

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

UNITED STATES COAST GUARD

Complainant

vs.

JOEY R. BROUSSARD

Respondent.

Docket Number: CG S&R 06-0009
CG Case No. 2554787

DECISION AND ORDER

Issued: April 13, 2007

Issued by: Thomas E. P. McElligott, Administrative Law Judge

Appearances:

For Complainant

LT John Luff and LTJG Andrew Preston, both stationed at the time at the U.S. Coast Guard
Marine Safety Unit Morgan City, 800 David Drive, Morgan City, Louisiana 70380

For Respondent

Captain Joey R. Broussard, pro se

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PRELIMINARY STATEMENT

The United States Coast Guard ("Coast Guard") initiated this administrative action seeking revocation of the merchant mariner's document and license issued to Joey R. Broussard, the respondent in this case ("Respondent"). In a complaint dated January 5, 2006, the Coast Guard alleged that Respondent committed Misconduct in violation of 46 U.S. Code ("U.S.C.") 7703(1)(b) and 46 Code of Federal Regulations ("CFR") 5.27, by refusing to take a reasonable suspicion drug test requested by his marine employer. The complaint was served personally upon the Respondent by one of the Investigating Officers ("IOs") stationed at the same office in Morgan City, Louisiana. The complaint alleged that Respondent is the holder of a Merchant Mariner's License and Document. The factual allegations for Misconduct read as follows:

- "1. On 03 December 2005, Respondent was employed by International Boats, LLC.
- "2. A REASONABLE SUSPICION DRUG / ALCOHOL SCREEN WAS REQUESTED BY INTERNATIONAL BOATS, LLC ON 03 DECEMBER 2005.
- "3. The Respondent REFUSED to submit the requested sample."

On January 6, 2006, Respondent submitted a handwritten Answer to the complaint wherein he admitted the jurisdictional allegation, and denied the factual allegations stating "DID NOT REFUSE DRUG/ALCOHOL SCREEN". Respondent, in his signed Answer to the complaint, also checked the box indicating that he wished to be heard on the proposed order.

An evidentiary hearing was held on September 27, 2006 at the United States Coast Guard Marine Safety Office in Morgan City, Louisiana. At the hearing, the Coast Guard offered the following exhibits which were admitted into evidence by the Administrative Law Judge:

Investigating Officer's (IO) Exhibit 1 is a letter from International Boats, LLC, of P.O. Box 1580, Larose, Louisiana 70373, dated December 15, 2005. The letter was addressed to the Marine Safety Office (MSO) Morgan City, at 800 David Drive, Room 243, Morgan City,

Louisiana 70380-1304, to the attention of the Investigations Department. It states in paragraph one, "Pursuant to provisions of 46 CFR, Parts 4, 5, and 16, International Boats, LLC hereby notifies you that Joey Broussard ... failed to show up to be tested for probable cause on December 3, 2005 in accordance with the standard set forth in 49 CFR 40." The letter also gave Respondent's last known address and phone number and was signed by Kathy Dufrene, HR / HSS&E Manager.

IO Exhibit 2 is a document entitled "SEPARATION NOTICE ALLEGING DISQUALIFICATION" of Joey Broussard, with separation date of December 9, 2005, date hired June 8, 2004, and date last worked December 3, 2005. The reason for leaving was checked "Discharge, (Fired)" and the explanation was "Broke company policy". The document is dated December 9, 2005 and signed by a manager for the employer company.

IO Exhibit 3 consists of three (3) pages of the "MASTER BOAT LOGS" for the vessel involved.

IO Exhibit 4 consists of six (6) forms. The first page is the document entitled "ALCOHOL AND CONTROLLED SUBSTANCE TEST CONSENT", signed by the Respondent, applicant and employee, with his printed name, Joey Broussard, dated June 8, 2004 and witnessed by someone at the company for International Boat Rentals, Inc. The first paragraph of this document states, "I understand that as a condition of employment, I must voluntarily consent to and satisfactorily complete urine screening tests to determine the presence of certain substances and/or a breath, blood alcohol test to determine the presence of alcohol." The second paragraph states, "As a candidate for employment, I understand that the presence of unauthorized drugs/medications will disqualify me from further consideration from employment."

The second page of IO Exhibit 4 is entitled "SUBSTANCE ABUSE POLICY". Again, it is signed by the Respondent on June 8, 2004. The first paragraph states, "INTERNATIONAL BOAT RENTALS, INC. strictly forbids the use of mood altering substances by employees while on the job. This includes the property of INTERNATIONAL BOAT RENTALS, INC. any of its customers, and any transportation to or from the job site."

The third page of IO Exhibit 4 is entitled "ACKNOWLEDGEMENT FORM", and it is signed by Respondent Joey Broussard, with his printed name, a company representative's signature and dated June 8, 2004. It states, "I HAVE READ OR HAVE HAD READ TO ME THE CONTENTS OF THE COMPANY POLICY ON DRUGS AND ALCOHOL MISUSE PREVENTION. I FULLY UNDERSTAND AND FURTHER AGREE TO ABIDE BY THESE POLICIES AND PROCEDURES. I FURTHER UNDERSTAND DISCIPLINARY ACTION, UP TO AND INCLUDING TERMINATION, WILL BE TAKEN IF I AM FOUND TO BE IN VIOLATION OF THIS POLICY."

The fourth page of IO Exhibit 4 is entitled "APPENDIX A EMPLOYEE CERTIFICATE OF UNDERSTANDING AND AGREEMENT", signed by Respondent Joey Broussard, on June 8, 2004, containing Respondent's signature and printed name. The first paragraph states, "I, the undersigned, certify that I have read and understand INTERNATIONAL BOAT RENTALS, INC. Policy Statement regarding Alcohol and drug Use and have received a copy of that policy."

The fifth page of IO Exhibit 4 is entitled "ACKNOWLEDGEMENT USCG AND NOT-DOT POLICY". It is signed by Respondent Joey Broussard and a supervisor or witness on June 8, 2004. It reads:

"By my signature below, I, (please print) _____ hereby acknowledge that I have read (or it has been read to me) and understand the guidelines regarding compliance with the Department of Transportation U.S. Coast Guard 46 CFR

Parts 4, 5, 16 and Compliance with Drug Free Act of 1988, 41 U.S.C. 701 ET. SEQ. I also understand that these policies will be left on display for any future references.

"I agree to cooperate and abide by those policies and understand that any failure to do so on my part may be grounds for removal from safety sensitive positions and/or termination."

The sixth and last page of IO Exhibit 4 is entitled "ACKNOWLEDGMENT & CONSENT". It again shows the Respondent's signature and printed name, dated June 8, 2004. On the bottom of that form it reads, "Consent and authorization for disclosure to ExxonMobil of alcohol and drug test results and related information."

IO Exhibit 5 is entitled "International Boat Rentals, Inc. Safety Orientation" This page has the personnel name written on top, Joey Broussard, and signed by Joey Broussard and dated June 8, 2004. At the bottom it reads, "I hereby acknowledge that International Boat Rentals, Inc. office personnel have informed me of the following information."

All five (5) of these exhibits were admitted into evidence by the U.S. Administrative Law Judge presiding at the trial-type hearing.

The IO called two witnesses who testified under oath. The first witness was Ms. Kathy Dufrene, a Human Resources/Safety Manager for International Boats, LLC, of Larose, Louisiana. She testified that the Respondent was presented with the company's drug and alcohol policies upon initial employment and that he signed the acknowledgement forms then indicating that he had read and understood the policy and would abide by its provisions as a condition of employment. She further testified that the Respondent violated the company's written drug and alcohol policies on December 03, 2005 and that his employment was terminated as a result.

The second witness was the Personnel Coordinator for International Boats, LLC, of Larose, Louisiana, Mr. Kelly Loupe. He testified that as the Respondent's Supervisor, he directed the Respondent to submit to chemical testing on December 03, 2005 and that the

Respondent did not comply with this direction. He further testified that the Respondent was employed as a Master of the Motor Vessel (M/V) INT'L COMMANDER, on December 03, 2005.

Respondent offered two exhibits which were admitted into evidence by the undersigned judge.

Respondent Exhibit 1 is on the letterhead of Gulf Resource Management, a marine transportation company. It is entitled "Release of Information Form – 49 CFR Part 40 Drug and Alcohol Testing". The employer is International Boats Rentals, of Larose, Louisiana 70373, phone number 985-798-7066 and fax number 985-798-7619.

Respondent Exhibit 2 is the same type of document from Gulf Resource Management, containing Respondent's signature and dated December 06, 2005. Respondent Exhibit 2 states in the lower paragraph 3, "Did the employee refuse to be tested?" The answer is circled as "Yes".

FINDINGS OF FACT

1. At all relevant times herein mentioned and specifically on or about December 03, 2005, Respondent was a holder in possession of a U.S. Coast Guard issued Merchant Mariner's Document and License Number 1013725 authorizing him to serve as a master of steam or motor vessels. (*Tr. 7-10*).
2. At all relevant times, Respondent was employed by International Boats, LLC, ("International Boats" or "company") of Larose, Louisiana 70373. (*IO Ex. 1; 3*).
3. International Boats operates the M/V INIT COMMANDER, which bears official number 601846. That vessel is required to have a licensed master and mate on board. (*Tr. 55-56*).

4. When Respondent was first hired by International Boats on or about June 8, 2004, he signed the company's: a) Alcohol and Controlled Substance Test Consent form; b) Substance Abuse Policy; c) Acknowledgement Form; d) Appendix A: Employee Certificate of Understanding and Agreement; e) Acknowledgement: USCG and Non-DOT Policy; and f) the Acknowledgement and Consent form (collectively referred to as "International Boats Substance Abuse Policy Agreements". (*IO Ex. 4*).
5. By signing International Boats Substance Abuse Policy Agreements on June 8, 2004, Respondent certified that he read, understood, and received a copy of company's drug and alcohol policy; agreed to submit to drug and alcohol testing (including random testing); and acknowledged that he understood that disciplinary action, including possible termination, could result if the presence of prohibited drugs or alcohol is detected following urine, breath, or blood alcohol screening or testing. (*Id.*; *Tr. 29-35*).
6. Ms. Cathy Dufrene, human resources and safety manager for International Boats went over the company's drug and alcohol policy with Respondent when he was first hired, on or about June 8, 2004. (*IO Ex. 5*; *Tr. 36-38*).
7. In late 2005, International Boats received two separate reports of Respondent's alleged drug use or abuse: one report was received from an employee working on the vessel and the other report was received from a customer. (*Tr. 40-41, 52-54, 57, 66-67*).
8. At some point in time in December 2005, Mr. Jared Chaisson, personnel manager for International Boats, confronted Respondent and Respondent opted to be relieved of duty. (*Tr. 54, 57-58*).
9. International Boats believed that request was for temporary relief of duties. (*Tr. 57*).

10. On December 03, 2005, Respondent was serving as master on board the M/V INIT COMMANDER. (*IO Ex. 3*).
11. On or about December 03, 2005, upon his supervisor's request, Mr. Kelly Loupe, personnel coordinator for International Boats talked to Respondent on the telephone, he directed Respondent to come directly to the office from the vessel, M/V INIT COMMANDER, and he directed Respondent to undergo a urine drug screen test to alleviate the company's concerns regarding Respondent's alleged drug use. (*Tr. 50, 58-61, 66*).
12. Respondent agreed to come in to speak with International Boats personnel and submit to drug testing but he never showed up at the office on December 03, 2005. (*Tr. 42, 61*).
13. On December 04, 2005, Respondent telephoned International Boats and provided the company his notice of termination. (*Id.*).
14. On December 06, 2005, Respondent accepted employment with Gulf Resource Management, which is a company that is located closer to his home and which offers a better salary than International Boats. (*Resp't Ex. 1, 2; Tr. 70-71, 76-77*).
15. In a Gulf Resource Management drug and alcohol testing release form dated December 06, 2006 in Section 1, Respondent authorized release of information from his Department of Transportation regulated drug and alcohol testing records from his previous employer, International Boats. (*Resp't Ex. 1, 2*).
16. On December 07, 2005 at 13:51 local time, International Boats faxed the drug and alcohol testing release form to Gulf Resource Management. In Section 2.A. of the form, International Boats circled "No" in response to question 3 which stated in the two years

to the date of the employee's signature (in Section 1), for DOT regulated testing "Did the employee refuse to be tested?" (*Resp't Ex. 1; Tr. 78-79*).

17. Approximately one hour later, at approximately 14:52 on December 07, 2005, International Boats faxed a second drug and alcohol release form to Gulf Resource Management. In Section 2.A of the second form, the response to question 3 (Did the employee refuse to be tested?) was changed from "No" to "Yes."
18. Except for the different response to question 3 of Item 2.A, the two forms appear to be identical. (*Compare Resp't Ex. 1 and 2*). However, the Coast Guard argues that the two forms are not identical, one deals with alcohol and the other deals with drugs. (*Tr. 91-92*).
19. On or about December 09, 2005, International Boats discharged Respondent for breaking company policy. (*IO Ex. 2*).

DISCUSSION

The U.S. Administrative Procedure Act (APA), 5 USC 551-559, governs Coast Guard suspension and revocation trial-type hearings. 46 USC 7702(a). The APA only authorizes sanctions to be imposed if upon consideration of the entire record considered as a whole the charges are proved and supported by reliable, probative, and substantial evidence. 5 USC 556(d). "The term substantial evidence is synonymous with preponderance of the evidence as defined by the [U.S.] Supreme Court." Appeal Decision 2477 (TOMBARI) (1988). The burden of establishing or proving something 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, 371-372 (1970). (Harlan, J., concurring) (brackets in original)). Under the APA and Coast Guard regulations, the Coast Guard Investigating Officers representing the Coast Guard at the hearing bear the burden of proving the charges by a preponderance of the evidence. 33 CFR 20.701, 20.702(a). Therefore, to prevail, the Coast Guard Investigating Officers must prove with reliable and probative evidence that Respondent more likely than not committed the violations charged. In this case, the Coast Guard's Complaint alleged that Respondent committed Misconduct in violation of 46 U.S.C. 7703(1)(b) and 46 CFR 5.27 by refusing to take drug and alcohol screen tests.

I. Amendment of the Jurisdictional Allegations in the Complaint

As a preliminary matter, the complaint appears to be defective on its face. In paragraph 2 of the jurisdictional allegations of the complaint, the Coast Guard only alleges that "Respondent holds the following Coast Guard issued credential(s): CG License 1013725 and CG Merchant Mariners Document." The Coast Guard failed to allege that Respondent was acting under the authority of his license and document while serving as master on board the M/V INIT COMMANDER. However, this defect does not demand dismissal of the case. This is especially true given the fact that the jurisdictional issues were fully litigated at the hearing and Respondent had an opportunity to cross-examine witness on this particular issue. Accordingly, the jurisdictional allegation is amended to conform to the evidence and proof.

Sua sponte amendments by the judge after the conclusion of a hearing are not unheard of in these administrative proceedings. See Appeal Decision 2630 (BAARSVIK) (2002); Appeal Decision 2393 (STEWART) (1982). The test of whether a pleading may be amended is not based on timing of the amendment. Rather, it is based on whether there has been actual notice

and opportunity to litigate the amended allegation. See BAARSVIK (citing Kuhn v. Civil Aeronautics Board, 183 F.2d 839, 841 (D.C. Cir. 1950)). In Kuhn, the court stated that “[t]he whole thrust of modern pleading is towards fulfillment of a notice-giving function . . . [and] [i]t is now generally accepted that there may be no subsequent challenge of issues which were actually litigated, if there has been actual notice and adequate opportunity to cure surprise.” 183 F.2d at 841-42. In Appeal Decision 1792 (PHILLIPS) (1970), the Commandant relied on the Kuhn decision in finding that the ALJ has authority to make necessary amendments to conform specifications to the proof. Consistent with Kuhn, 33 CFR 20.305 states:

“ ... no amendment or supplement may broaden the issues without an opportunity for any other party or interested person both to reply to it and to prepare for the broadened issues.”

The Kuhn doctrine is recognized as an effective administrative tool when used to make amendments to pleadings to avoid unreasonable delay in proceedings and unnecessary dismissal of charges. See Appeal Decision 2326 (MCDERMOTT) (1983); PHILLIPS. However, where the amendment constitutes a substantial change of the pleading or there is sufficient reason to believe that all of the issues surrounding the change might not have been raised at hearing, the Commandant has held that it is inappropriate to invoke the Kuhn doctrine. See BAARSVIK, Appeal Decision 2326 (MCDERMOTT) (1983), Appeal Decision 1956 (HANSON) (1973).

In the case sub judice, the defect in the jurisdictional allegations of the complaint was cured by the evidence that showed that a U.S. Coast Guard issued licensed master and mate was required on board the M/V INIT COMMANDER. Respondent was given an opportunity to cross-examine witnesses on this particular issue. Accordingly, I find it appropriate to sua sponte invoke the Kuhn doctrine and amend the complaint to conform to the proof.

II. The Coast Guard Proved Jurisdiction

Past Commandant Decisions on Appeal state that jurisdiction is critical to the validity of a proceeding. See Appeal Decision 2656 (JORDAN) (2006). To establish jurisdiction for a Misconduct case, 46 U.S.C. 7703(1)(b) requires the misconduct to have been committed while the holder was "acting under the authority of" the holder's merchant mariner credential. The term "acting under the authority" is defined 46 CFR 5.57. The regulatory definition includes situations when the holding of a U.S. Coast Guard issued license or document is "[r]equired by an employer as a condition for employment." See 46 CFR 5.57.

The record evidence shows that Respondent was acting under the authority of his U.S. Coast Guard issued license and/or document on December 03, 2005. Personnel from Respondent's former employer, International Boats, specifically testified under oath that a licensed master and mate were required on the M/V INIT COMMANDER. (*IO Ex. 3; Tr. 55-56*). Therefore, jurisdiction is sufficiently established.

III. The Coast Guard Proved 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. In this case, some of the applicable regulations are 49 CFR 40.191 and 46 CFR 16.105.

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 U.S. 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).

A mariner's refusal or failure to submit to required drug/alcohol testing constitutes Misconduct within the meaning of 46 CFR 5.27. See generally Appeal Decision 2641 (JONES) (2003) (affirming judge's finding of Misconduct proved based on mariner's refusal to submit to drug testing ordered by employer); Appeal Decision 2615 (DALE) (2000); but see 46 CFR 5.569 (listing refusal to take chemical drug test and required alcohol test as a "violation of regulation").

In this case, the employer's reasonable suspicion was based on two separate reports from an employee and customer that the Respondent was using or abusing drugs in a pill form and was acting as if he was under the influence of "something". (*Tr. 40-41, 52-54, 57, 66-67*). The issue in this case is whether Respondent's actions on December 03, 2005 constitute a refusal to submit to drug testing within the meaning of 46 CFR 16.105 and 49 CFR 40.191. The parties presented conflicting testimony concerning Respondent's advance knowledge of the reasonable cause drug test on December 03, 2005. Mr. Loupe, personnel coordinator for International Boats, testified on behalf of the Coast Guard that he spoke to Respondent on the telephone on

December 03, 2005 and told him to come directly to the office from the M/V INIT COMMANDER so that they could talk and Respondent could undergo a urine drug screen test to alleviate the company's concerns regarding Respondent's alleged drug use. (*Tr. 50, 58-61, 66*). Respondent disputes that: 1) he spoke to Mr. Loupe on December 03, 2005; 2) he was placed on notice that he had to submit to drug testing; and 3) he refused to take a drug test. Therefore, it is necessary for the undersigned to assess the witnesses' conflicting testimony and determine credibility.

In doing so, I am mindful that the judge is the finder of fact; therefore, witness credibility and assessment of evidence is best left to the determination of the presiding judge. Appeal Decision 2633 (MERRILL) (2002); Appeal Decision 2632 (WHITE) (2002). "The [judge] is not bound by the witnesses' opinion, but must make his own determination based on the facts and the law." WHITE. When conflicting or inconsistent testimony is presented during an administrative law hearing, the judge is afforded broad discretion to determine the credibility of witnesses. Appeal Decision 2616 (BYRNES) (1997).

Here, Respondent's testimony that he only he spoke with Mr. Chaisson to arrange transportation from the vessel in Cameron to his home and Mr. Chaisson advised him to call back on the afternoon of Tuesday, December 06, 2005 to advise Mr. Chaisson on how many days he wanted off is not deemed credible. This is especially true given the conflict within Respondent's own testimony.

First, a review of Respondent's answer to the complaint reveals that he only denies refusing to take the drug test. He only raised lack of notice as a defense for the first time at the hearing. If Respondent did not receive notification as he now claims, it is believed that he would have raised that defense in his answer.

Second, during the hearing Respondent testified that he did not learn about the refusal to take a drug test by providing a urine sample and blood test until he was charged by the Coast Guard. (*Tr.* 72-73). Then, almost in the same breath, Respondent testified he spoke with Mr. Chaisson at International Boats regarding his discharge on December 09, 2005 for breaking company policy and Mr. Chaisson advised Respondent that it was because Respondent refused a drug screen test. (*Tr.* 73-74). It is also noted that one of Respondent's own exhibits (*Resp't Ex.* 2) shows that Respondent's first employer company, International Boats, indicated that Respondent refused to be tested on one of the two drug and alcohol testing release forms faxed to Gulf Resource Management, Respondent's second employer, on December 07, 2005.

Based on the above, Respondent's testimony is not viewed or found as being credible. The fact that International Boats faxed two separate drug and alcohol testing release forms to Gulf Resource Management (one indicating that he did not refuse and the other indicating that he did refuse) does not lend further support to Respondent's testimony. The Coast Guard's argument that one form dealt with alcohol and the other deals with drugs is a reasonable explanation for the two separate forms. Finally, the fact that Respondent was offered employment at another company three days after being directed to undergo drug testing is not viewed as a mere coincidence. Therefore, I find that the Coast Guard has proven by a preponderance of reliable and credible evidence that Respondent refused to take a reasonable cause drug test on December 03, 2005, requested by his first employer company, International Boats..

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The captioned Respondent's, Joey R. Broussard's, U.S. Coast Guard issued License and Merchant Mariner Document and the subject matter of this hearing are properly within the

jurisdiction of the U.S. Coast Guard and the U.S. Administrative Law Judge in accordance with 46 U.S. Code Chapter 77, including section 7703 (West Supp. 1999), 46 CFR Part 5 and 33 CFR Part 20.

2. At all relevant times, the captioned Respondent was a licensed and merchant mariner document holder acting under the authority of his U.S. Coast Guard issued Merchant Mariner's License and Document.
3. The testimony of Respondent that he did not receive notice of the December 03, 2005 drug test from Mr. Loupe is not deemed or found credible.
4. The drug and alcohol tests were carefully and satisfactory arranged for by Respondent's first marine employer following the chemical and drug testing rules, including 46 CFR Part 16.
5. The allegations in the Complaint served upon the Respondent are found proved by a preponderance of the reliable, probative, substantial and credible evidence based on Respondent's admissions in the Answer to the Complaint and based upon the testimony of the two witnesses who were found very credible and including the five (5) exhibits offered into evidence by the IOs.

SANCTION

The selection of an appropriate order is the responsibility of the Administrative Law Judge. 46 CFR 5.569(a). The Investigating Officers and the Respondent may suggest an order and present evidence of mitigating or aggravating circumstances. 46 CFR 5.569(a). Since revocation is not necessarily mandatory for refusing to test, factors that may affect the order include: (1) any remedial actions independently undertaken by Respondent; (2) Respondent's prior record; and (3) evidence of mitigation or aggravation. 46 CFR 5.569(b). Since Respondent refused to take a drug and alcohol test under 49 CFR 40.191(b), 49 CFR 40.191(c) subjects

Respondent to the guidance contained in 46 CFR 5.569(d) which suggests (absent any mitigating or aggravating circumstances) a suspension of 12-24 months for only a simple violation of law based on refusal to test for drugs.

In this case, the Coast Guard Complaint states that the Coast Guard proposes revocation in accordance with 46 USC 7703.

Respondent Joey R. Broussard testified in his own behalf under oath.

As a witness testified on or about pages 66 and 67 of the hearing transcript, several customers and at least one or two crewmembers stated that it looked like the Respondent was under the influence of drugs or was taking drugs and they reported it to Respondent's first employer company. While Respondent was operating the vessel as Master and Captain of that vessel, there were four (4) crewmembers aboard that vessel, including Respondent Broussard. As shown on pages 74, 75 and 76 of the transcript, the Investigating Officer stated that we have had testimony that a couple of crewmembers on Respondent's vessel and a customer representative told Respondent's supervisor that they felt Respondent was using drugs. The two (2) crewmembers and the customer representative testified that Respondent was taking pills and that Respondent Joey Broussard was "acting weird," while Respondent was supposed to be safely and carefully acting as master or captain of the vessel for the vessel and all people on board.

The Coast Guard Investigating Officers are seeking revocation of Respondent's U.S. Coast Guard issued License and Merchant Mariner's Document. It is well within the authority of the ALJ to order any of a variety of sanctions, including revocation. See 46 CFR 5.569; see also Appeal Decision 2569 (TAYLOR). The Table 5.569--Suggested Range of an Appropriate Order (Table) for various offenses can be found at Title 46 CFR Part 5.569. According to the table,

committing a simple act of misconduct generally results in suspension of a mariner's document. See 46 CFR 5.569(d). An ALJ, however, is not bound by this table and has discretion and authority to exceed the suggested range or reduce the sanction. Id. See also Appeal Decision 2628 (VILAS). The purpose of the table is to provide guidance to the ALJs. For the purpose of determining the appropriate sanction, the ALJ may consider any remedial action taken by the Respondent, the Respondent's prior record and other mitigating or aggravating factors. 46 CFR Part 5.569(b).

During summations, the Coast Guard Investigating Officers asked the undersigned judge to take official notice that Respondent's refusal to provide a urine sample for the purpose of taking a drug test and/or urine test for drugs and/or alcohol use is a violation of 49 CFR 40.191(a). The Coast Guard Investigating Officers also asked the undersigned to take official notice of Appeal Decision 2578 (CALLAHAN), wherein it states in clear language, revocation is the appropriate remedy to prevent such refusals in the future by other U.S. Merchant Mariners.

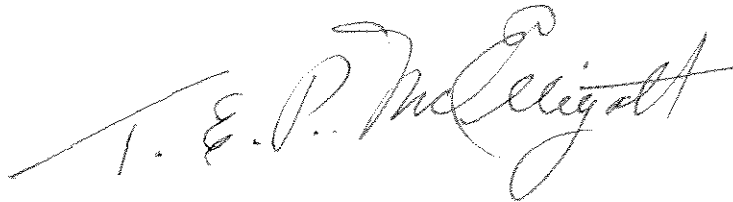
ORDER

IT IS HEREBY ORDERED that the U.S. Coast Guard Merchant Mariner's License and Merchant Mariner's Document issued to Respondent Joey R. Broussard are hereby **SUSPENDED FOR EIGHTEEN (18) MONTHS OUTRIGHT**. Respondent is ordered to immediately deliver by mail, certified mail return receipt requested; overnight express courier service such as FedEx; or deliver in person his U.S. Coast Guard issued License and Merchant Mariner's Document to the U.S. Coast Guard Marine Safety Unit, 800 David Drive, Room 232, Morgan City, Louisiana 70380. They should be delivered to the Commanding Officer or Assistant Senior Investigating Officer James Wilson, Esq., or any other Investigating Officer

then stationed at the Marine Safety Unit Morgan City as soon as possible, if not already delivered to them. The eighteen (18) month suspension will start from the first day they are or were received by the said Marine Safety Unit, Morgan City, Louisiana.

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 April 13, 2007
Houston, Texas

A handwritten signature in black ink, appearing to read "T. E. P. McElligott". The signature is written in a cursive style with a large, stylized initial "M".

**THOMAS E. P. McELLIGOTT
ADMINISTRATIVE LAW JUDGE
U.S. COAST GUARD**

DOCKET NUMBER CG S&R 06-0009

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.