

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

UNITED STATES COAST GUARD,

Complainant,

vs.

FERNANDO MIGUEL LOPEZ,

Respondent,

**Docket Number 2024-0107
Enforcement Activity Number 7864519**

DEFAULT DECISION

Issued: September 6, 2024

By: George J. Jordan, Administrative Law Judge

Appearances:

**Shawn Merrick, Investigating Officer
Sector Jacksonville
For the Coast Guard**

**Fernando Miguel Lopez, *Pro se*
For the Respondent**

This matter comes before me based on the United States Coast Guard's (Coast Guard) Motion for Default Order (Motion for Default). As of the date of this order, Fernando Miguel Lopez (Respondent) has not replied to the Complaint nor the Motion for Default. Upon review of the record and pertinent authority, the allegations in the Complaint are **PROVED**.

On February 21, 2024, the Coast Guard filed a Complaint against the Respondent seeking to revoke his Merchant Mariner Credential (MMC) for misconduct in violation of 46 U.S.C. § 7703(1)(B) and 46 C.F.R. § 5.27 by refusing to take a required drug test. Specifically, the Coast Guard alleges Respondent departed the testing facility prior to the completion of a second required drug test.

The Coast Guard served the Complaint upon Respondent by express courier service delivered to Respondent's residence and signed for by a person of suitable age and discretion residing at Respondent's residence on February 23, 2024. Subsequently, the Coast Guard filed a Motion for Default on July 9, 2024, served upon Respondent by express courier service and signed for by him at Respondent's residence on July 11, 2024. To date, more than twenty days have passed from service of the Motion for Default and Respondent has neither filed an answer nor requested an extension of time to file an answer. 33 C.F.R. § 20.308(a).

As Respondent has not filed an answer nor asserted good cause for failing to do so, I find Respondent in **DEFAULT**. 33 C.F.R. § 20.301(a); Appeal Decision 2700 (THOMAS) 2012. A default constitutes an admission of all facts alleged in the Complaint and waiver of the right to hearing on those facts. 33 C.F.R. § 20.310(c). I find the following factual allegations in the Complaint **ADMITTED**.

1. On September 13, 2023, Respondent took a required pre-employment drug test, pursuant to 46 C.F.R. Part 16.

2. Respondent reported to CWP Express Care/Corp Wellness Partners, Libertyville, IL, where Michael Szostek initiated the collection process by completing Step 1 of the Federal Drug Testing Custody and Control Form for Specimen ID # 7924215226, allowing Respondent to select, an individually wrapped or sealed collection container from collection kit materials, in accordance with 49 C.F.R. § 40.63.
3. Prior to the completion of the collection process, as described by 49 C.F.R. § 40.79(a)(7), Respondent failed to remain at the urine collection site to provide another sample after providing an initial sample which, was not within the acceptable temperature range in accordance with 49 C.F.R. § 40.65(b).
4. Respondent's failure to remain at the urine collection site is a refusal to take a required drug test pursuant to 46 C.F.R. Part 16, as described by 49 C.F.R. § 40.191(a)(2).
5. Refusal to take a required drug test is Misconduct, as described by 46 U.S.C. § 7703(1)(B) and defined by 46 C.F.R. § 5.27.
6. In aggravation, Respondent deliberately attempted to circumvent the drug testing program and undermine marine safety by attempting to deceive a collector with a tampered urine sample which was "hot to the touch" and not within temperature range.

Upon finding Respondent in default, I must now issue a decision against him. 33 C.F.R. § 20.310(d). In reviewing the record, I find that the facts deemed admitted are sufficient to establish that Respondent's misconduct is a violation of regulation, as described by 46 U.S.C. § 7703(1)(B) and 46 C.F.R. § 5.27. Accordingly, I find Respondent committed misconduct by violating a regulation.

SANCTION

Having found Respondent in default and all allegations in the Complaint proved, I now must determine the appropriate sanction. 33 C.F.R. § 20.902(a)(2). While it is within the sole discretion of the Administrative Law Judge (ALJ) to determine the appropriate sanction at the conclusion of a case. Appeal Decision 2362 (ARNOLD) (1984). The Table of Suggested Range of Appropriate Orders (Table) provides sanction ranges for various offenses. 46 C.F.R. § 5.569 tbl. 5.569. The purpose of this Table is to provide guidance to the ALJ and promote uniformity

in orders rendered. Appeal Decision 2628 (VILAS) (2022), aff'd NTSB Order No. ME-174. A sanction ordered within the range specified in the Table is not excessive. 46 C.F.R. § 5.569(d).

However, this Table is not binding on an ALJ and either aggravating or mitigating circumstances may support a sanction different from the Table. 46 C.F.R. § 5.569(b)(3). The Coast Guard proved Respondent committed misconduct by violating a regulation. The sanction range in the Table for violations of regulations concerning refusal of a drug or alcohol test specify a sanction of 12-24 months outright suspension. 46 C.F.R. § 5.569 tbl. 5.569.

In this case, the Coast Guard is seeking a sanction of revocation. In order to assess a sanction greater than the sanction range a clearly articulated explanation of the aggravating factors must support it. Appeal Decision 2702 (CARROLL) (2013) (quoting Commandant v. Moore, NTSB Order No. EM-201 (2005)); Appeal Decision 2455 (WARDELL) (1987), aff'd, NTSB Order No. EM-149 (1988).

The aggravating factor supplied by the Coast Guard in this case is Respondent's deliberate submission of a urine sample not within the acceptable temperature range, but still "hot to the touch." This is not in fact an aggravating factor at all, but merely a restatement of the misconduct by Respondent contained in the previous allegations of the Complaint. An excessively warm or cold specimen is the prerequisite condition leading to a direct observation test for which failing to remain at the collection site constitutes misconduct. 49 C.F.R. §§ 40.65(b)(1), 40.67(c)(3), 40.191(a)(2). The fact that the specimen was above the permitted temperature range in and of itself is not indicative of an intent to deceive. Therefore, the Coast Guard has not articulated any aggravating factors warranting elevation of the sanction in this case beyond the 12-24 months outright suspension specified in the Table.

However, given that Respondent departed the collection site rather than submit to a direct observation test does merit aggravation above the minimum sanction range in the Table.

Therefore, I find Respondent's departure from the collection site prior to the completion of collection in this case merits the sanction of 18 months outright suspension.

WHEREFORE,

ORDER

IT IS HEREBY ORDERED, all of Respondent's Coast Guard issued credentials, including Respondent's MMC [REDACTED], are **SUSPENDED OUTRIGHT FOR 18 MONTHS**.

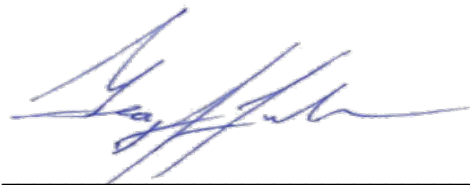
IT IS FURTHER ORDERED, Respondent shall immediately deliver all Coast Guard issued credentials, licenses, certificates, or documents, including the MMC, by mail, courier service, or in person to: Shawn Merrick, Investigating Officer, Sector Jacksonville, United States Coast Guard, 10426 Alta Drive, Jacksonville, FL 32226. In accordance with 18 U.S.C. § 2197, if Respondent knowingly continues to use the Coast Guard issued MMC [REDACTED], Respondent may be subject to criminal prosecution.

IT IS FURTHER ORDERED, pursuant to 33 C.F.R. § 20.310(e), for good cause shown, an ALJ may set aside a finding of default. A motion to set aside a finding of default may be filed with the ALJ Docketing Center in Baltimore. The motion may be sent to the U.S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21202-4022.

PLEASE TAKE NOTICE, service of this Default Order on the parties serves as notice of appeal rights set forth in 33 C.F.R. § 20.1001-20.1004 (Attachment A).

IT IS SO ORDERED.

Done and dated, September 6, 2024,
Seattle, Washington



GEORGE J. JORDAN
UNITED STATES COAST GUARD
ADMINISTRATIVE LAW JUDGE