

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

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Complainant

vs.

ROBERT KEITH LANDRY

Respondent.

Docket Number: CG S&R 04-0144
CG Case No. 1813375

DECISION AND ORDER

Issued: October 7, 2004

Issued by: Parlen L. McKenna, Administrative Law Judge

Appearances:

Lieutenant Ronnie D. Patrick
Lieutenant Boris K. Towns
U.S. Coast Guard
800 David Drive
Morgan City, LA 70380

For the Coast Guard

Robert K. Landry, Pro Se

For the Respondent

PRELIMINARY STATEMENT

The United States Coast Guard (Coast Guard) initiated this administrative action seeking revocation of Merchant Mariner's License Number 894592 issued to Respondent Robert Keith Landry. The Complaint was issued pursuant to the legal authority contained in 46 U.S.C. 7703 and its underlying regulation contained in 46 CFR 5.27.

On March 18, 2004, the Coast Guard issued a Complaint alleging Respondent committed misconduct when he failed to submit to a periodic drug test and vessel inspection. In support of the Complaint, the Coast Guard alleged that on May 29, 2003, Respondent reported to the M/V _____ SUPERIOR RESULT for duty and was informed that his employer, Superior Energy Services, was administering a periodic drug test. Respondent refused to submit to the drug test and was transported to Superior Energy Services' office and his employment was immediately terminated.

Respondent's Answer dated March 26, 2004, denied all jurisdictional and factual allegations contained in the Complaint and requested a hearing before an Administrative Law Judge (sometimes hereinafter referred to as "Judge"). On June 3, 2004, the hearing commenced in Morgan City, Louisiana in accordance with the Administrative Procedure Act, codified at 5 U.S.C. 551-559, and the Coast Guard procedural regulations set forth in 33 CFR Part 20. At the hearing, Respondent admitted to all charges brought by the Coast Guard. (Tr. 4).¹ Therefore, the remaining issue considered at the hearing was the appropriate sanction for Respondent's refusal to undergo a chemical drug test. (Tr. 8-9). The Investigating Officer, on behalf of the Coast Guard, presented the testimony of one witness and five exhibits were admitted into evidence. Respondent proffered two exhibits for admission into the record and testified on his own behalf. The list of witnesses and exhibits are contained in Attachment A.

¹ Citations referencing the transcript are as follows: Transcript followed by the page number (Tr. ____).

After careful review of the factual allegations, Respondent's admissions, and applicable case law, I find the Coast Guard **PROVED** Respondent committed misconduct by refusing to participate in a periodic drug test on May 29, 2003.

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 May 29, 2003, through June 3, 2004, the above named Respondent was the holder of Merchant Mariner's License Number 894592 issued by the United States Coast Guard. (Tr. 5).
2. The Respondent's License, dated September 22, 2000, authorized him to serve as master of steam or motor vessels of not more than 100 gross registered tons (domestic) on or near coastal waters. (Tr. 21-23; Gov't Ex. 2).²
3. On May 29, 2003, Superior Energy Services ordered a unit sweep and inspection of the M/V SUPERIOR RESULT crew because the division manager was concerned about improper drug use on the vessel. The Substance Abuse Policy implemented by Superior Energy Services provides for biological testing of all employees in a unit for illegal drugs. This is referred to as a "unit sweep." (Tr. 13-15; Gov't Ex. 3).
4. On May 29, 2003, the Respondent reported to the M/V SUPERIOR RESULT to relieve the previous shift captain of his duties. At that time, the Human Resource Manager informed Respondent of the unit sweep. (Tr. 14).
5. All the crewmembers, except Respondent, participated in the testing for illegal drugs. (Tr. 15).

² Citations referring to Agency Exhibits are as follows: Government followed by the page number (Gov't Ex. __); Respondent's Exhibits are as follows: Respondent followed by the page number (Resp Ex. __).

6. The Human Resource Manager overseeing the unit sweep and vessel inspection transported the Respondent back to Superior Energy Services' office and immediately terminated the employment of the Respondent for refusal to submit to a requested drug test . (Tr. 16, 22).
7. At the hearing, Respondent admitted all jurisdictional and factual allegations. (Tr. 4).
8. Respondent testified that he refused to take the drug test because he was around someone using marijuana. (Tr. 25).
9. During examination by the Coast Guard, Respondent admitted that in 1997 he previously tested positive for the use of illegal drugs. (Tr. 27-28).
10. Respondent failed to disclose his prior drug use on his application for an original license on or about August 28, 2004. (Tr. 33-34; Gov't Ex. 5).

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Respondent, Robert Landry, and the subject matter contained in the hearing are properly within the jurisdiction vested in the United States Coast Guard under 46 U.S.C. 7703; 46 CFR Parts 5 and 16; and 33 CFR Part 20.
2. At all relevant times, the Respondent was the holder of Merchant mariner's License Number 894592.
3. At all relevant times, the Respondent acted under the authority of his license, which was required for employment as a captain with Superior Energy Services. (Tr. 14, 28-29).
4. The Respondent failed to comply with the Substance Abuse Policy established by Superior Energy Service, which allows biological testing of employees in a unit sweep for illegal drugs.

5. The Respondent's refusal to submit to biological testing resulted in his termination with Superior Energy Services.
6. The Coast Guard **PROVED** by a preponderance of reliable and credible evidence that the Respondent, while acting under the authority of his license, committed an act of MISCONDUCT by refusing to participate in a periodic drug test.

DISCUSSION

Under 46 U.S.C. 7703, a mariner's license may be suspended or revoked if the holder of the license is acting under the authority of that license and the holder commits an act of misconduct. A mariner is considered to be acting under the authority of his license if the license is: (1) required by law or regulation; or (2) required by an employer as a condition of employment. See 46 CFR 5.57; see also Appeal Decision 2620 (COX) (2001). In this case, the Human Resource Manager for Superior Energy Services testified that the Respondent was required to hold a license as a condition of employment. (Tr. 14; Resp Ex. B). The Coast Guard established jurisdiction under 46 CFR 5.57(a)(2); further, Respondent admitted to Coast Guard's jurisdiction over his license at the hearing. (Tr. 4-5, 12-14, 21-22).

The Complaint alleges that the Respondent refused to participate in a periodic drug test, which constituted an act of misconduct.³ (Gov't Ex. 1). Misconduct is defined as human behavior which violates some formal, duly established rule. See 46 CFR 5.27. Accordingly, "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 requested." Id.

³ Although the factual allegations in the Complaint characterized the test for illegal drugs as a periodic drug test, the facts presented at the hearing portray a reasonable cause drug test. Employers implement reasonable cause drug tests when an employee acting under the authority of a license or merchant mariner's document is reasonably suspected of using illegal drugs. See 46 CFR 16.250. Here, Respondent had sufficient notice of the allegations and understood his refusal to submit to the drug test constituted the basis for the charge of misconduct. See Appeal Decision 2578 (CALLAHAN) (1996). Therefore, reference in the Complaint to a periodic drug test, as opposed to a reasonable cause test, was not error. It is well established that amendments needed to conform specifications to a Complaint is permissible in administrative proceedings. See Kuhn v. Civil Aeronautics Board, 183 F.2d 839 (D.C. Cir.) (1950); see also Appeal Decision 2630 (BAARSVIK) (2002); Appeal Decision 2326 (MCDERMOTT) (1983). Moreover, Respondent did not object to the wording in the Complaint.

Here, the formal, duly established rule violated by Respondent was the refusal take a required drug test. See 46 CFR 16.250. The purpose of the chemical testing regulations in 46 CFR Part 16 is to minimize use of intoxicants by mariners and to promote a drug free and safe work environment. See 46 CFR 16.101. The chemical testing guidelines and procedures followed by the Coast Guard are detailed in 49 CFR Part 40. Specifically, failure to provide a urine specimen for a drug test constitutes a refusal to take a drug test and mariners who refuse to comply with the regulations incur the consequences specified by that agency. See 49 CFR 40.191(a)(3) and (c).

The Respondent also violated his employer's Substance Abuse Policy. Superior Energy Services Substance Abuse Policy states that testing may be performed on employees if the testing is based on belief or objective facts sufficient to lead a supervisor to suspect that someone may be under the influence. (Tr. 17-18; Gov't Ex. 3). Additionally, each employee must give a written acknowledgement that he has received the Substance Abuse Policy, read the policy and understood it. (Tr. 18-19; Gov't Ex. 4). The Policy further states that an employee must consent to drug testing as a condition of employment; failure to do so results in that employee's termination. (Tr. 16; Gov't Ex. 3).

The Human Resource Manager testified that the unit sweep was ordered after the Division Manager reported concerns of "some activity" on the vessel. (Tr. 13). At the hearing, Respondent admitted to all facts supporting the Coast Guard's allegation of misconduct, resulting from a refusal to take a chemical drug test. (Tr. 4). An admission of all facts by a Respondent constitutes a waiver of all non-jurisdictional defects and defenses and is sufficient to support a finding of charges proved. See Appeal Decision 2376 (FRANK) (1985). Here, the

Coast Guard satisfied the burden of proof and I find the allegation of misconduct **PROVED**.

The remaining issue to determine is the appropriate sanction.

SANCTION

The Coast Guard seeks revocation of Respondent's license; in contrast, the Respondent requests a sanction that would allow him to retain his license. It is well within the power of the Judge to order any of a variety of sanctions, including revocation. See 46 CFR. 5.569; see also Appeal Decision 2569 (TAYLOR). Title 46 of the Code of Federal Regulations Part 5 Section 569 provides the Table of Suggested Range of Appropriate Orders (Table) for various offenses. According to the Table, committing an act of misconduct generally results in suspension of a mariner's document. See 46 CFR 5.569(d). However, a Judge is not bound by this Table and has discretion to exceed the suggested range or lessen the sanction. See 46 CFR 5.569(d); see also Appeal Decision 2628 (VILAS) (purpose of table is to provide guidance and promote uniformity).

In support of revocation, the Coast Guard relied on Appeal Decision 2578 (CALLAHAN) (1996) and Appeal Decision 2624 (DOWNS) (2001) in its post hearing filing to argue that revocation is appropriate for refusing a drug screen.⁴ In these aforementioned cases, the Commandant affirmed the order of revocation and reasoned, "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 being tested." See Appeal Decision 2578 (CALLAHAN)

⁴ On June 7, 2004, the Coast Guard filed a Motion for Revocation of the License of Robert K. Landry. At the conclusion of the hearing, the undersigned issued an oral decision of revocation, ordered the Coast Guard to take possession of the license and complete the necessary paperwork for revocation. The undersigned informed the parties that a written decision and order memorializing the decision would be forthcoming. (Tr. 31-34). Since the undersigned issued an order of revocation, it was not necessary for the Coast Guard to file a motion requesting revocation. As a result, the Coast Guard's Motion for Revocation is treated as a post hearing brief.

(1996) and Appeal Decision 2624 (DOWNS) (2001). Furthermore, a mariner's refusal to submit to a drug test raises doubts about a mariner's ability to perform safely and competently in the future. Id.

Superior Energy Services ordered the drug testing as a result of the division manager's concerns regarding activity on the M/V SUPERIOR RESULT. All employees participated in the unit sweep except the Respondent. During the hearing, the Respondent testified that he refused to participate in the drug test because he had been around someone smoking marijuana and was afraid he might have marijuana in his system. The Respondent's refusal to submit to drug testing contradicts the purpose of the mandated drug-testing regulations, which is to minimize use of intoxicants by merchant mariners and to promote a drug free and safe work environment. See 46 CFR 16.101(a); see also (CALLAHAN).

Although the Respondent did not have a prior record, additional aggravating factors support an order of revocation. During the Coast Guard's examination of Respondent, he admitted to testing positive for illegal drugs with a previous employer. The Coast Guard also proffered for admission into evidence the Respondent's application for an original license dated August 28, 2000. Review of that application revealed that the Respondent failed to disclose his 1997 drug use. Given the Respondent's refusal to test and these aggravating factors, revocation is the appropriate remedy to ensure maritime safety, to guarantee the effectiveness of the drug-testing program, and to prevent potential abuse by the Respondent in the future.

ORDER

IT IS HEREBY ORDERED that Merchant Mariner's License number 894592 and all other valid licenses, documents, and endorsements, issued by the Coast Guard to Robert Keith Landry are hereby REVOKED.

PLEASE TAKE NOTICE that service of this Decision on the parties and/or parties' representative(s) serves as notice of appeal rights set forth in 33 CFR 20.1001 – 20.1004. See Attachment B.

Done and dated on this 7th day of October 2004
Alameda, California



**HON. PARLEN L. MCKENNA
ADMINISTRATIVE LAW JUDGE
UNITED STATES COAST GUARD**