

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

UNITED STATES COAST GUARD

Complainant

vs.

ROGER DENNIS PHILLIPS

Respondent.

Docket Number: CG S&R 06-0075
CG Case No. 2576839

DECISION AND ORDER

Issued: September 14, 2007

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

Appearances:

For Complainant

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For Respondent

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PRELIMINARY STATEMENT

The United States Coast Guard (Coast Guard) Investigating Officers (IOs) initiated this administrative action by serving the Complaint on R. D. Phillips personally, seeking revocation of Roger D. Phillips' (Respondent) Merchant Mariner's Document (MMD). This action is brought pursuant to the authority contained in 46 U.S.C. 7703(1)(B), 7704(c) and its underlying regulations codified at 46 CFR Part 5 and 33 CFR Part 20.¹

On February 20, 2006, the Coast Guard issued and served a Complaint against Respondent alleging one (1) count of Use of or Addiction to a Dangerous Drug and three (3) counts of Misconduct. Specifically, the Coast Guard alleges Respondent took a pre-employment urinalysis test on July 9, 2004. This urinalysis, collected in accordance with Department of Transportation (DOT) regulations, tested positive for cocaine metabolites. The three (3) counts of Misconduct allege Respondent failed to make full and complete disclosures of all previous criminal convictions on the Coast Guard license and document applications submitted on August 15, 2003, May 15, 2004, and November 13, 2005. Respondent filed his Answer to this Complaint on February 21, 2006, wherein he denied all jurisdictional and all factual allegations contained in the Complaint.

On February 27, 2006, the Chief Administrative Law Judge assigned U.S. Administrative Law (ALJ) Judge Thomas E. P. McElligott (the undersigned) to hear and adjudicate this case. On August 30, 2006, the undersigned scheduled this matter for a trial-type hearing in Corpus Christi, Texas on November 15, 2006. On October 16, 2006, Respondent filed a Motion to Request to Move Hearing Date, Time, and Location. The Court's high volume of cases limited

¹ In the Complaint, the Coast Guard cites statutory authority 46 U.S.C. 7703(b) for the Misconduct charges. The actual regulatory authority for Misconduct is 46 U.S.C. 7703(1)(B). This minor discrepancy is not found to have affected Respondent's actual notice of the Misconduct charges in the Complaint served on Respondent.

the undersigned's ability to reschedule the hearing. As a result, the undersigned denied Respondent's request to reschedule.

The trial-type hearing convened on November 15, 2006 in Corpus Christi, Texas before Thomas E. P. McElligott, U.S. Administrative Law Judge deciding cases for the Coast Guard and other Federal Agencies. The trial-type hearing proceeded for one (1) day with four (4) witnesses sworn and testifying under oath and seventeen (17) exhibits entered into evidence by this Judge. The list of witnesses and exhibits is contained in Attachment A. The hearing was conducted in accordance with the U.S. Administrative Procedure Act as amended and codified at 5 U.S.C. 551-59, and Coast Guard procedural regulations set forth in 46 CFR Part 5 and 33 CFR Part 20.

Respondent voluntarily deposited his MMD with the Coast Guard at the conclusion of the hearing on November 15, 2006. Both parties declined to submit proposed findings of fact and conclusions of law.

After careful review of the entire record, including witness testimony, applicable statutes, regulations, and case law, the allegation of User of Dangerous Drugs (first offense) in violation of 46 U.S.C. 7704(c), and one (1) count of Misconduct (third offense) in violation of 46 U.S.C. 7703(1)(B) are found proved. The second and fourth Misconduct offenses are dismissed based on lack of jurisdiction.

FINDINGS OF FACT

The Findings of Fact are based on documentary evidence, the testimonies of the witnesses, and the entire record considered as a whole.

1. At all relevant times, Respondent was the holder of a Merchant Mariner's Document (MMD), Number 039816, issued by the United States Coast Guard. (IO Ex. 1; Tr. at 80-82).²

Factual Allegation 1: Use of or Addiction to a Dangerous Drug

2. On July 9, 2004, Respondent participated in a pre-employment drug test at the Occupational Medical Center of West Jefferson. (Tr. at 22-25; IO Ex. 4, 5, 8).
3. Approximately twenty (20) minutes elapsed from the time Respondent knew he needed to take the pre-employment drug test and the time he actually submitted his urine sample for drug testing. (Tr. at 66-67).
4. Lisa Anne Rollins, a trained urine specimen Collector with approximately ten (10) years experience, collected the urine sample from this Respondent for the purposes of a tested and certified laboratory performing DOT urinalysis drug tests. (Tr. at 27-29).
5. Ms. Rollins followed collection procedures in accordance with U.S. DOT standards. (Tr. at 28-31; IO Ex. 5-8). Procedures Ms. Rollins followed include, but are not limited to, the following:
 - a. The Collector verified the identity of Respondent, the specimen provider (Tr. at 31), by inspecting his Merchant Mariner's Document and/or driver's license.
 - b. Following collection, Ms. Rollins checked the temperature of Respondent's specimen and ensured the sample measured between ninety (90) and one-

² Citations referencing the transcript are as follows: Transcript followed by the page number (Tr. at __); Citations referring to Agency Exhibits are as follows: Investigation Officer followed by the exhibit number (IO Ex. __); Respondent's Exhibits are as follows: Respondent followed by the exhibit number (Resp. Ex. __); ALJ Exhibits are as follows: ALJ followed by the exhibit number (Jud. Ex. __).

- hundred (100) degrees Fahrenheit within four (4) minutes of its production.
(IO Ex. 5).
- c. The Collector placed the specimen into two (2) separate specimen bottles, referred to as a “split specimen.” (Tr. at 25; IO Ex. 5).
 - d. Respondent initialed the seals on each urine specimen bottle. (Tr. at 29-30).
 - e. Ms. Rollins completed, dated and signed the Custody and Control Form with Respondent’s identifying information. (Tr. at 28-30; IO Ex. 8).
 - f. Respondent also signed the Collector’s Custody and Control Form. (Tr. at 29-30; IO Ex. 8).
 - g. Each Custody and Control Form contains a unique specimen identification number. (IO Ex. 8).
 - h. Occupational Medical Center sent Respondent’s split urine specimen to the tested and certified Kroll Laboratory in Gretna, Louisiana for testing for drug use by Respondent. (Tr. at 30).
6. Kroll Laboratory received Respondent’s urine specimen via a courier service. (Tr. at 43-44, 47-49). The urine specimen arrived with the specimen seals intact. (Id.).
 7. Kroll Laboratory tested Respondent’s urine in accordance with U.S. DOT guidelines. (Tr. at 37-43).
 8. Kroll Laboratory is a Substance Abuse and Mental Health Services (SAMHSA) tested and certified laboratory. (Tr. at 42-43; IO Ex. 15).
 9. The chain of custody for Respondent’s urine specimen was intact. (Tr. at 43-45, 47-49, 136; IO Ex. 4).

10. The initial drug screening test of Respondent's urine detected the presence of cocaine metabolites, which measured 456 nanograms per milliliter. (Tr. at 59-60).
11. A confirmatory second laboratory test verified the presence of benzoylecgonine, the cocaine metabolite, in Respondent's urine sample. (Tr. at 45, 49, 57-58).
12. Confirmatory testing is performed by the very reliable gas chromatography/mass spectroscopy test. (Tr. at 45, 47-49). The gas chromatography/mass spectroscopy even provides the molecular fingerprint for the specific drugs found in the urine sample. (Id.).
13. Cocaine clears the body within twenty-four (24) to seventy-two (72) hours after use. (Tr. at 60).
14. Kroll Laboratory reports all positive drug tests to a medical review officer (MRO). (Tr. at 50). It was also done in Respondent R. Phillips case as usual.
15. Dr. Brian Heinen, an M.D. and Medical Review Officer (MRO), verified Respondent's positive drug test. (Tr. at 134-35; IO Ex. 6).
16. Dr. Heinen owns Heinen Medical Review, a company that conducts drug testing reviews. (Tr. at 131). Dr Heinen has worked as a MRO since 1989. (Id.).
17. Dr. Heinen interviewed Respondent personally on July 12, 2004 to determine if a legitimate medical or other explanation existed for the positive drug test. (Tr. at 137-39; IO Ex. 7, 8).
18. Respondent informed Dr. Heinen that medication he was taking, included Tylenol PM and multivitamins. (Tr. at 117-18, 151; IO Ex. 7).
19. Respondent was not taking any prescription medication that could explain the presence of cocaine in his body and system. (Tr. at 137-39).

20. Respondent did not supply Dr. Heinen with a legitimate medical excuse or reason for the positive test result. (Id.).
21. Dr. Heinen informed Respondent of his right to have the split sample retested by a second tested and certified laboratory. (Tr. at 139-40; IO Ex. 7). Respondent did not request more testing of the Respondent's split sample. (Tr. at 139-48; IO Ex. 7).
22. Dr. Heinen's final determination is that the urine specimen was positive for cocaine metabolite and that Respondent had used cocaine. (Tr. at 139; IO Ex. 8).

Factual Allegations 2-4: Misconduct

23. On October 3, 2002, the State of Washington convicted Respondent of Interfering with Reporting of Domestic Violence and Disorderly Conduct. (Tr. at 92-95, 101, 106; IO Ex. 12, 13, 14). Respondent pleaded guilty and received a \$575 fine. (Id.).
24. On August 15, 2003, Respondent executed, in writing, his completed, signed and dated original filed application for a U.S. Coast Guard MMD. (IO Ex. 9).
25. On May 15, 2004, Respondent executed, in writing, an application for raise in grade to his MMD. (IO Ex. 10).
26. The Coast Guard issued the upgraded MMD on July 6, 2004. (IO Ex. 1).
27. On November 13, 2005, Respondent executed, in writing, his original application for a Merchant Mariner's License. (IO Ex. 10).
28. On each application (filed on August 15, 2003, May 15, 2004, and November 13, 2005), there were three (3) boxes inquiring into whether the applicant had ever been criminally convicted. (IO Ex. 9-11). The application questions are as follows:
 - a. Have you ever been convicted of violating a dangerous drug law of the United States, District of Columbia, or any state, or territory of the United States? (including marijuana)

- b. Have you ever been convicted by any court – including military court – for an offense other than a minor traffic violation? (Conviction means found guilty by judgment or by plea and includes cases of deferred adjudication (no contest, adjudication withheld, etc.) or where the court required you to attend classes, make contributions of time or money, receive treatment, submit to any manner of probation or supervision, or forgo appeal of a trial court finding. Expunged convictions must be reported unless the expungement was based upon a showing that the court’s earlier conviction was in error.)
- c. Have you ever been convicted of a traffic violation arising in connection with a fatal traffic accident, reckless driving or racing on the highway or operating a motor vehicle while under the influence of, or impaired by, alcohol or a controlled substance?

(Id).

29. Respondent marked “X” in the “No” column for all three boxes. (IO Ex. 9-11)

30. Respondent admits to being convicted of an offense other than a minor traffic violation. (Tr. at 92).

DISCUSSION

A major purpose of Coast Guard suspension and revocation trial-type hearings and proceedings is to promote safety of lives, vessels and properties at sea and in our port areas. See 46 U.S.C. 7701(a). To assist in this goal, ALJs have authority to suspend or revoke mariner documents for violations arising under 46 U.S.C. 7703-04. See 46 CFR 5.19(b). Under Coast Guard procedural rules and regulations, the Coast Guard IOs bear the burden of proof and must prove the Complaint’s allegations by a preponderance of the evidence. 33 CFR 20.701, 20.702(a).

I. Jurisdiction

Neither the Coast Guard IOs nor Respondent addresses the issue of jurisdiction in depth. The Coast Guard’s Complaint attempts to establish jurisdiction by merely citing to statutory authority 46 U.S.C. 7703 and 7704. Respondent’s Answer simply states he lacks sufficient

knowledge or information to admit or deny the jurisdictional allegations. However, jurisdiction is a question of fact and must be determined before the substantive issues of the case are decided. See Appeal Decision 2620 (COX) (2001). In this case, the allegations raise jurisdictional concerns that need to be addressed.

The Coast Guard issued a Complaint against Respondent alleging four (4) offenses. Factual allegations two (2) and four (4) create the greatest jurisdictional concern. These offenses allege Respondent committed two (2) acts of Misconduct by submitting fraudulent applications for an original MMD and license on two separate dates: August 15, 2003 and November 13, 2005, respectively.

The undersigned has authority to adjudicate charges of Misconduct if the “misconduct occurred while performing under authority of a document or license.” See Appeal Decision 2025 (ARMSTRONG) (1975). However, when an individual is applying for an original credential, that person is not in possession of the credential for which he is applying. Id. Since the credentials do not yet exist, it would be “factually impossible for him to have acted under authority of the [credentials]. . . .” Id.

In this case, the Coast Guard IOs allege Respondent submitted a fraudulent application for an original MMD and Coast Guard License on two separate dates: August 15, 2003 and November 13, 2005, respectively. Since Respondent did not possess Coast Guard credentials at the time of application, he was not “acting under” these credentials. Therefore, the undersigned lacks jurisdiction.³

The Coast Guard also alleges Respondent committed one (1) count of Misconduct by filing with a Coast Guard, Regional Examination Center (REC) a fraudulent MMD upgrade

application on May 15, 2004. The undersigned has jurisdiction to rule on this allegation. When a mariner applies for a renewal or upgrade to credentials, the mariner is “acting under the authority” of that credential. See 46 CFR 5.57; See also Appeal Decision 2433 (BARNABY) (1986). Even when an original credential is issued upon the submission of false information, Coast Guard policy affords a mariner the right to a hearing if charges are alleged during the renewal or upgrade to the original credential. See USCG Marine Safety Manual, Volume 3, Chapter 1, Paragraph F. The USCG Marine Safety Manual states:

The S&R process should also be sought when it is discovered upon reissue of a license that the applicant’s original license was initially issued by fraudulent means. Licensed mariners holding second and later issuance license have acquired “property interest” in the license. This “property interest” is protected by the due process requirements of the Fifth and Fourteenth Amendments of the [U.S.] Constitution.

In this case, the Coast Guard issued Respondent an upgraded MMD on July 6, 2004. (IO Ex. 1). Since that time, Respondent has relied upon the validity of that document for employment. (IO Ex. 1; Resp’t Ex. A, B; Tr. at 81-85). Respondent’s reliance upon his MMD generates due process rights. Therefore, Respondent is entitled to a due process trial-type hearing if disciplinary actions affect his upgraded MMD. The undersigned concludes jurisdiction exists to determine if Respondent committed Misconduct by filing a fraudulent MMD upgrade application on May 15, 2004.

In addition to the three (3) Misconduct allegations, the Complaint also alleges Use of or Addiction to Dangerous Drugs. When the Coast Guard charges a respondent with Use of or Addiction to Dangerous Drugs, jurisdiction is established solely upon a showing that Respondent

³ While the ALJ lacks jurisdiction to make a ruling on the misconduct charges for the original credential applications, such credentials “need not be returned as it was void ab initio and appellant has no interest in it.” Appeal Decision 2025 (ARMSTRONG) (1975).

is the holder of a license, certificate of registry, or merchant mariner's document.⁴ See Appeal Decision 2560 (CLIFTON) (1995). Since the allegations of drug use arose while Respondent held an upgraded MMD, jurisdiction exists.⁵

Having established proper jurisdiction for factual allegations one (1) and three (3), the substantive issues of this case are now discussed.

II. Use of or Addiction to Use of Dangerous Drugs

In this case, the Coast Guard IOs allege Respondent is a User of or Addicted to the Use of Dangerous Drugs, in violation of 46 U.S.C. 7704(c). Thus, the Coast Guard seeks revocation of Respondent's MMD in accordance with 46 U.S.C. 7704(c) and 46 CFR 5.569.

a) Applicable Law

Marine employers must conduct pre-employment testing for dangerous drugs on all employees who will serve as crewmember. See 46 CFR 16.210. A mariner's Coast Guard issued credential is subject to revocation upon proof, to include failing a pre-employment drug test, that the mariner is a user of or addicted to a dangerous drug unless satisfactory proof of cure is established. 46 U.S.C. 7704(c); see Appeal Decision 2634 (BARRETTA) (2002).

In these proceedings, the Coast Guard bears the burden of proof and must prove the allegations by a preponderance of the evidence. 33 CFR 20.701, 20.702(a). To successfully establish drug use, the preponderance of evidence standard requires the Coast Guard to "prove (1) that the respondent was the person who was tested for dangerous drugs, (2) that the

⁴ "If it is shown that a holder [of a license, certificate of registry, or merchant mariner's document] 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).

⁵ The allegations of drug use occurred while Respondent was working under his upgraded MMD. Respondent's original MMD was issued on September 5, 2003. (IO Ex. 10). Respondent was issued an upgraded MMD on July

respondent failed the test, and (3) that the test was conducted in accordance with 46 C.F.R. Part 16.” Appeal Decision 2603 (HACKSTAFF) (1998). Proof of these elements establishes a prima facie case of Use of a Dangerous Drug. Id. A prima facie case shifts the burden of going forward with evidence to the respondent to rebut the presumption of drug use. Id. If the respondent fails to produce convincing evidence in rebuttal, the ALJ may find the charge proved on the basis of the presumption alone. Id.

b) Prima Facie Case Proved

In this case, Respondent participated in a pre-employment drug test and provided his urine sample for drug testing on July 9, 2004. (Tr. at 24-28, 117-19; IO Ex. 4, 5, 8). The usual and required initial testing determined Respondent’s sample to be suspect positive for cocaine use by Respondent. (Tr. at 44, 49, 59-60). This first laboratory test detected the presence of cocaine metabolites at 456 nanograms per milliliter, well above the regulated minimum positive of 300 nanograms per milliliter. (Tr. at 59-60); See 49 CFR 40.87. The second laboratory confirmatory test, known as the gas chromatography/mass spectroscopy test, confirmed the presence of cocaine metabolites in Respondent’s urine specimens. (Tr. at 45, 47-49, 58-59).

Dr. Heinen, M.D., the Medical Review Officer (MRO), received and verified the laboratory’s test results. (Tr. at 131-39; IO Ex. 7, 8). Dr. Heinen interviewed Respondent in an effort to determine if a legitimate medical explanation or excuse existed for Respondent’s positive drug test. (Id.). During the interview, Respondent informed MRO Dr. Heinen that Respondent was taking Tylenol PM and multivitamins. (Tr. at 139; IO Ex. 7). Such medications do not account for the cocaine in Respondent’s urine and system. (Tr. at 137-139; IO Ex. 7, 8). Accordingly, Dr. Heinen did not find a satisfactory medical explanation for Respondent’s

6, 2004. (IO Ex. 1). The Coast Guard alleges Respondent tested positive for a pre-employment drug test on July 9,

positive drug test. (Id.). Dr. Heinen testified that the drug test was conducted in compliance with all Federal requirements. (Tr. at 136; IO Ex. 8). The immunoassay test, the gas chromatography/mass spectroscopy test, and the MRO testimony support the allegation of cocaine use by Respondent. (Tr. at 40-49, 139; IO Ex. 8). Given all the above, the Coast Guard IOs established and proved a prima facie case of dangerous drug use.

c) Respondent's Attorney's Rebuttal Unpersuasive

Respondent and Respondent's attorney rebut the prima facie case on three points. First, Respondent's counsel asserts that a person would have to be "crazy" to ingest cocaine while having advance knowledge of a "voluntary drug test." (Tr. at 66, 118, 174). While not necessarily a persuasive argument, Respondent is correct it would be foolish to ingest cocaine prior to taking a pre-employment drug test. However, in this case, Respondent did not have advance notice of the drug test. (Tr. at 66). Respondent testifies that only twenty (20) minutes elapsed between the time he knew of the required pre-employment drug test and the time he actually submitted Respondent's urine sample for drug testing. (Tr. at 66-67). Respondent had no advance knowledge of the drug test. Therefore, this argument fails.

Second, Respondent's attorney asserts that the MRO failed to notify Respondent of his right to test the split specimen. (Tr. at 174-75). Following a positive test of an employee, a MRO must notify the employee of the procedures for requesting a second testing of the split urine specimen. See 49 CFR 40.153. However, counsel's assertion is directly refuted by Respondent's own testimony. (Tr. at 139-140, 146). Respondent testified that "I was asked [if I wanted a retest]." (Tr. at 146). The question in dispute is, after being asked, did Respondent request a test of his split sample? The MRO testifies he informed Respondent of the right to test

the split sample, that he provided a telephone number to Respondent to call within three (3) days if Respondent wished a second laboratory test of the split sample, and that Respondent made no request to test the split sample. (Tr. at 139-40, 146; IO Ex. 7). This testimony by the MRO is found credible. Respondent's testimony is contradictory to the MRO's testimony. Respondent testifies the MRO transferred Respondent to a nurse following his request to test the split sample. (Tr. at 140, 146). Respondent then testifies that while he was talking to the nurse, his cell-phone lost coverage. (Id.). Respondent states he was unable to call the nurse back since he did not have the nurse's number. (Id.). Respondent admits he made no attempt to obtain the nurse's number, such as calling information. (Id.). Respondent also states he did not have a chance to call the nurse since he was "going straight back on the boat" where Respondent was working. (Tr. at 146). Assuming that Respondent's testimony is credible (which the undersigned does not find), Respondent's testimony still establishes that Respondent made no concerted effort to call the nurse or the MRO to arrange for further testing by a second laboratory.

Third, Respondent asserts he took medication that explains the presence of cocaine in his urine or system. (Tr. at 117-18). During the hearing, Respondent testifies he took Anbesol (or a similar type substance) for a toothache.⁶ (Tr. at 117-18). Respondent testifies "I found out . . . Anbesol . . . had a caine." (Tr. at 118). Presumably, Respondent is asserting Anbesol is a cocaine derivative and its use could be mistaken for cocaine use. The burden is on Respondent to establish a legitimate explanation for the presence of an illegal drug in his urine or system. See Appeal Decision 2637 (TURBEVILLE) (2003); See also 49 CFR 40.137(c). However, Respondent provides no explanation of how Anbesol could be mistaken for cocaine. Respondent

⁶ On July 12, 2004, the MRO interviewed Respondent to determine if a legitimate explanation existed for Respondent's positive drug test. (Tr. at 137-39; IO Ex. 7, 8). During this interview, Respondent did not inform the MRO he was taking Anbesol. (Id.). The MRO concluded that Respondent had not taken any medication that could explain the cocaine in his urine and system. (Id.).

provides no medical expert testimony, no dental history of his toothache, no prescriptions or receipts showing purchase of Anbesol, and no product information detailing the ingredients of Anbesol. Respondent failed to provide a legitimate medical reason explaining the presence of cocaine in his system and urine sample.

Respondent has not successfully rebutted the established and proven presumption of drug use. Accordingly, the Coast Guard's allegation of Use of or Addiction to a Dangerous Drug is Proved.

III. Misconduct

In this case, the Coast Guard alleges Respondent committed an act of Misconduct by failing to make a full and complete disclosure of all previous criminal convictions on his signed and filed application for upgrade of his MMD. The Coast Guard Investigating Officers seek revocation of Respondent's MMD.

a) Applicable Law

Misconduct is defined in 46 CFR 5.27 as "human behavior which violates some formal, duly established rule," such as those found in the common law, the general maritime law, a ship's regulation or order, or shipping articles. It is an act that is forbidden or a failure to do what is required. See 46 CFR 5.27. Specific intent is not an essential element of the charge of misconduct. See Appeal Decision 2607 (ARIES) (1999).

Title 46 CFR 10.201(h) and 46 CFR 12.02-4(c) provide that applicants applying and/or renewing a license or MMD "must provide written disclosure of all prior convictions (as defined in §12.01-6) at the time of application." An individual applying for a MMD or license has actual notice of this requirement as the application itself asks whether the Respondent applicant has "ever been convicted by any court – including military court – for an offense other than a minor

traffic violation.” (IO Ex. 9-11). The application specifies that even expunged convictions need to be disclosed.⁷ (*Id.*). The purpose of regulations governing the issuance of licenses and certifications in Parts 10 and 12 is to determine an applicant’s qualifications and whether they are competent to serve in a particular position on a U.S. merchant vessel. See 46 CFR 10.101(a); 46 CFR 12.01-1(a)(1). This is clearly a duly established rule requiring applicants to disclose their criminal convictions when executing by completing and signing such an application, the violation of which would be misconduct.

b) Respondent’s Failure to Disclose a Prior Conviction

On October 3, 2002, the State of Washington convicted Respondent for Interfering with Reporting of Domestic Violence and Disorderly Conduct. (Tr. at 92-95, 101, 106, 114; IO Ex. 12, 13, 14). Respondent pleaded guilty and received a \$575 fine. (*Id.*). Respondent failed to disclose this criminal conviction on his MMD upgrade application filed, completed and signed by Respondent on May 15, 2004. (IO Ex. 10).

Respondent admits to his arrest for Domestic Violence and Disorderly Conduct, his conviction of these charges, and to paying a fine in regards to the convictions. (Tr. at 92, 106). However, Respondent also admits to marking on his signed application that he had not been “convicted by any court” on the application in question. (Tr. at 85-86, 90-91). Respondent explains this inconsistency by testifying that the Judge who in Washington State convicted Respondent of the criminal offense told Respondent the conviction would not appear on his record. (Tr. at 106-08). This is not credible. Since he was under the impression that no record would be made of the conviction, Respondent contends he did not need to disclose the

⁷ The application defines “conviction.” “Conviction means found guilty by judgment or by plea and includes cases of deferred adjudication (no contest, adjudication withheld, etc.) or where the court required you to attend classes, make contribution of time or money, receive treatment, submit to any manner of probation or supervision, or forgo

conviction. (Tr. at 108, 112-14). In essence, Respondent argues he did not disclose the conviction because he did not think the Coast Guard would find out about the conviction. Coast Guard MMD applications explicitly require applicants to report all convictions, even expunged convictions. (IO Ex. 9-11). Respondent's testimony is not credible.⁸ Respondent was clearly aware of his prior conviction and purposely denied receiving the conviction on his Coast Guard signed by Respondent applications because he did not think the Coast Guard would discover the conviction.

Respondent's nondisclosure of his Domestic Violence and Disorderly Conduct conviction is a direct violation of his duty to disclose prior criminal convictions on Coast Guard completed and signed by Respondent applications as required by 46 CFR 10.201(h) and 46 CFR 12.02-4(c). This failure constitutes an act of misconduct.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. In regards to factual allegation first offense and factual allegation third offense, Respondent and the subject mater of this hearing are properly within the jurisdiction of the United States Coast Guard and the U.S. Administrative Law Judge in accordance with 46 U.S.C. 6301, 7703(1)(B),7704(c); 46 CFR Part 5; and 33 CFR Part 20.
2. Respondent was the holder of and acted under the authority of his U.S. Coast Guard issued Merchant Mariner's Document (MMD) Number 039816.

appeal of a trial court finding. Expunged convictions must be reported unless the expungement was based upon a showing that the court's earlier conviction was in error." (IO Ex. 9-11).

⁸ Respondent submitted evidence from a web based criminal history search. (Resp't Ex. C). This report found no record of Respondent's criminal history in Washington State. (Id.). Interestingly, Respondent generated this report on August 15, 2003, the same day Respondent filed his original application for a MMD. (Resp't Ex. C; IO Ex. 9). Presumably, Respondent initiated this search because he worried his prior conviction would be discovered. After determining the conviction was not on file, Respondent proceeded to lie, under oath, that he had received no prior convictions.

3. On July 9, 2004, Respondent participated in a pre-employment drug test and tested positive for benzoylecgonine (cocaine metabolite).
4. Respondent's positive drug test created the presumption that he is a user of dangerous drugs. 46 CFR 16.201(b).
5. Respondent failed to rebut the presumption and evidence that he is a user of dangerous drugs. 46 CFR 16.201(b).
6. The factual allegation, first offense, of **"USE OF OR ADDICTION TO A DANGEROUS DRUG"** against Respondent is found **PROVED** by a preponderance of the reliable, probative, substantial and credible evidence and testimony as taken from the record considered as a whole.
7. On October 3, 2002, the State of Washington convicted Respondent of Interfering with Reporting of Domestic Violence and Disorderly Conduct.
8. Respondent failed to disclose his criminal conviction on his MMD upgrade application filed with the U.S. Coast Guard on May 15, 2004.
9. The factual allegation, third offense, of **"MISCONDUCT"** against Respondent is found **PROVED** by a preponderance of the reliable and credible evidence and testimony as taken from the record considered as a whole.
10. All other **"MISCONDUCT"** allegations are **DISMISSED** because of lack of jurisdiction.

SANCTION

The authority to impose sanctions at the conclusion of a case is exclusive to the ALJ. Appeal Decision 2362 (ARNOLD) (1984). Title 46 CFR 5.569 provides the Table of Suggested Range of Appropriate Orders (Table) for various offenses. The purpose of this Table is to

provide guidance to the ALJ and promote uniformity in orders rendered. Appeal Decision 2628 (VILAS) (2002), *aff'd* by NTSB Docket ME-174.

When the Coast Guard proves that a merchant mariner has used or is addicted to dangerous drugs, any Coast Guard issued licenses, documents, or other credentials must be revoked unless cure of drug use is proven. See 46 U.S.C. 7704(c); 46 CFR 5.569; Appeal Decision 2535 (SWEENEY) (1992). Absent evidence of drug use cure or substantial involvement in the cure process, an ALJ must revoke a respondent's license and document under 46 U.S.C. 7704(c). See Appeal Decision 2634 (BARRETTA) (2002).

Here, the Coast Guard IOs proved and the undersigned found Respondent used a dangerous drug. Neither Respondent nor Respondent's attorney presented any evidence that Respondent took any steps to participate in the drug cure process. Therefore, I am precluded from issuing an order less than revocation.

In addition to the Coast Guard proving Use of Dangerous Drugs, the Coast Guard has also proved Respondent committed Misconduct by failing to disclose his criminal conviction on the MMD upgrade application. When a Coast Guard issued licenses, documents, or other credentials are procured via fraud, the only appropriate sanction is revocation. See Appeal Decision 2346 (WILLIAMS) (1984); See also Appeal Decision 2613 (SLACK) (1999). In this case, the facts establish Respondent made fraudulent statements on his signed MMD renewal application.⁹ Respondent had actual knowledge of his prior conviction and purposely denied receiving this conviction on his signed and filed Coast Guard application. Respondent's use of fraudulent statements to procure an upgraded MMD requires an order of revocation.

⁹ A "fraudulent statement" is one made by the respondent with either actual or constructive knowledge that the declaration is materially flawed or false. Appeal Decision 809 (MARQUES) (1955).

WHEREFORE,

ORDER

IT IS HEREBY ORDERED that U.S. Merchant Mariner's Document Number 039816, and all other valid licenses, documents, and endorsements issued by the U.S. Coast Guard to Roger D. Philips are **REVOKED**.

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).

Done and dated September 14, 2007
Houston, Texas



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

U.S. COAST GUARD vs. ROGER DENNIS PHILLIPS

DOCKET NUMBER CG S&R 06-0075

ATTACHMENT A

WITNESS AND EXHIBIT LISTS

WITNESS LIST

COAST GUARD WITNESSES

IO Witness 1	Lisa Rollins, Experienced Collector of Urine Specimens
IO Witness 2	Patricia Pizzo, Vice-President of Operations and Laboratory Director of Toxicology, Co-Responsible Person
IO Witness 3	Brian Heinen, MD. and Medical Review Officer
IO Witness 4	Roger Dennis Philips, Respondent, Resident of Corpus Christi, Texas

RESPONDENT WITNESS

Resp't Witness 1	Roger Dennis Philips, Respondent, Resident of Corpus Christi, Texas
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EXHIBIT LIST

COAST GUARD EXHIBITS

IO Ex. 1	Copy of U.S. Merchant Marine Document 039816 Issued by U.S. Coast Guard to Respondent R. D. Phillips
IO Ex. 2	Not Submitted
IO Ex. 3	Not Submitted

- IO Ex. 4 Laboratory Chain of Custody Forms
- IO Ex. 5 Rigdon Marine Notification of Positive Test Result for Cocaine
- IO Ex. 6 Heinen Medical Review Officer's Qualification Package
- IO Ex. 7 Heinen Medical Review Officer Verification Worksheet
- IO Ex. 8 Medical Review Officer's Chain of Custody Forms
- IO Ex. 9 August 2003 Application for License as an Officer, Staff Officer, or Operator and for Merchant Mariner's Document, by Respondent
- IO Ex. 10 May 2004 Application for License as an Officer, Staff Officer, or Operator and for Merchant Mariner's Document, by Respondent
- IO Ex. 11 November 2005 Application for License as an Officer, Staff Officer, or Operator and for Merchant Mariner's Document, by Respondent
- IO Ex. 12 National Crime Information Center Report for Respondent
- IO Ex. 13 Washington State Uniform Criminal Court Docket
- IO Ex. 14 Roger D. Phillips Case Financial History
- IO Ex. 15 Federal Register, Vol. 69, No. 128 – U.S. DOT List of Approved Laboratories

RESPONDENT EXHIBITS

- Resp't Ex. A Offshore Express, Inc. Letter Concerning Employment of Rodger D. Phillips
- Resp't Ex. B Offshore Express, Inc. Letter Concerning Employment of Rodger D. Phillips
- Resp't Ex. C Criminal History Web Search Transcript

JUDICIAL EXHIBIT

- Jud. Ex. 1 Kroll Laboratory Computer System Screen Print-Off

U.S. COAST GUARD vs. ROGER DENNIS PHILLIPS

DOCKET NUMBER CG S&R 06-0075

ATTACHMENT B

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.


Certificate of Service

I hereby certify that I have forwarded the attached document by First Class Mail, postage prepaid to the following persons:

LT Therasa Nettlesheim
USCG Sector Corpus Christi
555 N Carancahua St, Suite 500
Corpus Christi, TX 78478

Christopher Dupuy, Esq
Dupuy & Associates
2600 South Shore Blvd, Suite 300
League City, TX 77573

ALJ Docketing Center
US Customs House
40 S Gay St, Room 412
Baltimore, MD 21202


Livia Torres
Paralegal Specialist

Done and Dated September 14, 2007
Houston, TX