

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

UNITED STATES COAST GUARD

Complainant

vs.

MICHAEL DAVID GRATTON

Respondent.

Docket Number: CG S&R 05-0212
CG Case No. 2310635

ORDER

Issued: October 21, 2005

Issued by: Walter J. Brudzinski, Administrative Law Judge

Procedural History

This Order is issued in accordance with 33 CFR sections 20.710 and 20.902(c) in that the undersigned rendered his initial decision orally from the bench at the close of the hearing on October 18, 2005 at Morgan City, Louisiana. Finding Respondent and the subject matter of this hearing within the jurisdiction vested in the Coast Guard under 46 U.S.C. 7703 and 7044 and that the Coast Guard proved the charges alleged in the Complaint, the undersigned revoked Respondent's license and document at the close of the hearing. Since Respondent voluntarily deposited his license and merchant mariner's document with the Coast Guard on February 10, 2005 (ALJ Exhibit 1), the Revocation is effective as of that date.

The Complaint charges Respondent with 2 counts of Misconduct: “Use of Dangerous Drugs” and “Refusal of a Required Drug Screen.” The Complaint alleges that on February 9, 2005, Respondent advised his employer that he needed help with a drug problem. His employer requested that he submit to a chemical test. Respondent replied that he would not submit a sample because he “cannot pass it” and that he was “as high as can be.”

The Coast Guard proposed Revocation. In his timely Answer to the Complaint, Respondent, appearing *pro se*, admitted all factual and jurisdictional allegations but asked that his license be suspended, not revoked.

Law

If it is shown that a holder [of a license, certificate of registry, or merchant mariner’s document as per 46 U.S.C. 7704(b)] has been a **user** of, or addicted to, a dangerous drug, the license, certificate of registry, or merchant mariner’s document shall be **revoked** unless the holder provides satisfactory proof that the holder is cured.

46 U.S.C. 7704(c).

[a] license, certificate of registry, or merchant mariner’s document issued by the Secretary may be suspended or revoked if the holder – (1) when acting under the authority of that license, certificate, or document . . . (B) has committed an act of incompetence, misconduct, or negligence....

46 U.S.C. 7703(1)(B)

Title 46 CFR 5.27 provides that “*Misconduct* is human behavior which violates some formal, duly established rule. 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 required.” The standard of proof is the preponderance of the evidence. 33 CFR 20.701.

To show that refusal to take a chemical drug is proscribed conduct, the undersigned amended the Complaint by adding the word, “wrongfully” to the beginning of the final sentence in the second count. This amendment did not affect Respondent’s notice of the charge.

Title 46 CFR 5.59 provides that an administrative law judge shall enter an order revoking a respondent’s license, certificate or document when - “(a) [a] charge of misconduct for wrongful possession, **use**, sale, or association with dangerous drugs is found proved. . . .”

As per 46 CFR Table 5.569, the sanction for Refusal to take a Chemical Drug Test is 12 – 24 months. Under Commandant v. Michael S. Moore, NTSB Order No. EM-201, (2005), a sanction beyond that range will not be upheld “without a clearly articulated explanation of aggravating factors.”

Hearing

The Chief Administrative Law Judge originally assigned this case to Judge Jeffie Massey on May 27, 2005. Due to Judge Massey’s unavailability secondary to the effects of Hurricane Katrina, this case was reassigned to the undersigned. At the hearing, Investigating Officers (IOs) ENS Timothy Tilghman, USCG and LTJG Adam Bryant, USCG represented the Coast Guard. They presented one witness and introduced one (1) exhibit. Respondent testified on his own behalf and introduced one (1) exhibit.

The Coast Guard’s witness, Mr. Jim Guidry of Kirby Marine, Respondent’s employer, testified in pertinent part that on February 9, 2005, the Respondent advised him that he needed help with a drug problem. Mr. Guidry requested Respondent to take a chemical drug test. Respondent stated that he could not pass the chemical drug test because he had “done an ounce of cocaine this week.” When Mr. Guidry asked Respondent if he was currently under the influence, Respondent stated that “I am as high as I can be.” Respondent then showed Mr.

Guidry the track marks in his arm where he was shooting the drugs and said he “had it bad and had never known anyone who had it this bad before.” Mr. Guidry asked Respondent again if he was going to refuse to take the drug test and Respondent replied that would not take the test because he “could not pass it.” Mr. Guidry then told Respondent that he was terminating his employment for his refusal and that his name would be turned into the Coast Guard. The Coast Guard would then proceed with action against his license just as if the test were positive. Mr. Guidry also observed that Respondent was still acting very erratically and asked him if he was able to drive his vehicle, to which Respondent replied in the negative. Mr. Guidry then informed Respondent that a hotel room would be provided for him and that he was not to drive until the following day, when he was to see the Coast Guard. Mr. Guidry further offered to assist Respondent in finding a treatment center but Respondent replied that he already had one in Lafayette, Louisiana. Finally, Mr. Guidry testified that Respondent was a good employee and that there was no prior reason to believe he was doing drugs.

After the Coast Guard presented its case, the Respondent testified under oath essentially admitting the facts alleged in the Complaint. He offered into evidence a letter from the Louisiana Department of Health and Hospitals stating that he is currently enrolled in treatment and asked that his license be suspended rather than revoked.

At the conclusion of the hearing, I found that the Coast Guard had proved both charges. Respondent’s drug use admissions and Mr. Guidry’s credible testimony painted a convincing picture that Respondent used dangerous drugs and had wrongfully refused to submit to a chemical drug test. There being no request from the parties to submit proposed findings and conclusions, I announced my decision orally from the bench in accordance with 33 CFR 20.902(c).

Sanction

Section 46 U.S.C. 7704(c) requires that a merchant mariner's document be revoked if it is shown that he has been a user of or addicted to a dangerous drug unless the holder provides satisfactory proof that he is cured. Respondent's Exhibit A states that he is currently enrolled in a treatment program but has not yet successfully completed it.

To establish cure under 46 U.S.C. 7704(c), the mariner must, at a minimum: (1) successfully complete a bonafide drug abuse rehabilitation program; and (2) demonstrate a complete non-association with drugs for a minimum of one year following the successful completion of the drug abuse program. Decision on Appeal 2638 (PASQUARELLA) (2003).

Further,

the MRO [Medical Review Officer] must determine that the individual is drug-free and the risk of subsequent use of dangerous drugs by that person is sufficiently low to justify his or her return to work. In addition, the individual must agree to be subject to increased unannounced testing – (1) [f]or a minimum of six (6) tests in the first year after the individual returns to work as required in 49 CFR [P]art 40; and (2) [f]or any additional period as determined by the MRO up to a total of [sixty] 60 months.

46 CFR 16.201(f).

While Exhibit A is a necessary first step, it does not meet the requirements of cure as expressed above. Therefore, Respondent's evidence of cure, although a good start, is not sufficient to exempt his license and document from mandatory revocation prescribed in 46 U.S.C. 7704 (c).

While Revocation is required upon having found proved the "Use of Dangerous Drugs" charge, the recently decided National Transportation Safety Board (NTSB) case of Commandant v. Michael S. Moore, NTSB Order EM-201, (2005) requires the Administrative Law Judge to articulate aggravating circumstances to justify an upward departure from the 12 to 24 month

suspension recommended in 46 CFR Table 5.569 for drug test refusal cases. I find aggravating factors as follows: Mr. Guidry ordered respondent to take a drug test based on reasonable cause. Respondent admitted to Mr. Guidry that he had done an ounce of cocaine during the past week and was as high as he could be. Mr. Guidry also observed track marks on Respondent's arm as well as Respondent's erratic behavior. Based on those observations and Respondent's admissions, Mr. Guidry also forbade Respondent to drive and arranged for a motel room for Respondent to spend the night. These factors are sufficient not only to find the "Use of Dangerous Drugs" charge proved but also to justify an upward departure to Revocation.

ORDER

IT IS HEREBY ORDERED that Respondent's U.S. Merchant Mariner's License #1027343 and Document bearing his Social Security account number, now in the possession of the U.S. Coast Guard, are **REVOKED**.

IT IS FURTHER ORDERED that the effective date of **REVOCATION** is February 10, 2005, the date Respondent voluntarily surrendered his license and document.

PLEASE TAKE NOTICE that service of this Order 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 October 21, 2005
New York, New York

WALTER J. BRUDZINSKI
ADMINISTRATIVE LAW JUDGE
U.S. COAST GUARD

ATTACHMENT A

NOTICE OF ADMINISTRATIVE 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

COMPLAINANT'S WITNESS

Mr. Jim Guidry

RESPONDENT'S WITNESSES

Mr. Michael David Gratton, Respondent, **pro se**

EXHIBIT LIST

COMPLAINANT'S EXHIBITS

1. E-mail letter from Jim Guidry to LT Amy Coglianesse, USCG detailing the events surrounding Respondent's admissions of recent drug use, Respondent's refusal to take a chemical drug test, and Mr. Guidry's observations of Respondent's condition. 2 pages.

RESPONDENT'S EXHIBITS

- A. Letter dated October 14, 2005 from the Louisiana Department of Health and Hospitals, together with 2 Release Authorization forms. 3 pages.

ADMINISTRATIVE LAW JUDGE'S EXHIBITS

1. Coast Guard Good Faith Deposit receipt dated February 10, 2005. 1 page.

Certificate of Service

I hereby certify that I have served the foregoing document upon the following parties to this proceeding and to the ALJ Docketing Center at the addresses indicated by the method specified below:

Coast Guard Marine Safety Office
Attn: LTJG Adam Bryant
ENS Timothy Tilghman
800 David Drive
Morgan City, LA 70380-5342
Phone: (985) 380-5342
Telefax: (985) 380-5379

(Via Telefax)

Mr. Michael David Gratton
193 Whittington Drive
Lafayette, LA 70503

(Via Certified Mail, Return Receipt)

ALJ Docketing Center
40 S. Gay Street, Room 412
Baltimore, MD 21202
Phone: (410) 962-7434
Telefax: (410) 962-1746

(Via Telefax)

Done and dated October 21, 2005
New York, NY

Regina V. Thompson
Paralegal Specialist, Assistant to the
Administrative Law Judge
Phone (212) 668-2970
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