

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

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Complainant

vs.

GARY WAYNE FRAYSER

Respondent.

Docket Number: CG S&R 050362
CG Case No. 2361323

DECISION AND ORDER

Issued: March 13, 2006

Issued by: Peter A. Fitzpatrick, Administrative Law Judge

Appearances:

For Complainant

Nick Meyers, Marine Inspector
Willis Coomer, Marine Science Technician
U.S. Coast Guard
Marine Safety Detachment Cincinnati
3653 River Road
Cincinnati, Ohio 45204

For Respondent

Gary Wayne Frayser, Pro Se

PRELIMINARY STATEMENT

The United States Coast Guard (hereinafter “Coast Guard”) initiated this administrative action seeking revocation of Gary Wayne Frayser’s (hereinafter “Respondent”) Merchant Mariner’s License Number 1005535. This action was brought pursuant to the authority contained in 46 U.S.C. 7703(1)(B) and its underlying regulations codified at 46 CFR Part 5.

The Coast Guard issued a Complaint on May 18, 2005 charging Respondent with committing an act of Misconduct by refusing to submit to a chemical drug test. The Coast Guard alleged that on May 12, 2005, Respondent failed to remain at the collection site and failed to provide a urine sample after being advised that chemical testing was being conducted on the M/V LAURA TAMBLE. Respondent filed his Answer in the form of two letters denying any involvement in the illicit drug incident in Tennessee and expressing his displeasure at his treatment (apparently in connection with the proposed drug test).

On July 14, 2005, the case was assigned to the undersigned for hearing at Cincinnati, OH. Subsequently, the case was scheduled for hearing on December 1, 2005. On July 15, 2005, the Coast Guard issued an Amended Complaint which added the factual allegation that on the date involved (May 12, 2005), Respondent was in possession of materials that could be used to adulterate or substitute a urine sample during a chemical test.

On November 15, the Coast Guard submitted a motion to allow telephone testimony from six witnesses due to the distance they were located from the hearing site. The Investigating Officer also submitted a list of witnesses and exhibits. On November 23, 2005 the motion to permit telephone testimony was granted. See Order of that same date.

The hearing commenced on December 1, 2005, as scheduled and the Respondent appeared at 9:45 AM. The hearing was conducted in accordance with the Administrative

Procedure Act as amended and codified at 5 U.S.C. 551-559, and Coast Guard procedural regulations set forth in 33 CFR Part 20. The Coast Guard moved for admission of thirteen exhibits and presented testimony of eight witnesses. Also, the Investigating Officer's request for telephone testimony for a Coast Guard official now at Yorktown, VA was granted. Respondent moved for admission of two exhibits and testified on his own behalf. The list of witnesses and exhibits is contained in **Attachment A**. At the conclusion of the hearing, in accordance with 33 CFR 20.902(c), I issued an initial decision orally from the bench. The first Factual Allegation under the charge of Misconduct was found Proved but the second Factual Allegation was found Not Proved. I also held that Mr. Frayser's Coast Guard credentials would be suspended for 24 months and that consideration would be given to the three months the Coast Guard took possession of his license immediately following May 12, 2005.

FINDINGS OF FACT

1. At all relevant times mentioned herein and specifically on or about May 12, 2005, Mr. Frayser was the holder of Merchant Mariner's License Number 1005535 issued by the United States Coast Guard. (IO Ex. 13).

2. At the time of this incident the Respondent was employed by Southern Towing Company. (Tr. 43, 49).

3. Respondent confirmed he had been informed of Southern Towing Company's Drug and Alcohol Policy and knew its contents. (Tr. 141, IO Ex. 7)

4. Mr. Frayser signed Southern Towing Company's crew training record illustrating that he received drug and alcohol awareness training. (Tr. 51, IO Ex. 8).

5. Respondent admitted he was required to submit to a chemical test if ordered to by his employer. (Tr. 137-38).

6. On or about May 12, 2005, the Coast Guard office in Memphis, Tennessee received an anonymous telephone call informing Coast Guard officials that there was illicit drug use and abuse among the crew on the M/V LAURA TAMBLE. (Tr. 39-40).

7. As a result of that call, the Coast Guard set up a drug search at the Economy Boat Store in Memphis, Tennessee of all the packages and crew going aboard the M/V LAURA TAMBLE. (Tr. 40). Local police authorities brought a police dog to search the packages and crew members. (Tr. 40).

8. The police dog “hit” on one of the packages to be taken aboard the M/V LAURA TAMBLE; the package contained marijuana. (Tr. 40).

9. Frank Hollomon, the designated employee representative of Southern Towing Company, ordered a reasonable cause drug test to be conducted on the existing crew and the relief crew of the M/V LAURA TAMBLE. (Tr. 40-41).

10. The relief crew of the M/V LAURA TAMBLE included Respondent. (Tr. 42, 49).

11. Respondent arrived at the M/V LAURA TAMBLE in a personal truck to report as the relief captain. (Tr. 109).

12. Upon Respondent’s arrival at the M/V LAURA TAMBLE, he observed the police and subsequently spoke to one of the crew on the telephone. That crew member informed him that there was a problem in Memphis concerning marijuana. (Tr. 137).

13. Shortly after Respondent’s arrival at the boarding area, Coast Guard, Petty Officer Malone ordered him not to board the M/V LAURA TAMBLE until he was cleared by the boarding officer. (Tr. 89, 98).

14. While Respondent was waiting to be cleared, Petty Officer Malone, standing on the stern of the M/V LAURA TAMBLE approximately 50 yards away from Respondent, observed Respondent discard an object underneath the truck he was riding in. (Tr. 96, Ex. 1).

15. Petty Officer Malone and an Owensboro Police Officer retrieved the item from directly underneath the truck. (Tr. 91).

16. The officers determined from its odor and visual characteristics that the discarded item was a vial filled with urine. (Tr. 91).

17. Petty Officer Malone also found a bag of unidentified pills approximately 5 feet from the truck next to a dumpster. (Tr. 99).

18. At that point, Petty Officer Malone ordered Respondent to submit to a chemical drug test. (Tr. 101-02).

19. Respondent informed Malone and Coast Guard Petty Officer Clifford that he was “through with the business” and was not going to submit to a chemical test. (Tr. 93, 110).

20. Respondent refused to take his position as relief captain aboard the vessel and left the collection site. (Tr. 138).

21. In addition, Mr. Frayser insisted on relinquishing his license to Petty Officer Clifford without completing the customary Coast Guard approved Voluntary Surrender Agreement. (Tr. 110-111).

22. Subsequently, the Coast Guard held Respondent’s license for a period of 3 months before it was returned to him. (Tr. 108, 110, 128, IO Ex. 10c).

23. On May 12, 2005 the day of this incident, Southern Towing Company terminated Respondent for refusing to submit to a chemical drug test. (Tr. 51, IO Ex. 5).

24. Respondent previously refused to submit to another chemical drug test in 1999. (Tr. 140-41, IO Ex. 11).

DISCUSSION

The purpose of Coast Guard suspension and revocation proceedings is to promote safety at sea. See 46 U.S.C. 7701. Title 46 CFR 5.19 gives Administrative Law Judges authority to suspend or revoke a merchant mariner's license or document in a hearing for violations arising under 46 U.S.C. 7703. Under 46 U.S.C. 7703(1)(B), a Coast Guard issued license or document may be suspended or revoked if the holder when acting under the authority of that license or certificate has committed an act of misconduct. Misconduct is defined as the violation of some formal, duly established rule. 46 CFR 5.27. These rules are found in statutes, regulations, the common law, a ship's regulations, and other similar sources. Id.

The Coast Guard alleges Respondent committed Misconduct by refusing to submit to a chemical test and by possessing materials that could be used to adulterate or substitute a chemical test. For the reasons stated below, I find that the Coast Guard has proven that Respondent committed Misconduct by refusing to submit to a reasonable cause chemical test on May 12, 2005; however, the Coast Guard failed to prove that Respondent committed Misconduct by possessing materials that could be used to adulterate or substitute a urine sample during a chemical test.

Refusal to Test

The term "refusal to submit" is defined as a refusal to take a drug test as set out in 49 CFR 40.191. See 46 CFR 16.105. Under 49 CFR 40.191(a), a mariner refuses to take a drug test if the mariner, among other things:

- Fails to remain at a testing site until the testing process is complete;

- Fails to provide a urine specimen for any drug test required by any DOT agency regulations; or
- Fails to cooperate with any part of the testing process.

Chemical testing for merchant marine personnel is governed by 46 CFR Part 16. Specifically, 46 CFR 16.250 describes the reasonable cause testing requirements. An employer shall require any crewmember that is reasonably suspected of using a dangerous drug to be chemically tested for dangerous drugs. 46 CFR 16.250(a). The employer's decision to test must be based on a reasonable and articulable belief that the individual used a dangerous drug. 46 CFR 16.250(b). Also, the individual must be informed of the chemical test and directed to provide a urine sample. 46 CFR 16.250(c).

Here, a police dog "hit" on a package containing marijuana which was to be taken aboard the M/V LAURA TAMBLE. The Coast Guard notified Southern Towing Company of this discovery. (Tr. 40). The company relied on this information and had a reasonable belief that a crew member aboard the M/V LAURA TAMBLE was using illicit drugs. This information prompted Southern Towing Company's decision to order a reasonable cause drug test on the entire crew, including the relief crew. Respondent, the relief Captain of the M/V LAURA TAMBLE, was subject to this test. Upon Respondent's arrival at the M/V LAURA TAMBLE, he observed a police presence and spoke to a crew member on the telephone. (Tr. 137). At that time Mr. Frayser was informed that the reason for the police presence was that they were looking for marijuana. Id. Petty Officer Malone subsequently directly ordered Respondent to submit to a chemical test. (Tr. 101-02).

At that point, Respondent informed Petty Officer Malone and Petty Officer Clifford that he was through with the business of sailing. "He [Respondent] no longer wanted to work in this

business, no longer wanted to drive boats in the capacity of a Captain . . . he was done with the business, he was done with this job.” (Tr. 93, 110). Also, Mr. Frayser stated to the Coast Guard officials that he wanted to give up his license:

He [Respondent] said he was planning on quitting, he was always planning on quitting . . . he said that he wanted to, you know, give up his license. . . I [Respondent] want to give up my license right now. (Tr. 110-11).

Despite the order of the Coast Guard Petty Officer, the Respondent refused to submit to a chemical test. (Tr. 93, 110, IO Ex. 1).

Moreover, Respondent admitted at the hearing that he refused to submit to the ordered reasonable cause drug test. (Tr. 138). Mr. Frayser left the testing site and failed to provide a urine specimen in accordance with 49 CFR 40.191. After reviewing all the evidence related to this Factual Allegation, I find Respondent refused to submit to the reasonable cause drug test ordered on May 12, 2005.

Possession of Materials Used to Adulterate a Chemical Test

In order to prove an act of Misconduct a mariner must be found to have violated a duly established law. The duly established law the Coast Guard relies on in connection with the second Factual Allegation (the possession of materials used to adulterate and/or substitute a chemical test) is Kentucky Revised Statute § 516.101. That statute prohibits a person from using any product to “alter the results of a test designed to detect the presence of alcohol or a controlled substance in that person.” Ky Rev. Stat. § 516.101(1)(b).

First, I find that there is no evidence that the pills found 5 feet from the truck in the parking area near the collection site on May 12, 2005 could be used to adulterate a chemical drug test. There are no markings on the pills and no laboratory analysis was performed on the pills to determine their chemical composition and their effect on illicit drug metabolites in human urine.

See (Tr. 99). Second, the standard of proof applicable to a Coast Guard Suspension and Revocation hearing is the preponderance of the evidence. That is, the evidence in support of the allegations in the Complaint must be substantial, reliable and probative. Appeal Decision 2485 (YATES); 33 CFR 20.701. Petty Officer Malone testified that Respondent discarded the vial of urine underneath the truck. (Tr. 96). Kentucky Revised Statute § 516.110(1)(b) specifically states that a person must use the product to alter the results of a test designed to detect the presence of a controlled substance. Respondent never submitted to a chemical test and left the testing site in violation of the order to take the test issued by Malone. Thus, Mr. Frayser did not use the vial of urine to alter the results of a chemical test. There simply was no violation of Kentucky Revised Statute § 516.101. Thus, I find the second allegation is not proved and is DISMISSED.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent and the subject matter of the 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 held Merchant Mariner's License Number 1005535, and thus was subject to reasonable cause drug testing under 46 U.S.C. 7702(c)(2) and 46 CFR. 16.250.

3. Respondent was acting under the authority of his license when on May 12, 2005, he refused to submit to a reasonable cause drug test.

4. The Coast Guard PROVED by a preponderance of reliable and credible evidence that on May 12, 2005, Respondent was ordered to submit to a reasonable cause drug test and that he failed to provide a urine sample. Such action constitutes a refusal to test under the above discussed regulations.

5. The Coast Guard did NOT PROVE by a preponderance of reliable and credible evidence that on May 12, 2005, Respondent was in possession of materials used to adulterate or substitute a chemical test.

SANCTION

The authority to impose sanctions at the conclusion of a case is exclusive to the presiding judge. Appeal Decision 2362 (ARNOLD). Title 46 CFR 5.569 provides the Table of Suggested Range of Appropriate Orders (Table) for various offenses. The purpose of the Table is not to bind the judge, but to provide guidance to the ALJ and promote uniformity between orders rendered. Appeal Decision 2628 (VILAS). A judge may exceed the suggested range or impose a sanction less severe when aggravating or mitigating factors are present. Id.

The suggested sanction for refusal to submit to a drug test is a 12-24 month suspension. See 46 CFR Table 5.569. Here, the Coast Guard is seeking revocation of Respondent's license. The decision to revoke a respondent's license for a refusal to test is not excessive or an abuse of discretion. Appeal Decision 2578 (CALLAHAN). The National Transportation Safety Board determined that a respondent's document or license may be revoked for a refusal to test if aggravating facts are clearly articulated in the case. Commandant v. Moore, NTSB Order No. EM-201 (2005).

Based upon my review of all the facts presented at hearing, I conclude that the appropriate sanction here is a 24-month suspension. The Coast Guard proved through witness testimony and exhibits that Respondent was ordered to submit to a drug test on May 12, 2005 and that he refused to comply. Indeed, Respondent admitted at the hearing that he did refuse to take the drug test. An aggravating factor presented here is that Mr. Frayser previously refused to

submit to a drug test in 1999. The Respondent understood very well the consequences of his action here. Thus, I find that a 24-month suspension is an appropriate sanction.

Further, Mr. Frayser surrendered his license to the Coast Guard when he refused to submit to the drug test without completing a Voluntary Surrender Agreement. The license was held for a period of three months before being returned to Respondent. Title 46 CFR 5.567 states that the time period of any outright suspension commences when the license is surrendered to the Coast Guard. “A suspension period runs only when the document is in Coast Guard possession.” Appeal Decision 1920 (CRESSFORD). Thus, because the Coast Guard held Respondent’s license without a Voluntary Surrender Agreement, that period of time is included as part of Respondent’s suspension. Mr. Frayser was without his license for a period of three months, thus, Respondent’s suspension will be reduced to a 21-month suspension.

ORDER

IT IS HEREBY ORDERED that Merchant Mariner's License Number: 1005535, and all other valid licenses, documents, and endorsements, issued by the Coast Guard to Gary Wayne Frayser are SUSPENDED for a period of 21 MONTHS. The 21-month suspension commenced on December 1, 2005 after the Coast Guard took possession of Respondent's license at the hearing.

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 B).

**PETER A. FITZPATRICK
ADMINISTRATIVE LAW JUDGE
U.S. COAST GUARD**

Done and dated March 13, 2006 at
Norfolk, Virginia

ATTACHMENT A - WITNESS AND EXHIBIT LISTS

WITNESS LIST

GOVERNMENT'S WITNESSES

1. Frank Hollomon, Southern Towing Company
2. Bobby Dean Jones, Southern Towing Company
3. Barry M. Goddard, Maritime Consultants
4. Officer Steven Morgan, Owensboro Police Department
5. Detective Randall Boling, Owensboro Police Department
6. Petty Officer Michael Malone
7. Petty Officer David Clifford
8. Lieutenant Christopher Rose

RESPONDENT'S WITNESSES

1. Gary Wayne Frayser

EXHIBIT LIST

GOVERNMENT'S EXHIBITS

- IO Ex. 1 – Statement from Michael Malone
- IO Ex. 2 – Statement from Detective Randy Boling
- IO Ex. 3 – Statement from Officer Steve Morgan
- IO Ex. 4 – Statement from David Clifford
- IO Ex. 5 – Termination Letter from Southern Towing Company
- IO Ex. 6 – Motion to Allow Telephonic Testimony of David Clifford
- IO Ex. 7 – Southern Towing Companies Drug and Alcohol Policy

IO Ex. 8 – Gary Frayser’s Training Record

IO Ex. 9 – Kentucky Revised Statute 516.108, 516.110

IO Ex. 10a – June 22, 2005 Letter from C.A. Rose to Gary Wayne Frayser

IO Ex. 10b – May 18, 2005 Letter from C.A. Rose to Gary Wayne Frayser

IO Ex. 10c – Unsigned Voluntary Surrender Agreement

IO Ex. 11 – July 28, 1999 Report of Hearing for Gary Wayne Frayser

IO Ex. 12 – Letter from Gary Wayne Frayser concerning 1999 Refusal to Test

IO Ex. 13 – Coast Guard License Number 1005535 issued to Gary Wayne Frayser

RESPONDENT’S EXHIBITS

Resp’t Ex. A – Answer to Paragraph 1 of the Complaint

Resp’t Ex. B – Answer to Paragraph 2 of the Complaint

ATTACHMENT B - NOTICE OF ADMINISTRATIVE APPEAL RIGHTS

[REDACTED]