UNITED STATES OF AMERICA

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

---

UNITED STATES COAST GUARD

Complainant

vs.

WILLIAM EVERETT PALMER

Respondent.

---

Docket Number: CG S&R 05-0172

Case No. 2322238



# DECISION AND ORDER

**Issued: August 3, 2005**

**Issued by: Jeffie J. Massey, Administrative Law Judge**

**Appearances:**

**For Complainant**
CWO Quinn Quaglino
LT Kris Szczechowicz
U.S. Coast Guard
MSO New Orleans
1615 Poydras St
New Orleans, LA 70112

**For Respondent**
William Everett Palmer, *pro se*

## PRELIMINARY STATEMENT

On March 30, 2005, the United States Coast Guard ("USCG" herein) initiated an administrative proceeding against credentials issued to William Everett Palmer by the USCG. Specifically, it was alleged that, while a holder of Coast Guard issued credentials on March 28, 2005, the Respondent refused to take a DOT certified drug screen when directed to do so by his employer.

On May 4, 2005, Respondent's Answer was received by the Docketing Center. In his Answer, Respondent denied the factual allegations and requested to be heard on the proposed order. On May 16, 2005, a Notice of Hearing was issued, scheduling a hearing for June 3, 2005, in New Orleans, Louisiana.

On May 20, 2005, the USCG filed a Motion to Amend [the] Complaint, and an Amended Complaint was filed with the Docketing Center. The Amended Complaint changed the statutory basis upon which the Complaint was filed, but did not materially change the factual allegations.

The hearing was convened as scheduled in New Orleans, Louisiana.[1] The Respondent's rights were explained to him in some detail, and he indicated he was prepared to go forward without counsel. An Answer was obtained on the record, in response to the allegations in the Amended Complaint. The USCG called the following witnesses: Homer W. Cantrell, Sidney Snow, Albert Daigle, and Thomas Barrois. Six exhibits were admitted for evidentiary purposes on behalf of the USCG and three exhibits

[1] On May 25, 2005, the USCG filed a Motion to Subpoena Witnesses. After all the witnesses deemed necessary by the USCG appeared without subpoena on June 3, 2005, the USCG withdrew its Motion for Subpoenas.

were admitted for evidentiary purposes on behalf of the Respondent. The Respondent testified in his own behalf.

At the end of the testimony, the evidentiary record was closed. The undersigned allowed forty-five days for the submission of briefs and/or proposed findings of fact and conclusions of law. The USCG made their submission on July 18, 2005. The Respondent did not make a submission.

## FINDINGS OF FACT

1. On and about March 28, 2005, the Respondent was employed by Daigle Towing, LLC in a position that required him to possess USCG issued credentials.
2. As an employee of Daigle Towing, LLC the Respondent was a holder of credentials issued to him by the USCG.
3. On and about March 28, 2005, Respondent's employer requested that the Respondent submit to chemical testing based upon a series of events that led the employer to believe the Respondent should be tested for controlled substances before being moved to another vessel.
4. The employer's election to request that the Respondent submit to chemical testing was based on a series of events which had occurred aboard the M/V BAROID 111 and which had been directly observed by more than two persons and said events involved the behavior and performance of the Respondent.

5. The Respondent failed to make himself available for the requested chemical testing until approximately twenty-four hours after he had been requested to take the test by his employer.

## DISCUSSION

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 preponderance of the evidence as defined by the Supreme Court." **Appeal Decision 2477 (TOMBARI)** (1998). 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)). 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.

Title 46 U.S.C. §7703(1)(B) provides that a license, certificate of registry, or merchant mariner's document may be suspended or revoked if the holder when acting

under the authority of his license, certificate, or document has committed 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, among other places, statutes, regulations, the common law, the general maritime law, a ship's regulation or order, or shipping articles and similar sources. See 46 CFR §5.27.

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 or MMD, then the Coast Guard does not have jurisdiction under 46 CFR §5.57(a) over the alleged violation of law. See **Appeal Decision 2620 (COX)** (2001). Therefore, the Coast Guard must prove Respondent was employed in the service of a vessel when he committed a violation of law and Respondent's merchant mariner's credentials were either (1) required by law or regulation or (2) as a condition of his employment.

In this proceeding, the USCG has alleged that the Respondent refused to take a "reasonable cause" drug screen. Under the statutory scheme governing chemical testing, there are various classifications of chemical testing (pre-employment, periodic, random, serious marine incident, and reasonable cause). See Part 16 of Title 46 CFR. A reasonable cause test is appropriate when an employer "reasonably suspects" an employee has been using a dangerous drug. A "dangerous drug" is defined as "a narcotic drug, controlled substance, or a controlled substance analog (as defined in section 102 of the Comprehensive Drug Abuse and Control Act of 1970)". 46 U.S.C. 2101(8a).

Per the provisions of 46 CFR §16.250(b):

> The marine employer's decision to test must be based on a reasonable and articulable belief that the individual has used a dangerous drug based on direct observation of specific, contemporaneous physical, behavioral, or performance indicators of probable use. Where practicable, this belief should be based on the observation of the individual by two persons in supervisory positions.

The first witness to testify for the USCG was Captain Thomas Barrois, presently employed as Captain of the M/V MORGAN RAY, previously having been on board the BAROID 111.[2] He met the Respondent when working as a relief captain on the BAROID, probably in March 2005. They were working twelve hour shifts, so his direct contact with the Respondent was limited to the times he would wake the Respondent up to take over his shift. He related one incident where the deckhand went to wake up the Respondent, but when he didn't get up, Captain Barrois had to go and get the Respondent up to take over his shift. There was also one occasion when the Respondent was late for his shift, and he (the witness) had to work an extra six hours.

The witness related that the Respondent told him (more than once) that he was tired—he wasn't getting any/enough sleep. The witness related that other employees of the boat had told him on more than one occasion that they were afraid of Respondent being at the wheel. Captain Barrois was also told that the Respondent had been "reckless" at the wheel, that he was falling asleep at the wheel, running into barges when he was supposed to be tying up to them. He was not aware of any damage reports that were made as a result of these incidents he was told about.

[2] The evidence showed that these vessels were part of a small fleet of tugboats owned by Daigle Towing, LLC, which was in turn owned by Albert Daigle.

The next USCG witness was Captain Homer Cantrell, a former employee and co-worker of the Respondent at Daigle Towing. He met the Respondent when he was assigned to work eight-hour shifts with him aboard the BAROID 111 during the period of November 2004 until March 2005. He testified that on more than one occasion, the Respondent had to be roused more than once before he would actually get up so that he could start his shift. He would appear to be groggy when he got up.

Over the course of working with the Respondent, the witness formed the opinion that the Respondent was "a bit rough" with the boat—he would use excessive speed when landing the boat—more often than most captains. One incident prompted the witness to leave the boat and speed up his ongoing search for other employment. During this incident, the Respondent made a landing with a barge that was so rough, the witness was ejected from his bunk. There was also damage to the television in the galley, and a deckhand was injured. Immediately after the incident, Captain Cantrell went to the wheelhouse where the Respondent looked "dazed" and said he couldn't stop the boat. When he was asked why he didn't use a headline, the Respondent said something to the effect that he didn't know they had any. The witness said that there was probably three hundred feet of headline in the hole, at that time.

While the witness testified that he reported this last incident to Mr. Daigle, he could not recall if he had reported other incidents of concern to Mr. Daigle or not. On cross-examination by the undersigned, the witness said that he had never observed the Respondent using drugs, that he had never smelled burnt marijuana on board the vessel when the Respondent was present, nor had he ever observed anything on board the vessel that appeared to be controlled substances.

The USCG's next witness was the Respondent's employer, Mr. Albert Daigle. He testified that the Respondent was a good captain, working on two or three different boats, with his last assignment being aboard the BAROID 111. More than once during his testimony, he indicated that he would be willing to hire the Respondent again as a Captain.

Immediately preceding the witness' decision to ask the Respondent to take a chemical test, he had received complaints from the deckhands working with the Respondent. They claimed they were going to quit if Mr. Daigle did not "do something" about the Respondent. On the morning of March 28, 2005, the witness met up with the Respondent, intending to move him to another boat. He said that before he placed him on a different boat, he thought he had better have the Respondent submit to a chemical test—because the Respondent had been acting "differently" for a month or so.

The incident on the BAROID 111 that caused Captain Cantrell to quit had taken place about a month before the events of March 28. One morning a few days before March 28, the witness testified that he had gone to the boat and found the Respondent asleep at the table in the galley, and he was told by the deckhand that he had been sleeping there since midnight. The deckhand had tried unsuccessfully to wake up the Respondent.

The witness further testified that the Respondent had told him some time before that he was a diabetic, but they had never talked about any medications the Respondent was taking or supposed to be taking. When he told the Respondent he had to take a chemical test, he recalled that the Respondent stated he couldn't take a test because he couldn't pass it—that he had taken drugs a couple of days before. Later in his testimony,

the witness said that the Respondent had stated that he had "done drugs" with this girl he had been seeing. He denied that the Respondent had mentioned what kind of drugs were involved. The witness knew that the Respondent had recently been spending his off-shift time away from the boat (rather than sleeping on the boat when not on duty).

The last witness for the USCG was Sidney Snow. This witness worked for Mr. Daigle and had been in the vicinity of Mr. Daigle's truck when Mr. Daigle had asked the Respondent to take a chemical test on March 28. He recalled that the Respondent had said he couldn't take a chemical test because he could not pass it. This witness testified that he had first met the Respondent in January and seen him a total of four or five times. He had never seen anything about the Respondent that would suggest he was using drugs.

The Respondent decided to testify on his own behalf after having been advised that he was not required to take the stand. He testified that on the morning of March 28 when he met up with Mr. Daigle, he had been up for approximately 20 hours—having just finished his shift on the boat. He testified that he told Mr. Daigle that he "might not be able to pass" the test. He intended to go take the test when the facility opened up, but because it was so early in the morning and he had been up for so long, he testified that he told Mr. Daigle he was going to go home and shower and then go take the test. He further testified that he went home, fell asleep on the couch, and woke up still dressed at four o'clock that afternoon.

He said he went to the facility the next morning to take the test, but when the person there called Mr. Daigle, he told her that he (the Respondent) no longer needed to take a test. He produced a business card (Respondent's Exhibit 03) which indicated the

Respondent had signed in at the facility at 8:28 a.m. on the morning of March 29, 2005, but had to return to work (or home) "per Mr. Daigle until further notice."

The Respondent also provided documents which indicated he had taken alcohol and chemical tests on March 2, 2005. (Exhibits 01 & 02) The alcohol test was negative and the chemical test was presumably negative (because no positive result had been reported to him).

On cross-examination, the Respondent indicated that he had made a "serious misjudgment" which caused him to hit a barge too hard. He further testified that he had seen a girl (a prostitute) who had been the one doing drugs in his presence (smoking marijuana), and it was because he had been around her while she was doing this that he figured he could not pass a chemical test on March 28.

On further cross-examination, he testified that he had been taking medication for his diabetes for approximately 8 months. In March 2005, there were still days when he would forget to take it. He admitted that he had had problems—going back to before his diagnosis of diabetes—where he was falling asleep when he should not have been. He further testified that he was still having trouble with falling asleep when he shouldn't.

## ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. On and about March 28, 2005, the Respondent was employed by Daigle Towing LLC in a position that required him to possess USCG issued credentials.
2. As an employee of Daigle Towing, LLC, the Respondent was a holder of credentials issued to him by the USCG.

3. On and about March 28, 2005, Respondent's employer requested that the Respondent submit to chemical testing based upon a series of events that led the employer to believe the Respondent should be tested for controlled substances before being moved to another vessel.
4. The employer's election to request that the Respondent submit to chemical testing was based on a series of events which had occurred aboard the M/V BAROID 111 and which had been directly observed by more than two persons and said events involved the behavior and performance of the Respondent.
5. The Respondent failed to make himself available for the requested chemical testing until approximately twenty-four hours after he had been requested to take the test by his employer.
6. Under the circumstances of this case, it was not practicable for two persons in supervisory positions to observe the Respondent's behavior prior to the request that he take a chemical test.
7. Under the circumstances of this case, the Respondent's employer, Mr. Daigle, acted reasonably and with legally sufficient cause, when he requested on March 28, 2005, that the Respondent submit to chemical testing.
8. The offense of misconduct has been proven by a preponderance of the evidence.

## SANCTION

Under the provisions of 46 USC §7703(1)(b), upon proof of an offense of misconduct, and order of revocation or an order of suspension can be entered. Per the Table found at 46 CFR §5.569, the recommended length of suspension for refusal to take

a chemical test is 12-24 months. Per the regulations, as the ultimate arbiter of the sanction in this proceeding, the undersigned is directed to consider any "remedial actions which have been undertaken independently by the respondent," the prior record of the respondent (if any), and evidence of mitigation or aggravation.

A review of the evidentiary record in this case indicates no evidence of aggravating factors. Specifically, there is no evidence in the record of historical drug use or recent observation of the Respondent using illegal drugs. The innuendo of the USCG's case was that the Respondent was guilty of using dangerous drugs or controlled substances.[3] However, there is no direct proof of this fact. One witness recalls that the Respondent said he had taken drugs, and that is why he could not pass a chemical test on March 28. The Respondent contradicted this testimony with his testimony that he had been with someone who had been smoking marijuana, and that was why he did not believe he could pass a chemical test on March 28. (He did pass one on March 2.) Ironically, if the Respondent believed he would have failed the test on March 28, the chances are very good he would have failed the March 29 test he attempted to take, as well.

I conclude that Mr. Daigle believed the Respondent said to him "I can't pass the test because I was doing drugs," or words to that effect. That conclusion means that I find Mr. Daigle's testimony to be credible. However, I also believe the Respondent's testimony that he believed he could not pass a drug test on March 28 because he had recently been around a prostitute whom had been smoking marijuana in his presence, and *that* was the reason he could not pass the test. Thus, with this direct conflict in testimony,

[3] At page 3 of the USCG's post-hearing submission, it is stated "The Coast Guard believes Capt. Palmer was a drug user who refused to take a drug screen."

I cannot conclude that it is more likely than not that the Respondent was a user of illegal drugs sometime between March 2 and March 28. Such a conflict in evidence does not support the innuendo that the USCG wishes me to use to impose the maximum sanction in this proceeding.

Witnesses who had been in the Respondent's presence for weeks and months prior to March 28 could provide no evidence to support the suggestion that the Respondent had been using drugs. These witnesses are the very persons who were in the closest contact with the Respondent during the times he was exhibiting unusual behavior. In fact, Respondent's employer was willing to re-hire him at any point he could get his present difficulties with his license behind him.

While it is more probable than not that the Respondent had been experiencing some problems with the quality of his work performance in the months leading up to March 28, it is more likely than not, based on the entire record before me, that Respondent's work-related performance issues are the result of health problems—specifically his diabetic condition which he was attempting to manage with medication.

While it is of paramount importance that the Respondent obtain control over his diabetes and successfully manage it in order to be able to maintain a satisfactory level of performance at work, the undersigned cannot translate the problems he was probably having as a result of his diabetic condition into aggravating factors with regards to the issue of an appropriate sanction. In other words, I cannot conclude on the record before me that the Respondent was using illegal drugs. The record simply does not support that conclusion as being more likely than not.

On the plus side, the Respondent did attempt to take a chemical test on March 29. In addition, he had tested negative just a few weeks before the March 28 request in random alcohol and chemical tests (as indicated by Respondent's Exhibits 01 & 02). On the whole, the record before me indicates a willingness to participate in testing, at least up until March 28. On the whole, I find the Respondent's testimony to be credible.

Based on the record before me, I find no "excuse" for the Respondent's refusal to undergo a test on March 28. He hesitated in his testimony to out and out admit that his actions on March 28 constituted a refusal. I have found that his actions did constitute a refusal. But, I judge this refusal in the context of his having undergone recent testing, his attempt to be tested the next day, and the likelihood that his performance related problems were more likely than not the result of health problems instead of the result of illegal drug use. On the whole, the record before me justifies a downward departure from the suggested suspension range contained in the table at §5.569.

Refusing to test remains a serious matter, however. As such, a suspension of six months of the Respondent's USCG issued credentials is appropriate, on the record before me, as a sanction in this proceeding.

## ORDER

**IT IS HEREBY ORDERED** that all credentials issued to the Respondent by the United States Coast Guard are hereby **SUSPENDED FOR A PERIOD OF SIX MONTHS, EFFECTIVE AS OF AUGUST 3, 2005. You must immediately surrender all documents in your possession to the Coast Guard. If you knowingly continue to use your documents, you may be subject to criminal prosecution.**

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. (Attachment A).

Done and dated August 3, 2005
New Orleans, Louisiana

**JEFFIE J. MASSEY**
**ADMINISTRATIVE LAW JUDGE**
**U.S. COAST GUARD**