

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

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Complainant

vs.

GUS JOHNS,

Respondent.

Docket Number CG S&R 04-0430  
CG Case No. 2170580

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U.S. DEPARTMENT OF HOMELAND SECURITY

**ORDER DENYING RESPONDENT'S THIRD MOTION TO REOPEN  
PROCEEDINGS**

**Issued : March 8, 2007**

**Issued by: Walter J. Brudzinski, Administrative Law Judge**

This matter came to be heard on Respondent's Third Motion to Reopen received at the ALJ Docketing Center in Baltimore on January 29, 2007 and subsequently forwarded to the undersigned for adjudication on February 6, 2007. In his Third Motion to Reopen, Respondent states that he "feels the basis for revocation is no longer valid . . . that he has not had any negative incidents with law enforcement . . . has completed an assessment and classroom program . . . has been gainfully employed . . . that his documents were revoked because of a refusal to submit to chemical drug tests . . . a misunderstanding on my part . . . good work history, along with a (negative) criminal history . . . and, the maritime industry is in need of experienced and knowledgeable operating engineers. . . ."

### Background

On August 19, 2004, the Coast Guard issued a Complaint alleging that the analysis of Respondent's urine specimen obtained from a random drug test revealed that it had been altered. Subsequently, the Respondent was charged with wrongfully refusing to submit to a required chemical test.

On August 27, 2004, Respondent entered into a Misconduct-Refusal to Test Settlement Agreement. The Agreement provided, among other things, that Respondent enroll in and successfully complete drug rehab by February 25, 2005; attend a substance monitoring program (such as AA/NA) for a minimum period of one-year following successful completion of the drug rehabilitation program; participate in a random, unannounced drug testing program following successful completion of the drug rehabilitation program during which time the Respondent is to undergo at least 12 random drug tests conducted in accordance with DOT procedures under Title 49 CFR Part 40; obtain and file a copy of the Medical Review Officer's (MRO) letter indicating that Respondent is drug-free and that the risk of Respondent's subsequent use of dangerous drugs is sufficiently low to justify return to work. The Respondent and the Investigating Officer submitted their Joint Motion for Approval of Settlement Agreement and Entry of Consent Order on that same day.

On September 2, 2004, the undersigned reviewed the Agreement and, finding it to be fair, reasonable, and in substantial compliance with the requirements of 33 CFR 20.502, issued a Consent Order Approving Settlement Agreement. The Consent Order states that it constitutes the full, final, and complete adjudication of this proceeding. It was faxed to the Investigating Officer and mailed to the Respondent that same day. Shortly thereafter, the case file was closed and forwarded to the ALJ Docketing Center.

### First Motion to Re-Open

On September 2, 2004, the ALJ Docketing Center received two letters from Respondent, one dated August 24, 2004 and the other dated August 30, 2004. Both letters were not part of the record when the undersigned reviewed the file and issued the Consent Order. In the August 24<sup>th</sup> letter, Respondent states that it is the written answer to the Complaint issued by the Coast Guard in his case. He states that he does not contest any of the allegations in the Complaint; that he did donate the urine specimen; and that he adulterated the specimen. Further, Respondent states that he "had attended a wedding the day prior [to the test] and had indulged in about 8 poppy seed cakes and panicked, fearing a false positive would show up." He went on to say that he has been working under his license since 1982 and had never had drug or alcohol addictions.

In the August 30<sup>th</sup> letter, Respondent states, Recognizing that I signed the 'Motion for Approval of Settlement Agreement and Entry of Consent Order' on 27 August 2004 under duress, (emphasis added) statement 5 states that I waive any right to appeal, however, I did not read this until now, 30 Aug. '04. I did wish to file an appeal because I feel that I have been a victim of misunderstanding, as a refusal to submit to a chemical drug test was not based on a drug or alcohol use, but simply a misunderstanding on my part, as stated, I over-indulged in poppy seed cakes the day before and was told it would bring a false positive on the pre-employment U/A. I offered to re-test that day but was told it was up to the company. The MRO already filed the results with the C.G. as I was enroute via airplane to the shop and could not be reached. Is it still possible to file an appeal after signing the agreement? Enrolling in a drug rehabilitation program would be pointless as I have not been exposed to drugs or drug use since returning from Viet-Nam service in 1970. I have pursued a drug and alcohol free sea-going career for the past 29 years and at my age cannot find alternative employment. Thank you for your consideration.

Because Respondent's letters were not clear whether he was attempting to appeal (which he waived in his Settlement Agreement) or was attempting to have the Consent Order vacated and his case reopened, the ALJ Docketing Center returned the case file to the undersigned for further action as appropriate.

The Coast Guard Investigating Officer submitted a written response in the form of a sworn affidavit opposing reopening. He also details the circumstances surrounding the settlement discussions and Respondent's decision to enter into an agreement as being in his best interest.

In my Order of September 23, 2005, I found that Respondent did not present any change in fact or law or otherwise show good cause sufficient to justify reopening this case. Further, I found nothing in the public interest to warrant reopening. Respondent admitted the facts alleged in the Complaint. He entered into the Settlement Agreement freely, without reservation or duress. The Investigating Officer informed him that a condition of the Settlement Agreement required that he attend and successfully complete a substance abuse rehabilitation treatment program. Respondent indicated that it was okay with him since he did not have a drug problem and he was glad that his license and MMD were not going to be revoked. Further, I found no evidence that the Coast Guard made a threat to Respondent.

#### Second Motion to Re-Open

On August 20, 2006, Respondent once again motioned to Re-Open this case. Respondent's motion was almost word for word the same as his initial motion of August 24, 2004. However, he attached a three page, undated letter entitled "In depth statement of facts." In that statement of facts, Respondent states that he had successfully completed the drug assessment program and that the alcohol and substance abuse Outpatient Treatment Coordinator could not recommend nor enroll him in a substance abuse monitoring program because there was insufficient evidence of chemical dependency and that he could skip part "c" and part "d" of the Settlement Agreement (one year period and 12 random, unannounced drug tests). He stated that his successful completion of alcohol and drug information school is sufficient to satisfy the requirements and that it would be illegal for him to enroll in that one year program.

The Investigating Officer stated that Respondent has provided no evidence that he has completed paragraphs 2c, 2d, and 2e of the Settlement Agreement which was supposed to be completed by February 23, 2005. Further, the Investigating Officer stated that the MRO sent a letter stating that the "Respondent to date has failed to follow up with him on any of the terms required in the Coast Guard Settlement Agreement." The Investigating Officer stated that Respondent was informed that if he failed to provide evidence and documentation demonstrating completion of the conditions of this Agreement by February 23, 2005, his credentials would be revoked. Therefore, on September 13, 2006, I found that Respondent had failed to complete paragraphs 2c, 2d, and 2e of the Settlement Agreement and denied his second Motion to Re-Open. I also found that "[m]erely providing a name and phone number of the alcohol and substance abuse outpatient treatment coordinator does not discharge his obligations under the Settlement Agreement which specifically provides that the MRO will determine whether Respondent is drug free . . . ."

#### Notice of Failure to Complete Settlement Agreement

The Coast Guard had rejected Respondent's evidence of completion and on September 15, 2006, the Investigating Officer filed his Notice of Failure to complete Settlement Agreement. Under the terms of the Agreement, the records at the ALJ Docketing Center and Respondent's Merchant Mariner's Records will be modified to reflect that the stayed order is in full force and effect unless the Respondent requests a hearing before an Administration Law Judge by filing a written request with the Hearing Docket Clerk within 10 days after receiving the notice of failure to complete. Respondent did not file a request for hearing. Therefore, his license and document have been revoked in accordance with the terms of the Settlement Agreement.

### Third Motion to Re-Open

In Respondent's Third Motion to Re-Open, he invokes the administrative clemency aspects of 33 CFR 20.904(f) which specifically provides that

Three years or less after an S&R proceeding has resulted in revocation of a license, certificate, or document, the respondent may file a motion for reopening of the proceeding to modify the order of revocation with the ALJ Docketing Center.

- (1) Any motion to reopen the record must clearly state why the basis for the order of revocation is no longer valid and how the issuance of a new license, certificate, or document is compatible with the requirement of good discipline and safety at sea.
- (2) Any party who does not respond to any petition to reopen the record waives any objection to the motion.

Respondent's motion states that he feels the basis for revocation is no longer valid. However, Respondent introduces no evidence why it is no longer valid. Further, Respondent does not present any evidence demonstrating substantial compliance with the terms of the Settlement Agreement he entered into on August 27, 2004. No facts have changed since his first motion to re-open was denied. His position appears to be that his obligation to complete the terms of the Settlement Agreement was discharged by the substance abuse outpatient treatment coordinator's opinion.

The Coast Guard's response objects to the Motion to Re-Open because "Respondent failed to complete the following conditions: attend a substance abuse monitoring program such as (AA/NA) for a minimum period of one-year following successful completion of the drug rehabilitation program; participate in a random, unannounced drug-testing program for a minimum period of one-year following successful completion of the drug rehabilitation program, which involved completing

twelve (12) random drug tests conducted in accordance with Department of Transportation procedures found in Title 49, Code of Federal Regulations (CFR), Part 40; and Obtain and file a copy of the Medical Review Officer (MRO) letter that indicates the respondent is drug free and the risk of respondent's subsequent use of dangerous drugs is sufficiently low to justify return to work."

Respondent's problems began when he adulterated his specimen. He exacerbated his problems by failing to comply with the terms of the Settlement Agreement. This noncompliance formed the basis upon which his license and document were revoked. His Third Motion to Re-Open advances no evidence why the basis for that revocation is no longer valid and that issuing a new license and document are compatible with the requirement of good discipline and safety at sea.

WHEREFORE,

**ORDER**

**IT IS HEREBY ORDERED** that Respondent's Third Motion to Re-Open is **DENIED**.

Done and dated March 8, 2007  
New York, NY



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**WALTER J. BRUDZINSKI**  
Administrative Law Judge  
United States Coast Guard