

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

---

UNITED STATES COAST GUARD

Complainant

vs.

KENNETH ROUSSELL

Respondent.

---

Docket Number: CG S&R 03-0365  
CG Case No.: 1792700

**DECISION AND ORDER**

**Issued: April 1, 2004**

**Issued by: Peter A. Fitzpatrick, Administrative Law Judge**

**Appearances:**

Lieutenant Boris Towns and  
Lieutenant Junior Grade Robert Butts  
U.S. Coast Guard  
Marine Safety Office  
800 David Drive  
Morgan City, Louisiana 70380-1304

**For the Coast Guard**

Jessica Duet, Esq.  
Kopfler & Hermann, L.C.  
7910 Main Street, Suite 400  
P.O. Box 3760  
Houma, Louisiana 70361-3760

**For the Respondent**

RECEIVED  
ALJ DOCKETING CENTER  
2004 JUN 30 A 10:30  
BALTIMORE, MD

## PRELIMINARY STATEMENT

On June 11, 2003, the Coast Guard filed a Complaint alleging Respondent committed an act of Misconduct by refusing to take a random drug test while assigned as the Master of the TAYLOR R. MARTIN. The jurisdictional allegations of the Complaint listed Respondent's address and alleged Respondent held a Coast Guard issued license. Respondent filed an Answer admitting the Jurisdictional Allegations and denying the Factual Allegations.

Since Misconduct is an "acting under the authority" offense<sup>1</sup> and the Complaint did not allege Respondent was "acting under the authority" of his license, a Show Cause Order was issued directing the Coast Guard to either amend the Complaint or show cause why the Complaint should not be dismissed. On December 11, 2003, the Coast Guard filed a Motion to Amend the Complaint and alleged Respondent was acting under the authority of his license while assigned to the M/V TAYLOR R. MARTIN. Respondent filed an Amended Answer stating that aside from this proceeding Respondent has never refused or failed a drug screen; Respondent was scheduled to work on May 6, 2003; Respondent consumed alcoholic beverages on May 4, 2003 and the morning of May 5, 2003; Respondent's employer contacted him on May 5, 2003 at 7:00 a.m. and instructed Respondent to report to work at 11:00 a.m. on May 5, 2003 instead of May 6, 2003. Respondent's Amended Answer also argued that the sanction sought by the Coast Guard was too harsh. At the hearing, the Amended Complaint and Amended Answer were both accepted. (Tr. at 8).

The hearing was held on January 29, 2004 at 9:30 a.m. in Morgan City, Louisiana. The Coast Guard presented three (3) witnesses and thirteen (13) exhibits were

admitted into evidence. Respondent was the only witness to testify on his behalf and three (3) exhibits were offered and admitted into evidence. One (1) exhibit was admitted into evidence at the Administrative Law Judge's initiative. At the conclusion of the hearing, the Administrative Law Judge, in accordance with 46 CFR 5.521(b), directed the Coast Guard to take possession of Respondent's license. (Tr. at 162).

### **FINDINGS OF FACT**

1. Respondent holds a Coast Guard issued license authorizing him to serve as Master of steam or motor vessels of not more than 100 gross tons on or near coastal waters and engage in commercial assistance towing. (IO Ex. 1). Respondent's license was issued on September 26, 2001 and expires on September 26, 2006. (IO Ex. 1).

2. From September 12, 2002 to May 5, 2003, AMT Marine employed Respondent as a licensed Captain. (Tr. at 131; IO Ex. 13).

3. On April 21, 2003, Respondent completed his watch on the TAYLOR R. MARTIN and thought he was not scheduled to report back to work until May 6, 2003. (Tr. at 114, 133, 143-147; IO Ex. 13).

4. The TAYLOR R. MARTIN is an 86 gross ton vessel owned and operated by AMT Marine. (Judge Ex. I). The Certificate of Inspection for the TAYLOR R. MARTIN requires the vessel to be manned by one Master, one Mate, and two deckhands. (Judge Ex. I). However the crew may be reduced to one Master and two deckhands if the vessel is not underway for more than twelve hours in a twenty four hour period. (Judge Ex. I).

5. The work schedule for the TAYLOR R. MARTIN's crew, including Respondent, was twenty-eight days on and fourteen days off. (Tr. at 61). Although specific days are

---

<sup>1</sup> See 46 U.S.C. 7703(1)(B).

scheduled for crew changes, the changes do not always occur on schedule. (Tr. at 61). AMT Marine tries to keep to the announced schedule, but the ship's schedule may cause the company to move the crew change a day or two before or after it was originally scheduled. (Tr. at 61-62, 114-117, 132-133). If an employee is unable to come in to work before the original date scheduled for his/her duty, the company will hire someone else. (Tr. at 121). Respondent was aware of these circumstances. (Tr. at 143).

6. At 7 a.m. on May 5, 2003, Respondent received a call from Mr. Pitre with AMT Marine asking him to come to work at 11:00 a.m. that same day. (Tr. at 134-135). Respondent reported as directed although he had been up until 2:30 a.m. or 3:00 a.m. drinking "quite a few beers." (Tr. at 133-135).

7. AMT Marine had scheduled a random drug test for all their crewmembers on board the TAYLOR R. MARTIN on May 5, 2003, which included two Captains and four deckhands. (Tr. at 48-50, 105-107). Respondent reported to the vessel to serve as Captain. (Tr. at 50, 61).

---

8. When Respondent boarded the TAYLOR R. MARTIN, he was informed of the random drug test. (Tr. at 136-137). Respondent admitted refusing to take the drug test, because he was worried that he still had alcohol in his system. (Tr. at 137, 147). Respondent did not appear intoxicated or under the influence of alcohol or illicit drugs. (Tr. at 67).

9. Respondent was fired after refusing the test. (Tr. at 69, 138-139; IO Ex. 13).

10. Prior to May 5, 2003, Respondent had never refused a drug test. (Tr. at 132). Since May 5, 2003, Respondent has been subject to random drug tests as part of his current employment and has not refused any of those drug tests. (Tr. at 139-140).

11. AMT Marine did not have any previous problems with Respondent. (Tr. at 75).

12. Respondent is married and has two children. (Tr. at 127-128). Respondent's wife is a "stay at home" homemaker, and both Respondent's wife and children depend on him for food, clothing, and life necessities. (Tr. at 127-128). The highest grade of formal education Respondent completed is seventh grade. (Tr. at 141). Without a license, Respondent expects to earn \$75-\$85 less per day than he would earn working as a Master. (Tr. at 140-141).

### **ULTIMATE FINDINGS OF FACT/CONCLUSIONS OF LAW**

The Coast Guard proved by a preponderance of the evidence that Respondent was acting under the authority of his license when he committed an act of Misconduct by refusing to take a random drug test administered by his employer.

### **DISCUSSION**

#### A. Burden of Proof

The Administrative Procedure Act (APA), 5 U.S.C. 551-59, 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 the preponderance of the evidence as defined by the Supreme Court." Appeal Decision 2477 (TOMBARI) (1988). The burden of proving a claim 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, 371-72 (1970) (Harlan, J., concurring) (brackets in original)). Further, under Coast Guard procedural 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.

B. Misconduct

Title 46 U.S.C. 7703(1)(B) provides that a license, certificate of registry, or merchant mariner's document (MMD) may be suspended or revoked if the holder when acting under the authority of that license, certificate, or document commits an act of incompetence, misconduct, or negligence. Misconduct is partly defined as human behavior that violates some formal, duly established rule, and such rules are found in statutes, regulations, the common law, the general maritime law, a ship's order or regulation, shipping articles, and similar sources. 46 CFR 5.27.

1. Acting under the authority

Since Respondent did not admit he was acting under the authority of his license as the Amended Complaint alleged, it must first be determined if the Coast Guard proved jurisdiction by a preponderance of the evidence. A person employed in the service of a vessel is considered to be acting under the authority of his/her license, certificate, or MMD when the holding of that license, certificate, or MMD is required by law, regulation, or by the employer as a condition of employment. 46 CFR 5.57(a). If law, regulation, or condition of his employment did not require the Respondent to have a

license, then the Coast Guard does not have jurisdiction under 46 CFR 5.57(a). See Appeal Decision 2620 (COX) (2001). Therefore, the Coast Guard must prove that (1) Respondent was employed in the service of a vessel when he committed an act of Misconduct and (2) Respondent's license was required by law, regulation, or as a condition of his employment.

As stated above, the first prong of "acting under the authority" requires the Coast Guard to prove Respondent was employed in the service of a vessel. Employed in the service of a vessel does not require Respondent to have boarded the vessel. See Appeal Decision 2615 (DALE) (2000) (Respondent was acting under the authority of his MMD when his employer had assigned him to a vessel, but Respondent had not boarded.). Since Respondent was not only assigned to the TAYLOR R. MARTIN but had also boarded the vessel before learning of the random drug test, Respondent was employed in the service of the vessel. (Tr. at 49-50, 61, 136-137).

The next question becomes whether law, regulation, or condition of employment required Respondent's license. In this case, the evidence demonstrates that Respondent's license was required by 46 CFR 15.501(a) and 46 CFR 15.515(a), so determining whether Respondent's license was required as a condition of employment is not necessary. To find that a law or regulation required Respondent to hold a license, the vessel's certificate of inspection or a description of the vessel must be examined. Appeal Decision 2283 (FUEHR) (1982). For vessels inspected under 46 U.S.C. 3301<sup>2</sup>, the certificate of inspection specifies the minimum complement of officers and crew

---

<sup>2</sup> Title 46 U.S.C. 3301 provides that the following categories of vessels are subject to inspection: freight vessels, nautical school vessels, offshore supply vessels, passenger vessels, sailing school vessels, seagoing barges, seagoing motor vessels, small passenger vessels, steam vessels, tank vessels, fish processing vessels, fish tender vessels, and Great Lake barges.

necessary for the safe operation of the vessel, and no vessel may be operated unless it has in its service and on board the complement required by the certificate of inspection. 46 CFR 15.501(a); 46 CFR 15.515(a).

Since the M/V TAYLOR R. MARTIN is an inspected vessel and the Certificate of Inspection requires a licensed Master, Respondent's license was required by 46 CFR 15.501(a) and 46 CFR 15.515(a) in order for him to serve aboard the TAYLOR R. MARTIN as a Master. (Tr. at 147-148; Judge Ex. I; IO Ex. 1). Since the preponderance of the evidence shows Respondent was employed in the service of a vessel and his license was required by a regulation, the Coast Guard proved Respondent was acting under the authority of this license when he refused the random drug test.

## 2. Formal, Duly established rule

To prove Respondent committed Misconduct, the Coast Guard must prove Respondent's behavior violated some formal, duly established rule. In this case, the formal, duly established rule is a regulation prohibiting safety sensitive employees from refusing to take a drug test. A person refuses to take a drug test when he/she fails to provide a urine specimen for any drug test required under 49 CFR Part 40 or DOT agency regulations. 49 CFR 40.191(a)(3). Under Coast Guard regulations, marine employers are required to administer random drug tests. 46 CFR 16.230. Since Respondent admitted refusing to take a random drug given by his employer, the owner and operator of the TAYLOR R. MARTIN, Respondent violated 49 CFR 40.191(a)(3) and therefore committed an act of Misconduct. (Tr. at 48-50, 105-107, 137, 147, Judge Ex. I).



## SANCTION

Title 49 CFR 40.191(c) provides that if an employee refuses to take a drug test the employee incurs the consequences specified under DOT regulations. The Table of Average Orders in the Coast Guard's regulations suggests a suspension for one to three months for Misconduct based on the failure to comply with U.S. law or regulation. 46 CFR 5.569(d). However, the Table of Average Orders is only intended to provide information and guidance, and the Administrative Law Judge is not bound by the range of appropriate orders in 46 CFR 5.569(d). Appeal Decision 2578 (CALLAHAN) (1996); Appeal Decision 2475 (BOURDO) (1988). Evidence of mitigating or aggravating circumstances may justify departing from the suggested range. 46 CFR 5.569(d).

The Coast Guard recommends a sanction of revocation and cites the following cases for support: Appeal Decision 2578 (CALLAHAN) (1996) ("Refusal to submit to a post incident chemical test raises a serious doubt about a mariner's ability to perform safely and competently in the future...if mariners could refuse to submit to chemical testing and face a lesser Order, it is difficult to imagine why anyone that may have used drugs would ever consent to be tested.") and Appeal Decision 2624 (DOWNS) (2001) (citing CALLAHAN). (Tr. at 153-154).

However, the Respondent argues that the Appeal Decisions the Coast Guard cites do not apply, because CALLAHAN involved a refusal to test after an accident and DOWNS involved a reasonable cause test and not a random drug test. (Tr. at 158). Respondent also argues that 46 U.S.C. 7703 gives the Administrative Law Judge discretion to decide whether Respondent's license should be suspended or revoked, and

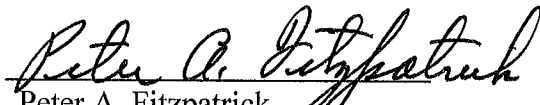
in the event the charges are found proved, Respondent requests a suspension not more than six months. (Tr. at 159-160).

Upon consideration of the above, I find that a mariner's refusal to take a chemical test for drugs and alcohol when ordered to do so by his marine employer, as part of the required Coast Guard drug testing program, must result in the revocation of that individual's Coast Guard issued license and/or document regardless of the type of test involved (post accident, pre-employment, random, probable cause, or periodic). There can be no distinction between the type of DOT drug test involved and the sanction issued. Each type of test is an integral part of the Congressional and Coast Guard's effort to root out substance abuse in the merchant marine. All refusals raise the specter of the mariner's illicit drug use and place in doubt the ability of a mariner to safely carry out his/her duties and responsibilities on the vessel. These considerations are particularly applicable in this case when the Master of the vessel refused to take the drug/alcohol test. Therefore, revocation is the appropriate sanction.

---

**ORDER**

**IT IS HEREBY ORDERED** that all licenses issued to Kenneth Roussell by the U.S. Coast Guard are revoked.

  
Peter A. Fitzpatrick  
Administrative Law Judge

Done and dated on this 1<sup>st</sup> day of April, 2004  
Norfolk, Virginia