

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

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Complainant

vs.

KEITH BRYANT KOCH

Respondent

Docket Number CG S&R 07-0596

CG Case No. 3099785

ORDER GRANTING COAST GUARD MOTION FOR DEFAULT

Issued: July 28, 2008

Issued by: Michael J. Devine, Administrative Law Judge

Investigating Officer:

CWO James R. Mints, IO

USCG Sector San Diego, CA

Respondent:

Keith Bryant Koch

On December 19, 2007, the Investigating Officer at Sector San Diego filed a Motion for Default Order, seeking revocation of the Respondent's Merchant Mariner's Document, which Motion. Respondent was charged with Misconduct in refusing to take a probable cause alcohol test 46 USC 7703, 46 CFR 5.27. The Respondent did not file an Answer to the Complaint, with either the Investigating Officer or the Coast Guard Administrative Law Judge Docketing Center. However, the Coast Guard failed to provide proof of service of the Motion for Default as required by 33 CFR 20.304 and the original Motion for Default was denied on March 18, 2008.

On March 28 , 2008 the Investigating Officer at Sector San Diego, filed a Motion to Amend the Complaint in this matter again seeking revocation of the Respondent's Merchant Mariner's Document, which Motion is incorporated herein by reference and made a part hereof. On April 4, 2008 this matter was reassigned to the undersigned Administrative Law Judge. On April 25, 2008 the Motion to Amend the Complaint was granted. According to the case file, a copy of the Amended Complaint, dated March 28, 2008 was duly served at the Respondent's residence via Federal Express Service on March 31, 2008. Respondent was again charged with Misconduct in refusing to take a probable cause alcohol test 46 USC 7703, 46 CFR 5.27. To date the Respondent has not filed an Answer to the Amended Complaint, with either the Investigating Officer or the Coast Guard Administrative Law Judge Docketing Center. On May 22, 2008 the Coast Guard initiated a new Motion for Default based on Respondent's failure to file an Answer. The Motion for Default was served and received at Respondent's home address on July 7, 2008. The Coast Guard submitted proof of service by Federal Express with the Motion for Default demonstrating compliance with 33 CFR Part 20.304.

To date the Respondent has not filed an Answer to the Amended Complaint, with either the Investigating Officer or the Coast Guard Administrative Law Judge Docketing Center. The Respondent has not provided any change of address therefore service of the Motion for Default is adequate in keeping with 33 CFR 20.304 and twenty days has passed since the Motion was served.

WHEREFORE,

Upon consideration of the record, I find the Respondent is in **DEFAULT**. A default constitutes an admission of all facts alleged in the Complaint and a waiver of the Respondent's right to a hearing. (33 CFR 20.310).

Accordingly, I hereby **ORDER** that the alleged violation of Misconduct for refusing to take an alcohol test is **PROVED**.

SANCTION

I have carefully reviewed the Complaint and the Motion for Default and note that the proposed sanction exceeds the suggested range of sanctions contained in Table 5.569 of 46 CFR 5.569. Respondent failed to respond to the Complaint so underlying facts are proven and there is no evidence of any remedial actions or mitigation by Respondent.

Title 49 CFR 40.261(b) provides that if an employee refuses to take an alcohol test the employee incurs the consequences specified under DOT regulations. The Table of Average Orders in the Coast Guard's regulations suggests outright suspension for twelve to twenty-four months for Misconduct based on the refusal to take a required alcohol test. 46 CFR 5.569(d). The Table of Average Orders is only intended to provide information and guidance, and the Administrative Law Judge is not bound by the range of appropriate orders in 46 CFR 5.569(d).

Appeal Decision 2578 (CALLAHAN) (1996); Appeal Decision 2475 (BOURDO) (1988).

Evidence of mitigating or aggravating circumstances may justify departing from the suggested range. 46 CFR 5.569(d).

The Coast Guard recommends a sanction of revocation. Some of the existing authority on available sanctions includes: Appeal Decision 2578 (CALLAHAN) (1996) (“Refusal to submit to a post incident chemical test raises a serious doubt about a mariner’s ability to perform safely and competently in the future...if mariners could refuse to submit to chemical testing and face a lesser Order, it is difficult to imagine why anyone that may have used drugs would ever consent to be tested.”) and Appeal Decision 2624 (DOWNS) (2001) (citing CALLAHAN). (Tr. at 153-154) revocation may be considered an appropriate sanction for refusal to submit to a reasonable cause test. However, recent authority also indicates that evidence in aggravation should be presented to support going beyond the suggested range of sanctions in the table. Commandant v. Moore, NTSB Order No. EM-201 (2005)(upward departure to revocation not upheld without an explanation of aggravating factors).

Upon consideration of the above, I find that a mariner’s refusal to take a test for alcohol when ordered to do so by his marine employer, as part of the required Coast Guard drug and alcohol testing program, is a serious offense that could result in the revocation of that individual’s Coast Guard issued license and/or document regardless of the type of test involved (post accident, pre-employment, random, probable cause, or periodic). However, in this case, the Coast Guard has not provided any evidence of aggravating factors that support exceeding the suggested range contained in the table. Likewise, nothing has been provided by the Respondent in remediation or mitigation. Such refusals to submit to testing raise the specter of the mariner having an alcohol abuse or illicit drug use problem and place in doubt the ability of a mariner to

safely carry out his/her duties and responsibilities on the vessel. These considerations are applicable in this case when the mariner refused to take the alcohol test. Therefore, 24 months outright suspension is the appropriate sanction.

WHEREFORE,

IT IS ORDERED that your Mariner's document is hereby **SUSPENDED OUTRIGHT FOR 24 MONTHS**. You must immediately surrender your document to the Coast Guard. In keeping with 46 CFR 5.567 the time period of suspension does not commence until your document is surrendered to the Coast Guard. If you knowingly continue to use your document, you may be subject to criminal prosecution.

Under 33 CFR 20.310(e) for good cause shown, an Administrative Law Judge may set aside this finding of Default. You may file a motion to set aside the findings with the ALJ Docketing Center, Baltimore.

Service of this Order of Suspension upon you serves to notify you of your right to appeal as set fourth in 33 CFR Subpart J, Section 20.1001 (Attachment A).

M. J. DEVINE
Administrative Law Judge
United States Coast Guard

Done and dated on July 28, 2008 at
Norfolk, VA

Certificate of Service

I hereby certify that I have this day served the foregoing Order by facsimile upon the following parties and limited participants (or designated representatives) in this proceeding at the address indicated:

CWO James R. Mints
Sector San Diego
2710 North Harbor Drive
San Diego, CA 92101-1064
FAX: (619) 278-7235
PHONE: (619) 278-7232

ALJ Docketing Center
United States Coast Guard
40 South Gay Street, Rm.412
Baltimore, MD 21202
Fax: (410) -962-1746
Phone (410) 962-7434

I hereby certify that I have this day served the foregoing document(s) upon the following parties and limited participants (or designated representatives) in this proceeding at the address indicated by First Class Mail:

Keith B. Koch
[REDACTED]

Janice Parker
Paralegal to the Administrative Law Judge

Done and dated on July 28, 2008 at
Norfolk, VA