

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

UNITED STATES COAST GUARD

Complainant

vs.

KEVIN GEROD LEWIS

Respondent

Docket Number: CG S&R 2015-0330
Coast Guard Enforcement Activity Number: 5200795

ORDER

Bench Decision Issued: April 11, 2016

Issued by: Michel J. Devine, Administrative Law Judge

This Order is issued in accordance with 33 C.F.R. § 20.902(c), which authorizes the issuance of an initial oral decision. The United States Coast Guard (USCG) initiated this administrative action seeking revocation of the Merchant Mariner's Credential (MMC) issued to Kevin Gerod Lewis (Respondent). The Complaint, dated October 29, 2015,¹ alleges Respondent, a holder of Coast Guard issued credentials, violated 46 U.S.C. § 7704 and 46 C.F.R. § 5.35 (use of or addiction to the use of dangerous drugs) on June 26, 2015, by presenting himself for voluntary, random drug testing by his employer; and that his hair specimen was

¹ The printed copy of the Complaint is dated August 28, 2015. However, the Complaint was not entered into the Marine Information for Safety and Law Enforcement (MISLE) database until October 29, 2015.

collected and resulted in a positive test for cocaine metabolites. On October 29, 2015, Respondent filed an Answer in which he generally denied the allegations.

An evidentiary hearing was held in Norfolk, Virginia on January 28, 2016, and on April 11, 2016. The hearing was conducted in accordance with Administrative Procedure Act, amended and codified at 5 U.S.C. §§ 551-59, Coast Guard Administrative Procedure statute codified at 46 U.S.C. § 7702, and the procedural regulations codified at 33 C.F.R. Part 20.

At the initial hearing on January 28, 2016, LT Matthew Romero, Investigating Officer, and Brian Crockett, Esq., entered an appearance on behalf of the Coast Guard. Respondent appeared at the hearing represented by Scott Hallauer, Esq. When the hearing resumed on April 11, 2016, LT Nathan Passay appeared in place of Brian Crockett, Esq. and Mr. James Staton also appeared on behalf of the Coast Guard with LT Matthew Romero.

The Coast Guard offered eleven (11) Exhibits, all of which were admitted, and called four witnesses. Respondent cross-examined each of the Coast Guard witnesses and at the conclusion of the Government's case-in-chief, moved to strike the charge. The motion was denied.

Respondent presented seven (7) exhibits, which included drug test results taken after the June 26, 2015 test alleged in the Complaint. The undersigned ALJ considered the subsequent tests to be either irrelevant due to the passage of time or of limited relevance when all facts were considered. However, all of Respondent's exhibits were admitted into evidence and given appropriate weight. Respondent also presented his own testimony and called one other witness on his behalf. The witness and exhibit lists are contained in Attachment A.

At the conclusion of the hearing, both parties waived the opportunity to file written argument and proposed findings of fact and conclusions of law. As permitted by 33 C.F.R. §§

20.710 and 20.902, the undersigned ALJ rendered an oral decision finding the jurisdictional and factual allegations proved and revoking Respondent's credentials. The findings of fact and conclusions of law are summarized as follows:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent, Kevin Gerod Lewis, and the subject matter of this proceeding is within the jurisdiction of the Coast Guard vested under the authority of 46 U.S.C. Chapter 77.
2. On June 26, 2015, Respondent consented to a voluntary random drug test conducted in accordance with the GMS Management System. (CG Exhibit 1). Respondent engaged in official matters relating to his Merchant Mariner Credentials by reporting for drug testing.
3. Respondent, at the hearing admitted he is the holder of MMC 000267911. Therefore since he was the holder of a MMC and was performing activities under the authority of his credentials, jurisdiction for this suspension and revocation proceeding exists under 46 C.F.R. § 5.57 and was not disputed at the hearing.
4. Department of Transportation procedures were not followed by the collector in this matter because the collector obtained a hair specimen from Respondent on June 26, 2015. Hair tests are not covered by Department of Transportation regulations.
5. Respondent's original specimen collected on June 26, 2015, was forwarded for testing at the Psychomedics Lab, the seals for the specimen were intact when received at the lab and the chain of custody was maintained and resulted in a positive test result for cocaine metabolites.

6. The MRO reviewed the results and determined there was no valid excuse or medical explanation for the positive test result.
7. Based on the testimony of the lab director and the MRO, the positive test result was demonstrated verified by probative and persuasive evidence.
8. The Omega Laboratory test results indicated a negative result but the test results were for an initial screening test and GC/MS confirmatory testing was not conducted.
9. Rebuttal testimony demonstrated the Omega Lab subsequent test results could have been positive if treated as a confirmatory test, but GC/MS testing was not done so this evidence is of limited value.
10. March 1, 2015, the date of Respondent's asserted innocent ingestion at a bar in Virginia Beach, Virginia, is more than seventy (70) days before the hair specimen was collected from Respondent on June 26, 2015.
11. The level of positive results if it had been from a single use of cocaine would have resulted in substantial physical problems and likely cardiac arrest.
12. I find the testimony of Michael Schaffer, Ph.D. (Lab Director) and Dr. Darren Duet, M.D., (MRO) credible and persuasive.
13. The evidence of later-in-time negative urinalysis and drug tests do not provide sufficient evidence to counter the evidence of a positive test result for cocaine.
14. The positive test results from the June 26, 2015 specimen are not consistent with one-time use.
15. There is no valid medical explanation for the positive test result. Respondent failed to provide sufficient evidence to rebut the evidence of dangerous drug use presented by the Coast Guard.

16. Based on the record as a whole, the Coast Guard has proved by a preponderance of reliable and credible evidence that Respondent is (or was) a user of dangerous drugs under 46 U.S.C. 7704(c) and the underlying regulations.

Evidence regarding allegations of dangerous drug use is not limited to urinalysis conducted pursuant to Department of Transportation (DOT) regulations. Proceedings conducted in accordance with 46 C.F.R Part 5 are remedial in nature and may consider evidence from any source. Appeal Decision 2542 (DEFORGE) (1992). I considered the evidence of subsequent drug tests, but I find they do not outweigh the evidence presented from the initial drug test by Psychemedics Lab and supported by the testimony of Michael Schaffer, Ph.D., of Psychemedics Lab and Dr. Duet. I find the evidence presented by Respondent does not outweigh the evidence of dangerous drug use as presented by the Coast Guard in this case. E.g. Appeal Decision 2635 (SINCLAIR) (2002); Appeal Decision 2575 (WILLIAMS) (1996); aff. sub nom. Kramek v. Williams, NTSB Order No. EM-183 1997 WL 780249 (1997).

WHEREFORE,

ORDER

IT IS HEREBY ORDERED, the Merchant Mariner's Credential and all other Coast Guard licenses, certificates, and documents issued to Respondent, Kevin Gerod Lewis, are **REVOKED**. Respondent's Merchant Mariner Credentials were surrendered to the Coast Guard at the conclusion of the hearing. Respondent must immediately surrender any other Coast Guard issued credentials to the Coast Guard, Sector Hampton Roads, 200 Granby Street, Suite 700, Norfolk, Virginia 23510. If you knowingly continue to use your credentials, you may be subject to criminal prosecution.

PLEASE TAKE NOTICE, within three (3) years or less, Respondent may file a motion to reopen this matter and seek modification of the order of revocation upon a showing that the

order of revocation is no longer valid and the issuance of a new license, certificate, or document is compatible with the requirement of good discipline and safety at sea. The revocation order may be modified upon a showing that the individual:

- (1) Has successfully completed a bona fide drug abuse rehabilitation program;
- (2) Has demonstrated complete non-association with dangerous drugs for a minimum of one year following completion of the drug rehabilitation program; and
- (3) Is actively participating in a bona fide drug abuse monitoring program.

See generally 33 C.F.R. § 20.904; 46 C.F.R. § 5.901. The drug abuse monitoring program must incorporate random, unannounced testing during that year. Appeal Decision 2535 (SWEENEY)(1992).

PLEASE TAKE FURTHER NOTICE, Service of this Order on you constitutes notice of your right to appeal as set forth in 33 C.F.R. § 20.1001 -1003. (Attachment B). A copy of the transcript will be provided to Respondent if requested.

<p>Michael J. Devine US Coast Guard Administrative Law Judge</p> <p>Date: April 14, 2016</p>
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ATTACHMENT A

WITNESS AND EXHIBIT LIST

Coast Guard Witnesses

1. Billy Gilbert Pellegrin
2. Cary Bergeron
3. Dr. Michael Schaffer, Lab Director
4. Dr. Daren Duet, MRO

Coast Guard Exhibits

1. GMS Management System Drug and Alcohol Procedure
2. Drug and Alcohol Free Work Environment Policy signed by Respondent
3. Report of positive drug test for Respondent dated July 9, 2015
4. Certificate of Completion for collector training (Cary Bergeron)
5. Federal Chain of Custody form (collector copy) showing Respondent's signature.
6. Accreditation and Certification Information Michael I. Schaffer, Ph.D
7. Psychemedics Laboratory Data Package
8. Psychemedics Hair Analysis Drug Test results for Respondent provided to Edison Chouest Offshore
9. CV for Darren J. Duet, MD, Edison Chouest Medical Director and MRO
10. Federal Chain of Custody form (MRO copy)
11. Laboratory Documentation Package (Omega Laboratories, Inc).

Respondent Witnesses

1. Kevin G. Lewis, Respondent
2. Chauncey Watkins

Respondent Exhibits

- A. Cedar Road Medical Associates Acute Sick Visit notes from visit by Respondent on March 6, 2015.
- B. Omega Laboratories Hair Drug Test results showing negative results in regard to not detecting 5 listed drugs equal to or greater than their listed cutoff.
- C. Federal Chain of Custody Form dated July 8, 2015 for pre-employment test
- D. Tidewater Occupational Health Drug Test results from January 25, 2016 (negative).
- E. Edison Chouest Offshore Seatime Accumulation for Respondent. (July 21, 2015)
- F. Letters of Recommendation for Respondent from Chief Engineer Christopher Nardone (two pages)
- G. Family Enrichment Center treatment Note dated January 26, 2016

ATTACHMENT B

NOTICE OF APPEAL RIGHTS

33 CFR 20.1001 General.

- (a) Any party may appeal the ALJ's decision by filing a notice of appeal. The party shall file the notice with the U. S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022. The party shall file the notice 30 days or less after issuance of the decision, and shall serve a copy of it on the other party and each interested person.
- (b) No party may appeal except on the following issues:
 - (1) Whether each finding of fact is supported by substantial evidence.
 - (2) Whether each conclusion of law accords with applicable law, precedent, and public policy.
 - (3) Whether the ALJ abused his or her discretion.
 - (4) The ALJ's denial of a motion for disqualification.
- (c) No interested person may appeal a summary decision except on the issue that no hearing was held or that in the issuance of the decision the ALJ did not consider evidence that that person would have presented.
- (d) The appeal must follow the procedural requirements of this subpart.

33 CFR 20.1002 Records on appeal.

- (a) The record of the proceeding constitutes the record for decision on appeal.
- (b) If the respondent requests a copy of the transcript of the hearing as part of the record of proceeding, then, --
 - (1) If the hearing was recorded at Federal expense, the Coast Guard will provide the transcript on payment of the fees prescribed in 49 CFR 7.45; but,
 - (2) If the hearing was recorded by a Federal contractor, the contractor will provide the transcript on the terms prescribed in 49 CFR 7.45.

33 CFR 20.1003 Procedures for appeal.

- (a) Each party appealing the ALJ's decision or ruling shall file an appellate brief with the Commandant at the following address: U.S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022, and shall serve a copy of the brief on every other party.
 - (1) The appellate brief must set forth the appellant's specific objections to the decision or ruling. The brief must set forth, in detail, the --
 - (i) Basis for the appeal;
 - (j) Reasons supporting the appeal; and
 - (k) Relief requested in the appeal.

- (2) When the appellant relies on material contained in the record, the appellate brief must specifically refer to the pertinent parts of the record.
 - (3) The appellate brief must reach the Docketing Center 60 days or less after service of the ALJ's decision. Unless filed within this time, or within another time period authorized in writing by the Docketing Center, the brief will be untimely.
- (b) Any party may file a reply brief with the Docketing Center 35 days or less after service of the appellate brief. Each such party shall serve a copy on every other party. If the party filing the reply brief relies on evidence contained in the record for the appeal, that brief must specifically refer to the pertinent parts of the record.
 - (c) No party may file more than one appellate brief or reply brief, unless --
 - (1) The party has petitioned the Commandant in writing; and
 - (2) The Commandant has granted leave to file an added brief, in which event the Commandant will allow a reasonable time for the party to file that brief.
 - (d) The Commandant may accept an *amicus curiae* brief from any person in an appeal of an ALJ's decision.

33 CFR 20.1004 Decisions on appeal.

- (a) The Commandant shall review the record on appeal to determine whether the ALJ committed error in the proceedings, and whether the Commandant should affirm, modify, or reverse the ALJ's decision or should remand the case for further proceedings.
- (b) The Commandant shall issue a decision on every appeal in writing and shall serve a copy of the decision on each party and interested person.