

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

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Complainant

vs.

ERIC JAMES SERIGNY,

Respondent.

Docket Number CG S&R 02-0667
CG Case No. 1487594

DECISION AND ORDER

Issued: September 25 2003

Issued by: Honorable Archie R. Boggs, Administrative Law Judge

Appearances:

LTJG Boris Towns
Investigating Officer
Jim Wilson
Assistant Chief Investigations
U.S. Coast Guard
MSO Morgan City, Room 243
800 David Drive
Morgan City, Louisiana 70380-1304

For the Coast Guard

Eric James Serigny, Pro Se
[REDACTED]

For the Respondent

PRELIMINARY STATEMENT

The United States Coast Guard (Coast Guard) initiated this administrative action seeking revocation of Merchant Mariner's License Number 962472 issued to Eric James Serigny (Respondent). This administrative action was brought pursuant to 46 U.S.C. 7703(1)(B) and its underlying regulations codified at 46 CFR Part 5.

On October 30, 2002, the Coast Guard issued a Complaint alleging misconduct for refusing to submit to a random drug test as requested on September 19, 2001. An Answer dated November 1, 2002, was received by the Administrative Law Judge Docketing Center on March 21, 2003. Respondent denied all jurisdictional and factual allegations specified in the Complaint and requested a hearing. The undersigned Administrative Law Judge (ALJ) issued an Order scheduling the hearing for June 4, 2003, in Morgan City, Louisiana.

The hearing commenced at the Marine Safety Office on June 4, 2003, and the Coast Guard moved to amend the Complaint. The Investigating Officer (IO) explained that on September 19, 2001, date of the alleged misconduct, Respondent's license number was 967309. Further, Respondent's license was renewed in November 2001 and his license number became 962472. The proposed Amended Complaint reflected Respondent's new license number, 962472. A second amendment to the Complaint was requested to change the factual allegation of- the use of or addition of dangerous drugs, to the charge of misconduct. A third amendment was made to include the name of the vessel Respondent was aboard, M/V SEA FOX. Respondent received a copy of the complaint and after full review, he did not object to the amendments. The Coast Guard's

motion was granted and the Complaint was amended to reflect the amended license number, the factual allegation of misconduct, and vessel name.

The hearing was conducted in accordance with the Administrative Procedures Act as amended and codified at 5 U.S.C. 551-559, and Coast Guard procedural regulations set forth at 33 CFR Part 20. The IO presenting the case on behalf of the Coast Guard moved for admission of three exhibits and presented the testimony of two witnesses.

Respondent moved for the admission of one exhibit, which contained several documents reflecting drug test results and letters of recommendation. The list of witnesses and exhibits is contained in Attachment A. Both parties waived the opportunity to file Post-hearing briefs.

After careful review of the facts and applicable law in this case, I find that the Coast Guard has **NOT PROVED** by a preponderance of reliable, probative, and substantial evidence that Respondent Serigny refused to submit to a random drug test in violation 46 U.S.C. 7703(1)(B) and 46 CFR 5.27.¹

FINDINGS OF FACT

The Findings of Fact are based on a thorough and careful analysis of the documentary evidence, testimony of witnesses, and the entire record.

1. At all relevant times mentioned herein and specifically on or about September 19, 2001, through June 4, 2003, the above-captioned Respondent was the holder of

¹ During the pendency of this case, the United States Coast Guard transferred from the Department of Transportation to the Department of Homeland Security. Pursuant to the Savings Provision of HR 5005 §1512 (PL 107-296), pending proceedings are continued notwithstanding the transfer of the Agency.

Merchant Mariners License Number 962472 (formerly License Number 967309) issued by the United States Coast Guard. (Tr. 10-13).²

2. On the date of the violation, September 19, 2001, Gary Sercovich was the owner of Offshore Crewboats (Offshore) and he affirmed that Offshore had an established drug testing program. (Tr. 21).
3. Respondent was employed as a captain by Offshore for approximately a year and a half. Mr. Sercovich testified that he did not have any “major” problems with Respondent during his employment with Offshore. (Tr. 24).
4. Respondent was scheduled to work on the M/V SEA FOX from September 16, 2001, through the duration of the job.
5. According to Offshore’s Invoice, on September 19, 2001, the job was interrupted and a vessel change occurred. The M/V SEA HAWK replaced the M/V SEA FOX for two days. Then, on September 21, 2001, the SEA FOX regained its responsibilities and completed the job on September 23, 2001. (Tr. 32-34; Gov’t Ex. 2).
6. It is alleged that, on September 19, 2001, two attempts were made to contact the M/V SEA FOX regarding the random drug test that had been scheduled. Mr. Sercovich made the first attempt by cellular telephone. The certified urine

² The citations in this Initial Decision and Order are as follows: Transcript followed by the page number, (Tr. ____); Agency Exhibit followed by number (Gov’t Ex. ____); and Respondent Exhibit followed by a letter (Resp Ex. ____).

collector, Kim Baril, General Manager for Bud's Boat Rental, made the second attempt via VHF radio. (Tr. 26, 58).

7. On ten occasions during the hearing, Mr. Sercovich testified that when he contacted the M/V SEA FOX for a random drug test, he did not know which crewmember he talked to on September 19, 2001. Mr. Sercovich testified that he either talked to Respondent or the other crewmember aboard the M/V SEA FOX. (Tr. 22, 26, 39, 40, 46, 47, 51 and 52).³
8. Mr. Sercovich testified that he did not know if Respondent received the message to report for random drug testing. (Tr. 48). Conversely, Mr. Sercovich later testified that he was sure Respondent knew to appear for random drug testing because Respondent and his brother were the only crewmembers on the boat. (Tr. 52).
9. During cross-examination of Mr. Sercovich by Respondent, the date of Respondent's employment termination with Offshore was disputed. According to Respondent, his last day of employment was September 18, 2001; however Mr. Sercovich testified that Respondent terminated his employment with Offshore on September 19, 2001. (Tr. 40-42).
10. An invoice dated September 25, 2001, was used by Mr. Sercovich to refresh his memory, which enabled him to testify to facts regarding vessel and crew change

³ The other crewmember identified at the hearing was Respondent's brother, "C.J." (Tr. 39-40).

from the M/V SEA FOX to the M/V SEA HAWK. (Tr. 24, 25, 32-35, and 45; Gov't. Ex. 2).

11. Generally, when Mr. Sercovich conducts random drug testing, he will contact the boat and whoever answers the radio or "phone" is instructed to advise the crew to report for drug testing. Mr. Sercovich testified that he does not limit his communications exclusively to the captain; he talks with whoever answers the radio or call. (Tr. 42-43).
12. Mr. Baril also testified that he is uncertain whether he talked with Respondent or his brother to notify the crew of the M/V SEA FOX of the random drug test. (Tr. 57-60, 65, 72).
13. Mr. Baril testified that he has worked with Respondent on several occasions but has only met Respondent's brother once or twice. (Tr. 63-64). Further, Mr. Baril stated that Respondent and his brother sound similar on the radio. (Tr. 58-60, 65, 72).
14. Mr. Baril testified that he was not certain of the number of crewmembers on the M/V SEA FOX, but he surmised that it was possible that another deckhand had left prior to the boat docking. (Tr. 71, 74).
15. Typically, when a mariner fails to appear for a random drug test, Mr. Baril will complete a form notifying the Coast Guard. In the case at bar, Mr. Baril neglected to complete the form and relied on Mr. Sercovich to forward the

information to the Coast Guard on the following day, September 20, 2001. (Tr. 69-70, 74; Gov't Ex. 1).

16. Respondent testified that he never received notification of the random drug test. (Tr. 77, 79).

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent and the subject matter of the hearing are properly within the jurisdiction vested in the United States Coast Guard under 46 U.S.C. 7703.
2. At all relevant times, Respondent was the holder of United States Coast Guard License Number 962472 (formerly License Number 967309).
3. Respondent is the holder of a license subject to random drug testing under 46 U.S.C. 7702(c)(2) and 46 CFR 16.230.
4. The Coast Guard has **NOT PROVED** by a preponderance of reliable, probative, and substantial evidence that on September 19, 2001, that Offshore Crewboats notified Respondent to report for a random drug test.

DISCUSSION

The purpose of Coast Guard suspension and revocation proceeding is to promote safety at sea. See 46 U.S.C. 7701. Under 46 CFR 5.19, the Commandant delegated to the Administrative Law Judges, the authority to suspend or revoke a license or certificate for violations arising under 46 U.S.C. 7703. In this case, the Coast Guard has charged Respondent with misconduct under 46 U.S.C. 7703(1)(B) alleging he refused to submit to a random drug test. The Coast Guard seeks revocation of Respondent's license.

There are two grounds supporting dismissal with prejudice because the Coast Guard has failed to prove the allegations in the complaint by a preponderance of the evidence. First, the Coast Guard has failed to make an evidentiary showing at the hearing of jurisdiction. Second, the evidence and testimony of the Coast Guard witnesses does not establish that Respondent received notice of the random drug test and refused to submit to testing in violation of 46 CFR Part 16 and 49 CFR Part 40. Each ground for dismissal is discussed in detail below.

A. JURISDICTION

Respondent claimed in his Answer, that the Coast Guard lacked jurisdiction over his license. “Jurisdiction is a question of fact and must be proven.” Appeal Decision 2620 (COX), 2, (citing Appeal Decision 2425 (BUTTNER), 3). Since jurisdiction is a dispositive issue, Respondent’s claim of lack of jurisdiction must be determined before the substantive issue of misconduct is reviewed.

Title 46 of the United States Code Section 7703 provides that a mariner’s license may be suspended or revoked if the holder is *acting under the authority of that license* and has committed an act of misconduct. 46 U.S.C. 7703(1)(B) (emphasis added). The Coast Guard has interpreted the requirements of acting under the authority of a license in 46 CFR 5.57 which provides, “A person employed in the service of a vessel is considered to be acting under the authority of a license, certificate or document when the holding of such license, certificate or document is: 1) Required by law or regulation; or 2) Required by an employer as a condition for employment.” See also Appeal Decision 2620 (COX), 2.

Here, the Coast Guard declared in its opening statement and closing argument that Respondent served on the M/V SEA FOX and was acting under the authority of his Coast Guard issued license while employed by Offshore on September 19, 2001. (Tr. 15-18, 80-82; Gov't Ex. 1). However, the Coast Guard failed to admit facts into the record supporting its allegation of jurisdiction. The record does not contain testimony or exhibits that demonstrate Respondent was acting under his license which was required by law/regulation or that Respondent was required to hold a license as a condition of his employment with Offshore, as a captain.

Review of the hearing transcript reveals information about Respondent's license, authorizing him to serve as a master, was read into the record at the beginning of the hearing by the ALJ:

ADMINISTRATIVE LAW JUDGE: This license authorizes Mr. Serigny to serve as Master of steam or motor vessels of not more than 100 gross registered tons, domestic tonnage, upon near coastal waters, also authorized to engage in commercial towing.

(Tr. 10). Respondent proceeded pro se, and during his cross-examination of Mr. Baril, he stated:

Well, there was only two crew members [sic] on the boat, and it was a twenty-four hour boat, and that's the reason I wound up leaving for it because I was tired of working by myself. I was the only Master on the boat.

(Tr. 40). These excerpts from the transcript do not constitute testimony offered by the Coast Guard to prove Respondent was acting under the authority of his license as required by law or as required by Offshore as a condition for employment.

Further, the record lacks evidence of the M/V SEA FOX's specifications. Facts describing the vessel would have enabled this ALJ to make a determination whether

Respondent was required by law or regulation to hold a license while employed in the service of the vessel. To find the Coast Guard proved jurisdiction would be mere speculation. Thus, an order dismissing this matter is appropriate. Moreover, for the reasons stated below, dismissal is also appropriate because the Coast Guard failed to meet its burden of proving the charge of misconduct by a preponderance of evidence.

B. Standard of Proof and Burden of Proof

Misconduct has been defined 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.

46 CFR 5.27. In this case, the formal duly established rule is found in Title 49 Part 40 Section 191(c) of the Code of Federal Regulations that provides, if an employee refuses a drug test, he will incur the consequences specified under the appropriate DOT agency. The consequence specified by Coast Guard regulations for refusal to take a drug test is a *suggested* range of 12 – 24 months suspension. 46 CFR 5.569. Further, the Commandant has held that the suggested range for an appropriate order does not bind an ALJ and a sanction of revocation for refusal to test was not excessive nor an abuse of power. See Appeal Decision 2578 (CALLAHN), 5.

The parties presented conflicting testimony regarding Offshore's effort to notify Respondent of the random drug test. According to the Coast Guard, two attempts were made to contact Respondent on September 19, 2001; once by cellular telephone and a second attempt by VHF radio. Respondent claims he never received notification to report for random drug testing. Thus, it is necessary for the undersigned ALJ to determine

whether the Coast Guard proved by a preponderance of reliable, probative, and substantial evidence that Respondent received notification to appear for a random drug test and whether his failure to appear constituted misconduct.

The Administrative Procedures Act (APA), as amended and codified at 5 U.S.C. 551-559, governs Coast Guard suspension and revocation hearings. 46 U.S.C. 7702(a). The APA does not authorize imposition of administrative sanctions unless charges have been proved by reliable, probative and substantial evidence.⁴ 5 U.S.C. 556(d); Steadman v. Securities and Exchange Commission, 450 U.S. 91, 98 (1981). In Steadman, the Supreme Court held that the degree of proof prescribed by Congress for administrative law proceedings conducted under the APA is the preponderance of evidence standard. Id. at 102. Therefore, preponderance of the evidence standard is applied in Coast Guard suspension and revocation proceedings. See 33 CFR 20.701; see also Appeal Decision 2468 (LEWIN), 6; Appeal Decision 2477 (TOMBARI) 4; Appeal Decision 2637 (TURBEVILLE), 7. The Supreme Court described preponderance of the evidence as requiring “the trier of fact to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact’s existence.” Concrete Pipe and Products v. Construction Laborers Pension Trust, 508 U.S. 602, 622 (1993) (quoting In Re Winship, 397 U.S. 358, 371-372 (1970) (Harlan J., concurring)).

⁴ The Supreme Court interpreted Congress’ use of the word “substantial” to signify quantity of evidence. Steadman v. Securities and Exchange Commission, 450 U.S. 91, 98 (1981).

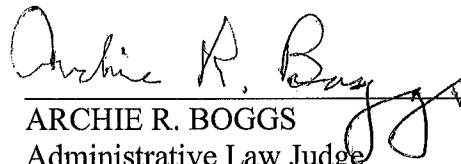
Here, Mr. Sercovich stated ten times during the hearing that he did not know whom he communicated with when he contacted the boat for a random drug test. Mr. Sercovich testified that he either talked with Respondent or his brother. (Tr. 22, 26, 39, 40, 46, 47, 51, and 52). Mr. Baril is also uncertain as to whom he communicated with when he contacted M/V SEA FOX. Mr. Baril testified that Eric and his brother sound similar on the radio, which added to his uncertainty. (Tr. 59, 60,65). In contrast, Respondent testified that he did not receive notification of the random drug test and he was not aware of the test until he was served with the Complaint. (Tr. 77, 79). The Coast Guard presented two witnesses, neither of whom were able to verify that they notified Respondent.

As the finder of fact, I must determine if the evidence submitted by the Coast Guard proves by a preponderance of the evidence that Respondent failed to appear for a random drug test. Restated, the evidence must be sufficiently reliable and probative to demonstrate the truth of the matter asserted with a degree of certainty. I do not find the witnesses or exhibits presented by the IO to be reliable nor do I find substantial evidence in the record to prove Respondent was notified of random drug testing. I conclude the Coast Guard did not prove by a preponderance of the evidence that Respondent received notification to submit to a random drug test and that his failure to appear was misconduct.

ORDER

WHEREFORE,

IT IS HEREBY ORDERED THAT the Complaint be DISMISSED with
prejudice.



ARCHIE R. BOGGS
Administrative Law Judge
U.S. Coast Guard

Dated this 25 day of September, 2003
New Orleans, Louisiana