

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

UNITED STATES COAST GUARD
Complainant

vs.

HAROLD LANGLEY

Respondent

Docket Number 2009-0397
Enforcement Activity No. 3590096

ORDER DENYING MOTION TO AMEND DECISION AND ORDER,
AND GRANTING REQUEST FOR EXCERPT OF TRANSCRIPT
Issued: March 26, 2010

By Administrative Law Judge: Honorable Michael J Devine

Appearances:

James T. Staton
Sector Hampton Roads

For the Coast Guard

PHILIP N. DAVEY, Esq.

For the Respondent

On March 8, 2010, the Respondent, through counsel submitted a Motion seeking to amend the written Decision and Order dated March 2, 2010 issued in this case citing to 33 CFR 20.103(c) and Federal Rules of Civil Procedure 59(e). The regulations contained in 33 CFR Part 20 provide the specific procedures for Coast Guard administrative hearings and the Federal Rules of Civil Procedure (FRCP) are not applicable unless there is no specific provision provided in 33 CFR Part 20. There is no reason to refer to the FRCP in this matter since there are specific

regulations that apply to this issue. The procedure for a post hearing motion of this nature is contained in 33 CFR 20.904 and Respondent's Motion has been considered as a motion to reopen the record under that regulation. Any party may move to reopen the record of a proceeding 30 days or less after the closing of the record and the ALJ may reopen the record if he or she believes that any change in fact or law, or the public interest warrants reopening it. 33 CFR 20.904. The Coast Guard has not submitted any response to the motion and has waived the opportunity to submit an objection. 33 CFR 20.904(b)(2).

After a hearing conducted on February 25 and 26, 2010 the undersigned Administrative Law Judge issued a decision orally from the bench in keeping with 33 CFR 20.902(c). The regulations further provide that:

If the ALJ renders the initial decision orally, and if a party asks for a copy, the Hearing Docket Clerk shall furnish a copy excerpted from the transcript of the record. The date of the decision is the date of the oral rendering of the decision by the ALJ.
33 CFR 20.902(d)

The oral decision stated on the record on February 26, 2010 is part of the official record and constitutes the initial decision of record in this matter and is only supplemented by the written decision issued on March 2, 2010. Since the official record already contains the statement that Respondent seeks to have included by amending the written order there is no basis to justify reopening of the record under 33 CFR 20.904. As provided in 33 CFR 20.902(d) a party may request an excerpt of the transcript regarding the decision. Respondent has made such a request. The excerpt of the transcript stating the initial decision is attached to this order as Enclosure (1).

WHEREFORE,

IT IS HEREBY ORDERED, Respondent's Motion to Amend the Decision and Order in this matter is **DENIED**.

IT IS HEREBY FURTHER ORDERED, that Enclosure (1), an excerpt of the transcript is provided for Respondent.

PLEASE TAKE FURTHER NOTICE, that the time period for exercising appeal rights relating to the initial decision issued in this matter is governed by the regulations in 33 CFR Part 20 including 33 CFR 20.904(d) and 33 CFR 20.1001-1003.

Michael J Devine
US Coast Guard Administrative Law Judge

Date: March 26, 2010

ENCLOSURE (1): Excerpt from Transcript

1 UNITED STATES OF AMERICA

2 UNITED STATES DEPARTMENT OF HOMELAND SECURITY

3 UNITED STATES COAST GUARD

4
5 UNITES STATES COAST GUARD,) Docket No.

6 Complainant,) 2009-0397

7 v.) Coast Guard

8 HAROLD LANGLEY,) Enforcement No.

9 Respondent.) 3590096

10
11 CERTIFIED COPY

12
13 TRANSCRIPT OF PROCEEDINGS

14 VOLUME II

15 Norfolk, Virginia

16 February 26, 2010

17
18 Before: The Honorable MICHAEL J. DEVINE, Judge

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20
21 -----
22 TAYLOE ASSOCIATES, INC.

23 Registered Professional Reporters

24 Telephone: (757) 461-1984

25 Norfolk, Virginia

1 me a little bit longer than that to be able to give a
2 decision, but hopefully sometime between 10:30 and 11:00 I
3 will be prepared to do it. It will take me to at least
4 10:30. If I can do it then, I will.

5 We'll follow then the procedure and, as I said,
6 in keeping with 33 CFR 20.710 I'll basically issue an oral
7 order, and I have to state some findings of fact and
8 conclusions of law based on the matters presented in
9 hearing from both sides.

10 Any questions by either party?

11 MR. STATON: No, sir.

12 MR. DAVEY: No, Your Honor.

13 THE COURT: Then the hearing is recessed

14 while I review the matter, and the parties should be
15 prepared to be back here at 10:30.

16 Thank you.

17 (A recess was taken.)

18 THE COURT: As noted before we recessed, I'm
19 going to issue a bench decision in this matter in
20 keeping with the regulations and thank both counsel for
21 presenting the case in an effective manner.

22 I will issue a written order sometime early
23 next week that may expand on this a little bit, because
24 this is an abbreviated process and -- but provided by the
25 regulations to issue a prompt decision.

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1 My findings are as follows, based on a complete
2 consideration of all the evidence presented in this
3 matter, including all the exhibits and testimony
4 presented, subject to the evidentiary rulings that I have
5 made in this matter.

6 One: Respondent Harold Langley is the holder
7 of merchant mariner document 057127 and was a member of
8 the crew of the USNS REGULUS on June 29th, 2009.

9 The subject matter of this proceeding is within
10 the jurisdiction of the Coast Guard under the authority of
11 46 United States Code Chapter 77 and 46 CFR 5.57.

12 Two: On June 29th, 2009 there was a urinalysis
13 conducted in keeping with company policy for both the
14 REGULUS and the POLLUX, both vessels.

15 No. 3: Respondent Harold Langley submitted a
16 urinalysis specimen on June 29th, 2009 with specimen ID
17 No. 6122863 in connection with his company-ordered random
18 test.

19 Four: The specimen No. 6122863 was documented
20 and collected and forwarded to the lab, Quest Diagnostics
21 in this matter, in keeping with the requirements of the
22 DOT regulations.

23 Five: Evidence presented by the Coast Guard
24 regarding testing conducted on January -- June 29th, 2009
25 included testimony by the collector on how individuals are

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1 identified and the dating and initialing of the seal of
2 the specimen provided by the donor and how the chain of
3 custody form was completed.

4 Six: Specimen 6122863 was tested at the lab
5 and determined to have no detectable creatinine and a
6 specific gravity of 1.0000, consistent with water.

7 Seven: The MRO reviewed the documentation and
8 contacted the respondent to question him about the test
9 results for specimen 6122863 and determined that there was
10 no valid medical reason for the results of not
11 consistent -- quotation marks, not consistent with human
12 urine, close quotation, the matters regarding refusal to
13 test, and checked substituted on the form.

14 Eight: There was evidence presented regarding
15 a clerical error by the MRO office in notifying witness
16 McKenna of the results for the specimen 612283 -- I'm not
17 sure I got the number exactly right, but the same
18 specimen.

19 It should be 863.

20 I find that this evidence does not present
21 sufficient evidence to affect the demonstrated chain of
22 custody and testing of the specimen.

23 No. 9: Evidence that the specimen provided by
24 the respondent on June 29th, 2009 was a substituted
25 specimen is aggravating evidence.

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1 No. 10: I have decided that the portion of the
2 Exhibit 2 relating to a prior matter from 1990 is not
3 relevant and is not considered for any purpose in this
4 decision. The time involved makes any such consideration
5 too attenuated and inappropriate to consider for this
6 matter.

7 No. 11: The Coast Guard has proven by a
8 preponderance of the reliable and credible evidence that
9 the respondent provided a substituted specimen for the
10 company-ordered urinalysis conducted on June 29th, 2009.

11 This constitutes a refusal to test, and under
12 the regulations and applicable case law the charge of
13 misconduct is proven.

14 No. 12: Official notice is taken of appeals
15 decision 2578, Callahan, 1996, and Commandant v. Moore,
16 NTSB order No. EM-201(2005).

17 Mr. Davey, if you desire I'm sure Mr. Staton
18 can provide you with copies or references for that.

19 These decisions are searchable in Westlaw. The
20 Commandant decision is on appeal, and the NTSB decisions
21 are binding authority for me to follow in these
22 proceedings.

23 With regards to the matter of the sanction, I
24 have carefully reviewed the record and considered all the
25 evidence presented in this matter, beginning with the

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1 complaint and answer and note that the Coast Guard has
2 proposed a sanction and revocation.

3 And as counsel for respondent pointed out, that
4 would exceed the suggested range of sanctions contained in
5 table 5.569 of 46 CFR.

6 The single violation of misconduct for refusing
7 drug test indicates a range of sanctions from 12 to 24
8 months to outright suspension.

9 There was evidence that the respondent provided
10 a substituted specimen as a matter considered in
11 aggravation regarding the test conducted on June 29th,
12 2009, and there is also evidence both in testimony and in
13 exhibits -- particularly Exhibits C, D, E, and F presented
14 by respondent -- of mitigation.

15 The table of orders is only intended to provide
16 information and guidance, and the Administrative Law Judge
17 is not bound by the range of appropriate orders in 46 CFR,
18 part 5.

19 And that's one of the reasons with the
20 reference to the appeals decision, Callahan. That also is
21 authority in that regard.

22 Evidence of mitigating or aggravated
23 circumstances may justify departing from the suggested
24 range in 46 CFR 5.69B table.

25 The Coast Guard had sought a sanction or

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1 revocation, and respondent has argued for various lesser
2 matters to be considered.

3 Here I find that the substitution of the
4 specimen, his action, attacks the integrity of the testing
5 process. I find that there is sufficient evidence to
6 justify a sanction of revocation, and that is the sanction
7 adjudged in this matter.

8 Part of the requirements of the regulations in
9 part 5 are for the promotion of safety at sea, and the
10 matter of the integrity of these types of tests ensure
11 that is a matter of great importance.

12 I find also, though, that the respondent has
13 presented significant evidence in mitigation and is

14 obviously highly valued by his shipmates.

15 The process for obtaining new license in 46 CFR
16 5.901 should be pursued and should be considered by the
17 Coast Guard.

18 That matter is -- allows for within three years
19 or less, particularly presenting evidence as required by
20 the regulations, there are opportunities to reacquire a
21 license.

22 I will issue a follow-up written order
23 memorializing this decision.

24 Are there any matters in addition to be raised
25 by the parties?

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1 The Coast Guard will retain the mariner's
2 credentials in keeping with the regulations.

3 Also, when I issue the written order it will
4 contain appeals rights, and if either party wants to
5 submit anything further in keeping with the regulations,
6 whether for reopening or reconsideration, that's also
7 contained in the part 20 regulations.

8 Does that raise anything for you, Mr. Staton?

9 MR. STATON: Not at all, Your Honor.

10 Upon request the Coast Guard would be happy to
11 provide guidance as far as administrative clemency
12 guidelines that may be pursued at a later date.

13 THE COURT: Thank you.

14 Mr. Davey?

15 MR. DAVEY: Nothing further, Your Honor.

16 THE COURT: All right.

17 Again, I thank you all, and this hearing is
18 closed.

19 (The proceedings were concluded at
20 11:05 a.m.)

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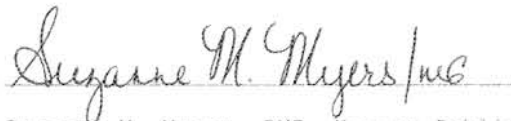
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COURT REPORTER'S CERTIFICATE

I, Suzanne M. Myers, RMR, Court Reporter,
certify that I recorded verbatim by stenotype the
proceedings in the captioned case before the Honorable
MICHAEL J. DEVINE, Judge of said Court, Norfolk, Virginia
on February 26, 2010.

I further certify that to the best of my
knowledge and belief, the foregoing transcript constitutes
a true and correct transcript of the said proceedings.

Given under my hand this 20th day of March,
2010, at Norfolk, Virginia.



Suzanne M. Myers, RMR, Notary Public

Notary No. 240597