/or merchant mariner's document (MMD).

The Coast Guard listed the following jurisdictional allegations:

1. Respondent's address is as follows: P.O. Box 11, Westwood Drive, Trinity, Texas 75862.
2. Respondent holds the following Coast Guard-issued credential(s): MMD Number 458 87 2255.
3. Respondent acted under the authority of that license, certificate or document, on November 26, 1998, by: serving as Tankerman aboard the vessel BUFFALO 251 (O.N. D1049870) as required by law or regulation.

The first factual allegation is entitled – "Misconduct." The Coast Guard proved that:

1. On November 26, 1998, at Houston Fuel Oil Terminal aboard the barge BUFFALO 251, the Respondent wrongfully acted by refusing to submit to a post-incident drug screen as required by company policy and by disobeying a direct order from Mr. Roy Mills (Port Captain/Dispatcher of Buffalo Marine Services) to submit to a post-incident drug screen.

The second factual allegation is entitled – "Violation of Law or Regulation." The Coast Guard proved that:

1. On November 26, 1998, at Houston Fuel Oil Terminal aboard the barge BUFFALO 251, the Respondent violated Title 46 Code of Federal Regulations 35.35-35

by failing to observe the rate of loading of liquid cargo in bulk to avoid overflow of tanks.

2. This regulation was intended to promote marine safety or protect navigable waters.

Respondent filed his formal "Answer" to the "Complaint," dated February 23, 2000, in which he admitted all jurisdictional allegations. Respondent denied the following numbered paragraphs in the factual allegations and admitted all others: Paragraphs 1, 2 and 3 in Misconduct, 46 CFR 5.27. He affirmatively alleged as a defense "Other," "Nonfactual accusation." Respondent stated that he wished to be heard on the proposed order.

On April 14, 2000, the undersigned Judge received this case file and a hearing was scheduled for May 23, 2000. On May 22, 2000, the Respondent's Mother, Ms. Jettie Brusco, called to request a continuance in the above captioned matter for her son, due to his inability to attend the hearing scheduled for May 23, 2000. In light of that fact, an "Order of Continuance and Change of Hearing Location" was mailed to the Respondent, Respondent's Mother and the Investigating Officer advising that the hearing would be held on July 19, 2000. Thus the hearing scheduled for July 19, 2000 by the Judge was held at the Coast Guard Hearing Room, 8876 Gulf Freeway, Houston, Texas.

In addition, both parties were advised that they were to be present at the hearing with all witnesses and/or exhibits. All witness lists and exhibit lists intended to be offered for consideration at the hearing must be submitted to the Judge by or before fifteen (15) calendar days before the hearing. The Respondent did not respond with any witness lists or exhibit lists by or before fifteen (15) calendar days before the hearing, but the Investigating Officer did.

At the hearing, the Judge was present together with the said Investigating Officer from the U.S. Coast Guard, but the Respondent was absent, or *in absentia*. Respondent was, therefore, found in default at the hearing.

As a result of the Respondent's default at the hearing, he was served with a "Motion for Default Order" by the Investigating Officer. The Motion was mailed to Respondent's last known address, as well as his Mother's last known address. The Motion was served upon the Respondent, as shown by his signature on the U.S. Postal Domestic Return Receipt Form with a date of July 25, 2000. Respondent again defaulted by not replying to this Motion. The case is now ripe for decision.

II

FINDINGS OF FACT BASED UPON THE ENTIRE

RECORD CONSIDERED AS A WHOLE

1. It has been established by the Respondent's two defaults, at the hearing and by the "Motion for Default Order," and by the documents and evidence produced by the Investigating Officers, that the Respondent is in default and, therefore, all jurisdictional allegations and factual allegations are found proved by default.

2. It is found that the Coast Guard had properly initiated an administrative proceeding against the captioned Respondent's license and/or merchant mariner's document (MMD) under the statutory authority of 46 U.S. Code 7703 when they alleged "Misconduct," with the regulatory authority at 46 CFR Part 5.27, and "Violation of Law or Regulation," with the regulatory authority at 46 CFR Part 5.33.

3. The Coast Guard established that Respondent's last known address was as listed in the Complaint as P.O. Box 11, Trinity, Texas 75862.

4. The Respondent holds the following Coast Guard-issued credentials: U.S. Merchant Mariner's Document Number 458872255.

5. Factual allegations in the Complaint: the Coast Guard did prove that: On November 26, 1998, at Houston Fuel Oil Terminal aboard the barge BUFFALO 251, the Respondent wrongfully acted by refusing to submit to a post-incident drug screen as required by company policy and by disobeying a direct order from Mr. Roy Mills (Port Captain/Dispatcher of Buffalo Marine Services) to submit to a post-incident drug screen. The Coast Guard proved that: On November 26, 1998, at Houston Fuel Oil Terminal aboard the barge BUFFALO 251, the Respondent violated Title 46 Code of Federal Regulations 35.35-35 by failing to observe the rate of loading of liquid cargo in bulk to avoid overflow of tanks.

III

ULTIMATE FINDINGS

The "Complaint" and its supporting allegations and paragraphs are found proved by a preponderance of the reliable, probative and substantial evidence and also by default by the Respondent, both at the hearing and after the "Motion for Default Order" following the hearing. The "Complaint" proved Respondent's "Misconduct" and "Violation of Law or Regulation" under 46 U.S. Code Section 7703. The supporting allegations in the "Complaint" above are found proved.

IV

CONCLUSIONS OF LAW

1. The U.S. Coast Guard and the Administrative Law Judge have jurisdiction over the subject matter of this hearing under the provisions of 46 U.S. Code Chapter 77, including 46 U.S. Code, sections 7701 through 7705; the U.S. Administrative Procedure Act, 5 U.S. Code, sections 551 through 559; 46 CFR Parts 4, 5 and 16, as amended, and 33 CFR Part 20 of the U.S. Coast Guard; and 49 CFR Part 40 of the U.S. Department of Transportation.

2. The supporting jurisdictional and factual allegations of the "Complaint" served upon the Respondent are found proved by a preponderance of substantial evidence of a reliable and probative character and by Respondent's two defaults, both at the hearing and following the "Motion for Default Order" following the hearing.

3. The "Complaint" of "Misconduct" and "Violation of Law or Regulation" in violation of 46 U.S. Code 7703 is found proved by a preponderance of the evidence and by default.

V

OPINION

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

The "Complaint" in this matter alleged Misconduct. Misconduct is defined in 46 CFR Part 5 as follows:

Misconduct is human behavior which violates some formal, duly established rule. Such rules are found in, among other places, statutes, regulations, the common law, the general maritime law, a ship's regulation or order, or shipping articles

and similar sources. It is an act which is forbidden or a failure to do that which is required.

The captioned Respondent was charged with refusal to submit to a drug test as directed by his marine employer. The gravamen of the offense is Respondent's conduct in refusing to obey the lawful order his marine employer, as conveyed to him by his the Port Captain/Dispatcher of Buffalo Marine Service, Inc., Mr. Roy Mills.

When Respondent refused on November 26, 1998 to submit to a post-incident drug test by refusing to submit a urine sample when requested to do so by his marine employer, he was in violation of 46 U.S. Code Chapter 77 and 33 CFR Part 20, as well as 46 CFR Parts 4, 5 and 16, as amended.

Conference sworn telephonic testimony has been upheld on appeal. 46 CFR 5.535(f) Appeal Decision 2538 (SMALLWOOD); 2503 (MOULDS); 2492 (RATH); and 2476 (BLAKE), aff'd sub.nom., Commandant v. Blake, NTSB Order EM-156 (1989); aff'd sub.nom. Blake v. U.S. Department of Transportation (DOT) and NTSB, No. 90-70013 (9th Cir. 1991).

Drug testing of employee's urine samples has been upheld by the U.S. Court of Appeals for the Ninth Circuit in Bluestein v. Skinner (U.S. DOT Secretary and U.S. FAA, 908 F.2d 451 (9th Cir. 1990); Cert. den. by U.S. Supreme Court at 112 L.Ed 2nd 1042 (1991). Additional U.S. Supreme Court Decisions with similar rulings and authority are National Treasury Employees Union v. Van Raab, 109 S.Ct. 1384 (1989); Skinner (U.S. DOT Secretary) v. Railway Labor Executives Association, 109 S.Ct. 1402 (1989).

Other decisions upholding drug testing of certain employees include American Federation of Government Employees v. Skinner (U.S. DOT), 885 F.2d 884 (D.C. Cir.

1989); National Federation of Federal Employees v. Cheney, 884 F.2d 603 (D.C. Cir. 1989); Thomson v. Marsh, 884 F.2d 113 (4th Cir. 1989); and Harmon v. Thornburgh, 878 F.2d 484, 487-488 (D.C. Cir. 1989).

The Respondent is advised of the right to appeal in accordance with 33 CFR Part 20, the relevant part of which is enclosed herein.

VI

ORDER

IT IS ORDERED that the captioned Respondent's U.S. Coast Guard Merchant Mariner's Document Number 458872255 issued to Jason Otis Brusco and all other U.S. Coast Guard licenses, documents, certificates and authorizations issued to him and still valid are hereby REVOKED. If the Coast Guard is not already in possession of the Respondent's above referenced License, Respondent is hereby ordered and directed to deposit by mail the said License and Documents with the Senior Investigating Officer of the U.S. Coast Guard Marine Safety Office, 2875 Jimmy Johnson Boulevard, Port Arthur, Texas 77640-2099. This includes all originals and/or duplicates of these licenses and documents.

The procedures following are known as the U.S. Coast Guard's "Administrative Clemency Program." These may require three or more years. Procedures are provided by which a person, or Respondent, whose U.S. Merchant Mariner's license and/or document has been revoked and surrendered, may apply to any Commanding Officer of a Marine Safety Office of the U.S. Coast Guard, after an applicable waiting period, for the issuance of a new license or document. These rules and conditions are found in 46 CFR Subpart L (46 CFR 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 Marine Safety Manual for application for clemency by the U.S. Coast Guard’s Administrative Clemency Review Board.



THOMAS E. MCELLIGOTT
Administrative Law Judge
U.S. Coast Guard

Dated: August 29, 2000

Copy:
MSO Port Arthur, Attn: LTJG Crettol, IO
Mr. Jason O. Brusio, Respondent
Ms. Jettie Brusio, Respondent’s Mother
ALJ Docketing Center, Baltimore