

**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD**

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vs.

DOMINIC MCDONALD

Respondent

Docket No. CG S&R 01-0118

Case No. PA00001665

**ORDER DENYING RESPONDENT'S MOTION TO ALTER OR AMEND
DECISION AND ORDER; ORDER GRANTING THE COAST GUARD'S MOTION
TO ALTER AND AMEND DECISION AND ORDER; AND ORDER GRANTING
RESPONDENT'S ATTORNEY LEAVE TO ENTER AN APPEARANCE**

On December 6, 2001, Respondent Dominic McDonald filed a Motion to Alter or Amend the November 9, 2001 Decision and Order issued by the undersigned in the above captioned case. The Decision was based on a finding that the Coast Guard had proved that Respondent McDonald wrongfully refused to submit to a required chemical test for dangerous drugs by providing a substituted urine specimen for pre-employment drug screening on July 31, 2000 in violation of 46 U.S.C. § 7703 and 46 C.F.R. Parts 5 and 16. The Order suspended Respondent McDonald's Merchant Mariner's License and Document for a period of twelve (12) months beginning on the date said license and document was delivered to the United States Coast Guard Marine Safety Unit in Galveston, Texas. The Order also imposed an additional 12 months of probation following expiration of the 12-month period of outright suspension.

In his December 6th motion, the Respondent requests that the Decision and Order be modified so that the 12-month outright suspension begins on July 31, 2000. The

Respondent argues that good cause exists to authorize him to return to work on probation because of the national emergency resulting from the events of September 11, 2001 and the critical shortage of licensed third mates needed to assist the United States Military Sealift Command in carrying fuel, supplies, and other material on board chartered International Organization of Master, Mates and Pilots (“MM&P”) vessels to directly support United States military bases and operations overseas.¹ The Respondent further argues that he is an excellent and reliable candidate for immediate return to work without further incident because of his long unblemished record of service and low probability of a having a substance abuse dependence problem.² The Respondent further points out that he has not worked for the past eighteen (18) months and a 12-month outright suspension of his license and document would result in the Respondent not working for a total of thirty (30) months.

On December 12, 2001, the Coast Guard filed a motion in opposition to the Respondent’s Motion to Alter or Amend the Decision and Order. The Coast Guard points out that Respondent McDonald intentionally maintained control of his license

¹ Respondent McDonald attached an affidavit signed under the penalty of perjury by Captain Glen P. Banks, International Secretary-Treasurer for MM&P to support this argument.

² The testimony of the substance abuse professional (“SAP”) regarding the Respondent’s probability of having a substance abuse problem was given little weight and was found to be unreliable because the SAP failed to consider all factors in reviewing the results of the substance abuse examination. USCG v. McDonald, Docket No. CG S&R 01-0118, at 22 (November 9, 2001). More specifically, the SAP failed to consider the Respondent’s elevated “defensiveness” score on the substance abuse examination in assessing Respondent McDonald’s probability of having a substance abuse problem. Furthermore, Mr. McDonald’s inconsistent and contradictory response at the substance abuse interview regarding use of medication and his testimony during the hearing calls his credibility into question. *Id.* at 18-19.

and document until September 7, 2001 when the Respondent attempted to renew his license and document and the Regional Examination Center in Houston, Texas took physical possession of said license and document pending the outcome of the hearing. The Coast Guard moves that the November 9, 2001 Decision and Order be modified to permit the 12 month outright suspension to commence on September 7, 2001, i.e., the day the Regional Examination Center in Houston, Texas took physical possession of Respondent McDonald's license and document.

After careful review of the applicable law and facts of this case, including the parties' respective arguments and evidence in support thereof, the Respondent's Motion to Alter or Amend the November 9, 2001 Decision and Order is **DENIED**. However, the Coast Guard's motion is well taken. The period of 12-month outright suspension shall be deemed to have commenced on September 7, 2001.

(I)
DISCUSSION

In these proceedings, at any time, upon party motion and for good cause shown, an administrative law judge may issue an order rescinding an order suspending a merchant mariner's license and/or document. 33 C.F.R. § 20.904. Selection of an appropriate order solely rests in the exclusive authority and discretion of the administrative law judge. 46 C.F.R. § 5.569(a); see also Appeal Decision 2427 (JEFFRIES); Appeal Decision 2452 (MORGANDE). In determining, the appropriate order in this case, the undersigned took into consideration the fact that Respondent McDonald: (1) has no prior history of violations of Coast Guard laws or regulations; (2) has never tested positive for dangerous drugs; (3) does not have a reported history of

drug use or abuse; and (4) only needs an additional 0.65 years of credited maritime services to qualify for a retirement pension from MM&P. Based upon these considerations, the undersigned determined that an order at the lower end of the Table of Suggested Range of an Appropriate Order codified at 46 C.F.R. § 5.569(d) was appropriate.

The mere fact that Respondent has not worked in eighteen months beginning on July 31, 2000 when he provided a substituted urine specimen for pre-employment drug testing does not justify reducing the order or otherwise providing Respondent with credit towards satisfaction of the November 9, 2001 decision and order. The regulations clearly state that “[t]he time of any period of outright suspension ordered **does not commence until the license, certificate or document is surrendered to the Coast Guard.**” 46 C.F.R. § 5.567(e). The term “surrender” means to relinquish or give up possession or control to the Coast Guard either by order or voluntarily. See generally Webster’s II New College Dictionary 1110 (Houghton Mifflin Co. 1995); see also Blacks Law Dictionary 1444 (6th ed. 1990) (defining “surrender” as “to relinquish, to deliver into lawful custody, or to give up in favor of another”); 46 C.F.R. § 5.203(b)(2) (defining voluntary “surrender” as a permanent relinquishment of all rights to the license, certificate or document); Word v. United State, 223 F. Supp. 614, 616 (S.D. Al 1963).

Here, Respondent maintained physical possession and control of his license and document until September 7, 2001 when the Coast Guard Regional Examination Center in Houston, Texas took actual possession and control of said license and document. Respondent McDonald maintained custody of the license and document even though he was presented with numerous opportunities to relinquish control of his merchant

mariner's license and document. In maintaining custody of his Coast Guard credentials, Respondent McDonald was cognizant that an adverse ruling could be rendered against him with respect to his license and document. Yet, Respondent McDonald held on to his license and document at his own expense and, thus, is not entitled to any credit for the period of time in which he did not work. The mere fact that Respondent McDonald did not, or otherwise could not, work under said license and document for 18 months is immaterial. The computation of the time period of outright suspension begins when the Coast Guard takes actual physical control and possession of the license, document, or certificate, which, in this case, occurred on September 7, 2001.

Moreover, although the undersigned is acutely aware of the events of September 11, 2001, at this juncture, I decline to reduce the 12-month suspension order based solely on the averment of Captain Banks. The Respondent has filed a notice of appeal and may explore other avenues permitting him to work pending resolution of the appeal. See 46 C.F.R. § 5.707.

(II)
ORDER

WHEREFORE,

IT IS HEREBY ORDERED that Respondent's Motion to Alter or Amend the November 9, 2001 Decision and Order in the above captioned case is **DENIED**.

IT IS FURTHER ORDERED that the Coast Guard's Cross-Motion to Alter or Amend the November 9, 2001 Decision and Order in the above captioned case is **GRANTED**. Merchant Mariner's License Number 788349 and Merchant Mariner's

Document Number [REDACTED], and all duplicates thereof and all other valid documents and certificates issued to Dominic D. McDonald by the United States Coast Guard or any predecessor authority is hereby **SUSPENDED OUTRIGHT** for **TWELVE (12) MONTHS** beginning on September 7, 2001. Following the period of **OUTRIGHT SUSPENSION** said license and document shall be returned to the Respondent, who will be required to serve an additional **TWELVE MONTHS PROBATION**, which if violated by Respondent's negligence or misconduct will result in an additional twelve (12) months suspension. However, if a drug case violation is later proved against the Respondent, his Coast Guard credentials will be revoked.

IT IS FURTHER ORDERED THAT, while resolution of the appeal is pending in this case, Respondent may apply for temporary issuance of Coast Guard license or document in accordance with 46 C.F.R. § 5.707.

IT IS FURTHER ORDERED THAT the Respondent's motion for leave to enter the appearance of William Hewig, III, Esq. as legal counsel is **GRANTED**.

IT IS FURTHER ORDERED THAT, pursuant to 33 C.F.R. §§ 20.904(d) and 20.1003(a)(3), the appellate brief must be received in the Docketing Center no later than 60 days from the date of issuance of this order.

Done and dated this ___ day of December 2001 at Houston, Texas

THOMAS E. MCELLIGOTT
Administrative Law Judge