

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

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Complainant

vs.

MICHAEL T. NUNEZ

Respondent.

Docket Number CG S&R 03-0003
CG Case No. 1705415

DECISION AND ORDER

Issued: November 21, 2003

Issued by: Thomas E. McElligott, Administrative Law Judge

Appearance:

Lieutenant Derek A. D'Orazio, Attorney, Senior Investigating Officer, and Senior Chief John I. Brown, Marine Science Technician, Investigating Officer, both Investigating Officers stationed at that time at the Marine Safety Office for the ports of Houston to Galveston, 9640 Clinton Drive, Houston, Texas 77029.

For the Coast Guard

Michael T. Nunez, pro se.

For the Respondent

PRELIMINARY STATEMENT

This is a suspension and revocation proceeding in which the Coast Guard alleged the Respondent committed a violation of law under 46 U.S.C. 7703(1)(A) and 46 CFR 5.33 by refusing to take a random drug test. On January 3, 2003, Investigating Officer Marine Science Technician Senior Chief (MSTCS) John I. Brown served the first Complaint on the Respondent, alleging that Respondent was a user of or addicted to dangerous drugs. In the first Complaint, the Coast Guard sought revocation of Respondent's License and Merchant Mariner's Document (MMD). Respondent admitted to all of the jurisdictional and factual allegations in his formal answer to the first Complaint, but requested a hearing on the sanction before an Administrative Law Judge.¹

After realizing that the first Complaint cited the incorrect statute, the Coast Guard filed an Amended Complaint. Therefore, the First Complaint is dismissed.

On March 19, 2003, the Coast Guard served an Amended Complaint on the Respondent. The Amended Complaint alleged violation of law under 46 U.S.C. 7703(1)(A) and sought a 24-month suspension of Respondent's License and MMD. In response to the Amended Complaint, Respondent filed an answer admitting all jurisdictional and factual allegations but requested a hearing contesting the proposed sanction.

The hearing was conducted in Houston, Texas on March 19, 2003. Lieutenant Derek A. D'Orazio and Senior Chief John I. Brown represented the Coast Guard at the hearing. The Respondent appeared pro se. At the hearing, three witnesses testified for the Coast Guard, and eight exhibits were admitted into evidence at the Coast Guard's

¹ During the pendency of this case, the U.S. Coast Guard transferred from the Department of Transportation to the Department of Homeland Security. Pursuant to the Savings Provision of

request. One witness testified for the Respondent and two exhibits were admitted into evidence at his request. Following the hearing, on March 27, 2003, the Respondent faxed a letter and a Certificate of Completion from the Austin Recovery Outpatient Program, dated March 26, 2003. I will deem this Respondent Exhibit C. The Administrative Law Judge admitted one exhibit into evidence.

On March 21, 2003, after conclusion of the hearing, the Respondent's U.S. Coast Guard issued Merchant Mariner's License and MMD were returned to Investigating Officer Brown by the ALJ's Office. The Coast Guard presented the Respondent's License and MMD to the Administrative Law Judge for verification in accordance with 46 CFR 5.521(a) at the hearing on March 19, 2003. The Merchant Mariner's License was in the Coast Guard's possession pursuant to a good faith deposit made by the Respondent on January 29, 2003. The MMD was in the Coast Guard's possession pursuant to the good faith deposit made by the Respondent on February 10, 2003.

FINDINGS OF FACT

1. At all relevant times herein mentioned and specifically on or about August 21, 2002, Respondent was a holder in possession of a U.S. Coast Guard issued Merchant Mariner's Document and a License for steam or motor vessels of not more than 200 gross tons issued. (IO Ex. 5).
2. Respondent admitted to serving as a pilot onboard the motor vessel (M/V) CHRISTINE McCALL on August 21, 2002, and his Coast Guard credentials were a condition of Respondent's employment. (IO Ex. 8).

HR 5005 Section 1512 (PL 107-296), pending proceedings are continued notwithstanding the transfer of the agency.

3. Respondent's marine employer arranged for a random drug test. The random drug test was conducted on board the M/V CHRISTINE McCALL while the vessel was moored in Pascagoula, Mississippi. The drug test was performed by an International Drug Detection company trained and experienced specimen collection technician.
4. Respondent admitted to taking the random drug test on August 21, 2002. He also admitted to pouring water into the urine specimen bottle. (IO Ex. 8; Resp. Ex. A).
5. Respondent stated, "When the safety officers came onboard, I had just walked out of the bathroom. (It would be a long wait until I would be able to urinate again.) The boat had been keeping a steady schedule of running for four hours and docking for two. I was frustrated by the interference of the inspection and foolishly poured water into the container in the hopes they would leave me alone." (Resp. Ex A).
6. Since the collector found the initial urine specimen collected was out of the normal human temperature range, the specimen collector obtained a second urine specimen from Respondent about one (1) hour after the first specimen was collected. The second urine sample collection was an observed collection in accordance with 49 CFR 40.61. (Testimony by laboratory and MRO).
7. Respondent's first urine sample was collected on August 21, 2002 at 4:35 pm and given a Specimen Identification number of 4799486 and a Lab Accession number of 967450R. (IO Ex. 4).
8. On August 21, 2002, Respondent signed a custody and control form and initialed the specimen bottle seal. The collector released the first specimen to a courier,

and the laboratory received the first specimen on August 23, 2002 with the specimen bottle seal intact. (IO Ex. 4).

9. A Substance Abuse and Mental Health Service Administration (SAMHSA) approved and certified laboratory, Quest Diagnostics, analyzed the Respondent's urine specimens. (IO Ex. 4).
10. The initial tests on Respondent's first specimen resulted in a creatinine concentration of 1.4mg/dL and a specific gravity of 1.000. The confirmatory test revealed that the Respondent's first urine specimen had a creatinine concentration of 1.3mg/dL and a specific gravity of 1.000. (IO Ex. 4).
11. Quest Diagnostics reported the Respondent's first urine specimen as substituted and not consistent with normal Human urine. (IO Ex 5).
12. Dr. Robert M. Bourgeois, a Medical Review Officer for Seacor/McCall's, verified the laboratory's report and findings. (IO Ex 2 –5).
13. The second urine sample was collected from the Respondent on August 21, 2002 at 5:30 pm. The second sample was assigned a Specimen Identification number of 4699511. (IO Ex. 6).
14. Respondent's second urine specimen was reported negative for dangerous drugs.
15. Respondent's answer to the Amended complaint admitted the following factual allegations:
 - i. On August 21, 2002, the Respondent took a random drug test as directed by his marine employer in accordance with 46 CFR § 16.230.
 - ii. Respondent's urine specimen was collected by Mr. Ed Lepre of International Drug Detection (IDD) of Harahan, LA.

- iii. Respondent signed a “Federal Drug Testing Custody and Control Form.”
- iv. Respondent’s urine specimen was collected and analyzed by Quest Diagnostics using procedures approved by the Department of Transportation.
- v. Respondent’s specimen was determined to be substituted and not consistent with normal human urine, constituting a refusal to take a drug test under 46 CFR 16.105, 49 CFR 40.191(b) and 46 CFR 5.569.
- vi. The chemical testing regulations that Respondent violated by substituting his urine specimen in this case were intended to promote marine safety or protect navigable waters. (IO Ex. 8).

16. At the hearing, the Respondent indicated that he had started a drug rehabilitation program.

17. Respondent’s employer representative, Mr. Keith Duggan, attested to Mr.

Nunez’s good personnel record with their company for safety and operations. Mr. Duggan also attested to Respondent employment with Cameron (the employer) for almost twenty-one (21) years. Mr. Duggan is from the company’s Cameron, Louisiana office and he knew the Respondent for approximately twenty (20) years. Mr. Duggan testified credibly that Respondent was very pro-personnel and safety conscious and that he performed timely crew changes and had no maritime accidents in about twenty (20) years. This is the first time to this witness’ knowledge that Respondent was ever in trouble with their company or with the Coast Guard. (Resp. Ex. A and B).

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent Michael T. Nunez's License and Merchant Mariner Document and the subject matter of this hearing are properly within the jurisdiction of the U.S. Coast Guard and the U.S. Administrative Law Judge in accordance with 46 U.S. Code Chapter 77, including 7703 (West Supp. 1999), 46 CFR Parts 5 and 33 CFR Part 20 (1998).
2. At all relevant times, Respondent was a holder acting under the authority of his U.S. Coast Guard issued Merchant Mariner's Document and License.
3. The random drug test was carefully and satisfactory performed in accordance with all chemical drug testing rules, including 46 CFR Part 16 (2002).
4. The allegations in the Amended Complaint are proved by a preponderance of the evidence based on Respondent's admissions to the jurisdictional and factual allegations contained in his written Answer.

DISCUSSION

In this case, the Coast Guard's Amended Complaint alleges the Respondent violated 46 U.S.C. 7703(1)(A) by refusing to take a random drug test.

The Administrative Procedure Act (APA), 5 U.S.C. 551-559, governs Coast Guard suspension and revocation hearings. 46 U.S.C. 7702(a). The APA only authorizes sanctions to be imposed if upon consideration of the record as a whole the charges are supported by reliable, probative, and substantial evidence. 5 U.S.C. 556(d). "The term substantial evidence is synonymous with preponderance of the evidence as defined by the Supreme Court." Appeal Decision 2477 (TOMBARI) (1988). The burden of showing

something by a preponderance of the evidence “simply requires 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 of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 622 (1993) (citing In re Winship, 397 U.S. 358, 371-372 (1970). (Harlan, J., concurring) (brackets in original)). Under Coast Guard regulations, the Coast Guard bears the burden of proving the charges by a preponderance of the evidence. 33 CFR 20.701, 20.702(a). Therefore, the Coast Guard must prove with reliable and probative evidence that Respondent more likely than not committed the violations charged. An admission of all facts alleged constitutes a waiver of all non-jurisdictional defects and defenses and is sufficient to support a finding of proved. Appeal Decision 2376 (FRANK) (1985).

U.S. Coast Guard issued licenses and documents may be suspended or revoked when an individual acts under the authority of that document or license and violates or fails to comply with Subtitle II of Title 46 of the United States Code, a regulation prescribed under Subtitle II of Title 46 of the U.S. Code, or any other law or regulation intended to promote marine safety or to protect navigable waters. 46 U.S.C. 7703(1)(A). In this case, the applicable regulations are 49 CFR 40.191(b) and 46 CFR 5.569(d). So, in order to prevail, the Coast Guard must prove the Respondent (1) was acting under the authority of his license when he refused to take the drug test; (2) the Respondent violated 49 CFR 40.191(b); and (3) 49 CFR 40.191(b) and 46 CFR 5.569(d) were prescribed under Subtitle II of Title 46 of the U.S. Code or intended to promote marine safety or

protect navigable waters. Respondent's admission to the allegations in the Amended Complaint establishes all of the elements.

SANCTION

As Respondent admitted to violating 46 U.S.C. 7703(1)(A) but contested the proposed sanction of a 24-month suspension of both his License and MMD, the only contested issue in this case involves the sanction.

The selection of an appropriate order is the responsibility of the Administrative Law Judge. 46 CFR 5.569(a). The Investigating Officers and the Respondent may suggest an order and present evidence of mitigating or aggravating circumstances. 46 CFR 5.569(a). Since revocation is not mandatory for violation of law by refusing to test, factors that may affect the order include: (1) any remedial actions independently undertaken by Respondent; (2) Respondent's prior record; and (3) evidence of mitigation or aggravation. 46 CFR 5.569(b). Since Respondent admitted to refusing to take a drug test under 49 CFR 40.191(b), 49 CFR 40.191(c) subjects Respondent to the guidance contained in 46 CFR 5.569(d) which suggests (absent any mitigating or aggravating circumstances) a suspension of 12-24 months for a violation of law based on refusal to test.

The Coast Guard has sought a sanction at the high end of the suggested range in 46 CFR. 5.569(d). However, the evidence weighs in favor of a reduced sanction. First, the Respondent admitted to the charges and contested only the sanction. If the maximum recommended sanction were ordered every time Respondents admitted to the charges but contested the sanctions, there would be no incentive for Respondents to admit responsibility for their actions. Additionally, the evidence shows Respondent had a good

personnel record with his marine employer for about twenty (20) years. (Resp. Ex. B).

Respondent also had a clean prior record with the U.S. Coast Guard. (Resp. Ex. A).

However, Respondent's statement that he was frustrated by what he considered to be an interference indicates he does not have the necessary respect for safety procedures and concerns that his occupation requires. The U.S. Coast Guard Commandant has recognized that the underlying important policies of the U.S. Coast Guard and the U.S. Congress could be seriously damaged when a Respondent refuses by his actions to submit to chemical urine testing. See Commandant's Appeal Decision 2578 (CALLAHAN).

Therefore, a suspension of eighteen (18) months is appropriate.

ORDER

IT IS HEREBY ORDERED that the captioned Respondent's U.S. Coast Guard issued License is SUSPENDED for eighteen (18) months outright, from January 29, 2003 (the date the good faith deposit was made) to July 29, 2004.

IT IS HEREBY FURTHER ORDERED that Respondent's U.S. Coast Guard issued Merchant Mariner's Document is SUSPENDED for eighteen (18) months, from February 10, 2003 (the date the good faith deposit was made) to August 10, 2004.

IT IS HEREBY FURTHER ORDERED that the Coast Guard's original Complaint alleging use of or addicted to dangerous drugs is DISMISSED WITHOUT PREJUDICE.

YOU ARE HEREBY NOTIFIED that any party may file a notice of appeal, if any, from a U.S. Administrative Law Judge's decision within thirty (30) days after the issuance of the decision.

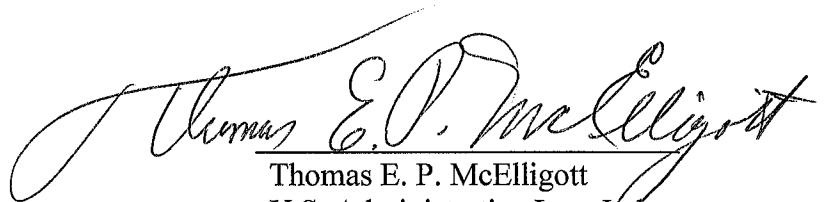
An appeal notice, if any, shall be served on all parties and filed with the U.S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; 40 S. Gay Street; Room 412; Baltimore, Maryland 21202-4022, phone number (410) 962-7434, fax number (410) 962-1742. A copy of the appeal notice should also be mailed or faxed to the undersigned Judge, at 8876 Gulf Freeway; Room 370; Houston, Texas 77017-6542, fax number (713) 948-3372.

Each party appealing has sixty (60) days following the U.S. Administrative Law Judge's decision to file an appellate brief. An appellate brief shall be served on all parties and filed with the same parties as above.

The rules and procedures for appellate review are found in Subpart J §§ 20.1001 – 1103, 33 CFR Part 20. A copy of Subpart J has been provided to the Respondent as an attachment to this Order.

Procedures are provided by which a person, or Respondent, whose U.S. Merchant Mariner's License and/or Document has been revoked or suspended for a lengthy period, may apply to any Commanding Officer of any Marine Safety Office of the U.S. Coast Guard for administrative clemency. This is also known as applying to the Coast Guard "Administrative Clemency Review Board." These rules and conditions are found in 46 Code of Federal Regulations (C.F.R.) Subpart L (46 C.F.R. sections 5.901, 5.903, and 5.905) entitled "Issuance of New Licenses, Certificates or Documents After Revocation

or Surrender,” and also can be found in the U.S. Coast Guard Marine Safety Manual at Coast Guard Marine Safety Offices.


Thomas E. P. McElligott
U.S. Administrative Law Judge

Done and dated on this 21st day of November, 2003
Houston, Texas