

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

UNITED STATES COAST GUARD

Complainant

vs.

EDWARD ALLEN DUNCAN

Respondent.

Docket Number: CG S&R 04-0592
CG Case No. 2219265

DECISION AND ORDER

Issued: March 15, 2005

Issued by: Hon. Parlen L. McKenna, Administrative Law Judge

Appearances:

Senior Chief Gary J. Vencill
CWO Russell S. Pogue
LTJG Zeke J. Lyons
LT. Felton Gilmore
6767 North Basin Avenue
Portland, OR 97217

For the Coast Guard

Steven L. Verhulst, Esq.
Karpstein & Verhulst, P.C.
220 NE Third Avenue
Hillsboro, OR 97124

For the Respondent

PRELIMINARY STATEMENT

The United States Coast Guard (Coast Guard) initiated this administrative action seeking revocation of Merchant Mariner's License Number 1020670 issued to Edward Allen Duncan (Respondent). This administrative action was brought pursuant to 46 U.S.C. 7703 and its underlying regulations codified at 46 CFR Part 5.

On October 12, 2004, the Coast Guard issued a complaint alleging misconduct for wrongfully operating a vessel with a blood alcohol concentration (BAC) of .04 or more. Attorney Frank T. Mussell submitted an extension of time to file an answer on behalf of Respondent. Respondent filed his answer on November 2, 2004, through attorney Steven L. Verhulst, admitting to the jurisdictional allegations but denying the factual allegations contained in Paragraph 2 of the complaint, which alleged that Respondent wrongfully operated a vessel with a BAC of .04 or more. In a letter dated November 4, 2004, Mr. Mussell notified the Coast Guard that he had withdrawn his representation of Respondent and that Mr. Verhulst now represents Respondent. A hearing date was then set for December 16, 2004.

The hearing commenced in Portland, Oregon on December 16, 2004. The proceeding 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 Investigating Officer(s) (IO) for the Coast Guard moved for the introduction of ten (10) exhibits and presented the testimony of four (4) witnesses. Respondent moved for admission of two (2) exhibits and presented the testimony of four (4) witnesses. The list of witnesses and exhibits is contained in Attachment B. The record is now ripe for decision.

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 29, 2004, through December 16, 2004, the above-captioned Respondent was the a holder of Merchant Mariner's License Number: 1020670 issued by the United States Coast Guard.
2. On September 29, 2004, Respondent was acting under the authority of his license when he boarded the Tug Klickitat (Klickitat) and performed the duties of a captain by operating the vessel. (Tr. 4)
3. A deckhand observed Respondent smelling of alcohol while operating the Klickitat. (Tr. 7-10).
4. The deckhand also observed Respondent yelling and screaming for no apparent reason. (Tr. 11-12).
5. Subsequently, Respondent was relieved of his duties. (Tr. 28-29).
6. The superintendent of the Marine Division ordered Respondent to submit to a blood alcohol test. (Tr. 27-30).
7. The dredge project manager took Respondent to a nearby hospital for a breathalyzer test at approximately 9:30 p.m. (Tr. 39).
8. The dredge project manager also observed Respondent smelling of alcohol. (Tr. 39-40).
9. The collector is certified to perform breathalyzer tests on the Lifeloc Phoenix machine. (Tr. 76, IO Ex. 6).

10. Prior to the start of the breathalyzer test, the collector explained to Respondent the proper way to take the test. (Tr. 51).
11. During the automatic breathalyzer test using a Lifeloc Phoenix, Respondent failed to provide an adequate air sample three times, causing the machine to read “invalid test.” (Tr. 51).
12. The collector then performed a manual test on Respondent in order to obtain a sample from Respondent’s “short puffs” of air. (Tr. 51-52).
13. Respondent used “short puffs” of air to evade a positive test result. (Tr. 67).
14. The test returned a positive result, measuring his BAC at .103. (Tr. 51-54).
15. Respondent tried to alter the positive test result on the readout by changing the result from a BAC of .103 to a BAC of .003. (Tr. 54-57).
16. The collector then performed a confirmatory test on Respondent which also returned a positive result of .100. (Tr. 52-54).

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent and the subject matter of this 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 a holder of United States Coast Guard License Number: 1020670.
3. Respondent was acting under the authority of his license when he performed captain duties aboard the Klickitat while intoxicated.
4. The Coast Guard **PROVED** by a preponderance of reliable, probative, and substantial evidence that on September 29, 2004, Respondent wrongfully operated a vessel with a blood alcohol concentration above .04 or more.

DISCUSSION

Coast Guard suspension and revocation hearings are held to promote safety at sea. See 46 U.S.C. 7701. The authority to suspend or revoke a mariner's license, certificate or document for violation of a Coast Guard regulation arises under 46 U.S.C. 7703. In this case, the Coast Guard charged Respondent with wrongfully operating a vessel with a BAC of .04 or more in violation of law or regulation under 46 U.S.C. 7703(1)(A) and 33 CFR 95.020(b).

Misconduct occurs when human behavior violates some formal duly established rule found in statutes, regulations, common law, general maritime law, or a ship's regulation or order. 46 CFR 5.27. Restated, misconduct is a forbidden act or failure to act. Id. Here, Respondent committed misconduct by operating a vessel other than a recreational vessel with a BAC of .04 or higher. 33 CFR 95.020(b). Respondent admitted that on September 29, 2004, he consumed alcohol earlier in the day, around 1:00-1:30 p.m., but claimed that he ceased consumption of alcohol shortly after that time. (Tr. 133-135). Further, Respondent denied consuming alcohol aboard the vessel. (Tr. 135). Respondent also testified that he was not under the influence of alcohol while he was operating as captain of the Klickitat. (Tr. 134). Respondent's testimony is not credible.

The record reveals that Respondent attempted to beat the breathalyzer test by failing to properly follow the collector's instructions. The collector testified that she performed the breathalyzer test on automatic three separate times and each time the breathalyzer read, "invalid test". (Tr. 51). Prior to the first test and after the first and second tests, the collector explained the proper way to take the test to Respondent. Id. After each explanation, Respondent gave "short puffs" of air instead of long slow breathes as explained to him by the collector. Id. The collector's opinion is that Respondent used "short puffs" to evade a positive test result. (Tr. 67).

After fully considering the entire record, including Respondent's testimony, I find that Respondent attempted to evade the breathalyzer. Contrary to Respondent's contention, the manual breathalyzer test results that produced the positive alcohol test results are valid. Respondent's first argument that the results were inaccurate based on the breathalyzer machine's (Lifeloc Phoenix) inability to distinguish between ethanol (drinking alcohol) and isopropyl (rubbing alcohol) alcohol is rejected. The applicable DOT regulations themselves do not distinguish between ethanol and isopropyl. Under 49 CFR 40.3, "alcohol" is broadly defined as the "intoxicating agent in beverage alcohol, ethyl alcohol or other low molecular weight alcohols, including methyl or isopropyl alcohol."

Respondent's second argument that the use of manual mode for both the initial and confirmatory test was erroneous is also rejected. The breathalyzer machine used by the collector in this case was a DOT approved machine. (Tr. 53); see 49 CFR 40.229 (identifying which devices are used for alcohol screening tests); see also Highway Safety Programs; Model Specifications for Devices to Measure Breath Alcohol, 69 FR 42237, 42238 (Jul. 14, 2004) (listing the Lifeloc Phoenix as an approved evidential breath testing device). The test was conducted in accordance with DOT regulations, which specifically authorize manual operation of evidential breath testing devices where an individual fails to provide a sufficient amount of air for alcohol testing. See 49 CFR 40.265(b)(4). The breathalyzer test showed that Respondent's BAC was more than double the 0.04 limit established in 33 CFR 95.020(b), which constitutes misconduct.

SANCTION

Upon finding a charge proved, the selection of an appropriate order is the responsibility of the Administrative Law Judge. 46 CFR 5.569. Except for acts or offenses for which

revocation is mandatory, aggravating or mitigating evidence may be considered in determining the extent of the sanction given. Id. Aggravating or mitigating evidence may include: remedial actions undertaken independently by the respondent; the prior record of respondent; and the period of time between prior acts and the current offense. Id.

In this case, based upon the existence of aggravating facts, revocation is an appropriate sanction. The Coast Guard proved Respondent was operating a vessel while intoxicated on September 29, 2004. Respondent demonstrated a blatant disregard for Coast Guard regulations when he tried to evade the positive result of the breathalyzer test. Next, Respondent tried to alter the positive test's printout. Furthermore, Respondent's license was previously revoked for testing positive for illegal drugs. However, Respondent's license was subsequently reinstated after he filed an application for administrative clemency.

Title 33 CFR 20.904 provides that a judge may reopen the record if there is any change in fact or law that warrants a reopening. Furthermore, a respondent, within three years or less after a Suspension and Revocation proceeding resulting in revocation of a license, may file a motion for reopening of the proceeding to modify the order. 33 CFR 20.904(f). Before Respondent may apply to have the case reopened, he must complete the following: (1) sign an agreement with the Coast Guard providing that he will not drink alcohol at anytime or any place so long as he holds a Coast Guard issued license (2) complete a DOT approved rehabilitation program; (3) supply proof that he has attended Alcoholics Anonymous meetings two times a week for one year; (4) supply proof through affidavits or other evidence that he has not touched alcohol continuously for a one year period prior to the filing of an application for reopening; and (5) obtain a Medical Review Officer or Substance Abuse Professional letter stating that he no longer poses a threat to safety, of life or property at sea. Until such time that Respondent can illustrate that he has

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complied with the aforementioned requirements, I find that his holding a Coast Guard issued license constitutes a danger to life and property at sea.

ORDER

IT IS HEREBY ORDERED that Merchant Mariner's License Number: 1020670, and all other valid licenses, documents, and endorsements, issued by the Coast Guard to Edward Allen Duncan be and they hereby are revoked. The Coast Guard is hereby directed to take custody of Respondent's merchant mariner papers.

IT IS FURTHER ORDERED that if you knowingly continue to use your License Number: 1020670, you may be subject to criminal prosecution.

Service of this Order of Revocation upon you serves to notify you of your right to appeal as set forth in 33 C.F.R. Subpart J, § 20.1001 (See Attachment A).

Done and dated on this 15th day of March, 2005
Alameda, CA

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

ATTACHMENT A

NOTICE OF APPEAL RIGHTS

33 CFR 20.1001 General.

- (a) Any party may appeal the ALJ's decision by filing a notice of appeal. The party shall file the notice with the U. S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022. The party shall file the notice 30 days or less after issuance of the decision, and shall serve a copy of it on the other party and each interested person.
- (b) No party may appeal except on the following issues:
 - (1) Whether each finding of fact is supported by substantial evidence.
 - (2) Whether each conclusion of law accords with applicable law, precedent, and public policy.
 - (3) Whether the ALJ abused his or her discretion.
 - (4) The ALJ's denial of a motion for disqualification.
- (c) No interested person may appeal a summary decision except on the issue that no hearing was held or that in the issuance of the decision the ALJ did not consider evidence that that person would have presented.
- (d) The appeal must follow the procedural requirements of this subpart.

33 CFR 20.1002 Records on appeal.

- (a) The record of the proceeding constitutes the record for decision on appeal.
- (b) If the respondent requests a copy of the transcript of the hearing as part of the record of proceeding, then, --
 - (1) If the hearing was recorded at Federal expense, the Coast Guard will provide the transcript on payment of the fees prescribed in 49 CFR 7.45; but,
 - (2) If the hearing was recorded by a Federal contractor, the contractor will provide the transcript on the terms prescribed in 49 CFR 7.45.

33 CFR 20.1003 Procedures for appeal.

- (a) Each party appealing the ALJ's decision or ruling shall file an appellate brief with the Commandant at the following address: U.S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022, and shall serve a copy of the brief on every other party.
 - (1) The appellate brief must set forth the appellant's specific objections to the decision or ruling. The brief must set forth, in detail, the --

- (i) Basis for the appeal;
 - (ii) Reasons supporting the appeal; and
 - (iii) Relief requested in the appeal.
- (2) When the appellant relies on material contained in the record, the appellate brief must specifically refer to the pertinent parts of the record.
- (3) The appellate brief must reach the Docketing Center 60 days or less after service of the ALJ's decision. Unless filed within this time, or within another time period authorized in writing by the Docketing Center, the brief will be untimely.
- (b) Any party may file a reply brief with the Docketing Center 35 days or less after service of the appellate brief. Each such party shall serve a copy on every other party. If the party filing the reply brief relies on evidence contained in the record for the appeal, that brief must specifically refer to the pertinent parts of the record.
- (c) No party may file more than one appellate brief or reply brief, unless --
- (1) The party has petitioned the Commandant in writing; and
 - (2) The Commandant has granted leave to file an added brief, in which event the Commandant will allow a reasonable time for the party to file that brief.
- (d) The Commandant may accept an *amicus curiae* brief from any person in an appeal of an ALJ's decision.

33 CFR 20.1004 Decisions on appeal.

- (a) The Commandant shall review the record on appeal to determine whether the ALJ committed error in the proceedings, and whether the Commandant should affirm, modify, or reverse the ALJ's decision or should remand the case for further proceedings.
- (b) The Commandant shall issue a decision on every appeal in writing and shall serve a copy of the decision on each party and interested person.

ATTACHMENT B

WITNESS AND EXHIBIT LISTS

WITNESS LIST

COAST GUARD'S WITNESSES

1. Casey Dale Collins
2. Gary Lee Collins
3. Randy Steed
4. Helena Graves

RESPONDENT'S WITNESSES

1. Forrest Kevin Ballus
2. Dr. Raymond Allen Grimsbo
3. Darren Christopher Tuor
4. Edward Allen Duncan

EXHIBIT LIST

COAST GUARD'S EXHIBITS

- | | |
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| IO Ex. 1 | Complaint |
| IO Ex. 2 | Photocopy of Respondent's License |
| IO Ex. 3 | DOT Notice of Conforming Breathalyzer s |
| IO Ex. 4 | U.S. Department of Transportation Alcohol Testing Form for Edward Duncan |
| IO Ex. 5 | Lifeloc Phoenix Breath Alcohol Analyzer Operations Manual |
| IO Ex. 6 | Certifications of Helena Graves |
| IO Ex. 7 | Training Calibration Logs |

IO Ex. 8 Federal Register Vol. 69, No. 28, Wednesday, February 11, 2004 – Chemical Testing

IO Ex. 9 Respondent's Prior Record

IO Ex. 10 Respondent's Letter to Coast Guard

RESPONDENT'S EXHIBITS

Resp't Ex. A Curriculum Vitae of Raymond Allen Brimsbo, Ph.D.

Resp't Ex. B U.S. Department of Transportation Alcohol Testing Form for Edward Duncan