

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

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UNITED STATES COAST GUARD  
Complainant

vs.

BRENDA COLLEEN GRAYS

Respondent

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Docket Number 2010-0432  
Enforcement Activity No. 3839547

**DECISION AND ORDER**  
**Issued: November 30, 2010**

**By Administrative Law Judge: Honorable Michael J Devine**

**Appearances:**

**Mr. James T. Staton**  
**Sector Hampton Roads**

**For the Coast Guard**

**STRICKER C. SANFORD, Esq.**

**For the Respondent**

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This Order is issued in accordance with 33 CFR 20.902(c), which authorizes the issuance of an initial oral decision. The United States Coast Guard initiated this administrative action seeking suspension of the Merchant Mariner's Credential issued to Brenda Colleen Grays, the respondent in this case. The amended Complaint dated November 10, 2010 alleges that Respondent, a holder of Coast Guard issued credentials, violated 46 U.S.C. 7703(1)(A) and 46

CFR 5.33 on June 8, 2010 by presenting herself for testing at Internal Medicine Specialists facility for pre-employment drug testing; that she failed to provide a specimen of sufficient quantity; and that she left the facility without providing a sufficient specimen thereby failing to complete a pre-employment drug screening; and that such failure to complete the drug testing constitutes a refusal to test under 49 CFR 40.191.

On September 16, 2010, Respondent filed an Answer in which she admitted to the jurisdictional allegations, admitted to attending the pre-employment drug test but denied that her actions constitutes a refusal to test and asserted an affirmative defense of necessity.

An evidentiary hearing was held in Norfolk, Virginia on November 30, 2010. The hearing was conducted in accordance with Administrative Procedure Act, amended and codified at 5 U.S.C. 551-59, Coast Guard Administrative Procedure statute codified at 46 U.S.C. 7702, and the procedural regulations codified at 33 CFR Part 20.

At the hearing, Mr. James Staton, Investigating Officer and LT Hector Pacheco entered an appearance on behalf of the Coast Guard. Respondent also appeared at the hearing represented by Attorney Stricker C. Sanford, IV.

After opening statements by both sides, the Coast Guard presented 3 Exhibits which were all admitted into evidence. Additionally, the parties reached a stipulation regarding both jurisdiction and the facts alleged in the Complaint which was addressed in the record and entered into evidence as Coast Guard Exhibit 4. Respondent presented the sworn testimony of four witnesses, including the Respondent herself and also presented a stipulation of expected testimony of another witness. Respondent did not offer any exhibits into evidence. The witness and exhibit list are contained in Attachment A.

At the conclusion of the hearing, an oral decision was rendered finding the jurisdictional and factual allegations proved. An order of a period of ten (10) months outright suspension was

issued. The Order also includes an additional two (2) months suspension on six (6) months probation. The findings of fact and conclusions of law may be summarized as follows:

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. Respondent Brenda Colleen Grays and the subject matter of this proceeding is within the jurisdiction of the Coast Guard vested under the authority of 46 U.S.C. Chapter 77.
2. On June 8, 2010, Respondent submitted to a pre-employment drug test. The Respondent engaged in official matters relating to her Merchant Mariner Credentials by reporting for pre-employment drug testing.
3. Respondent admitted jurisdiction by Answer. Jurisdiction is also clear under 46 CFR 5.57 and the parties stipulated to jurisdiction in Coast Guard Exhibit 4.
4. On June 8, 2010 Respondent departed the drug testing facility without providing a specimen sufficient for testing.
5. The failure to provide a specimen for testing was not because of a medical condition as described in 49 CFR 40.193 or 49 CFR 40.195.
6. Respondent's action in leaving the facility and failing to provide a sufficient specimen for testing constitutes a refusal to test under 49 CFR 40.191.
7. The alleged defense of necessity or emergency is not provided for or permitted by the regulations in 46 CFR Part 5 or 49 CFR Part 40.
8. To the extent that the defense of necessity or emergency is allowed as an inherent defense whether covered by the regulations or not, the evidence presented regarding the alleged emergency is not persuasive.
9. The Case of *New England Insurance Co. v. Brig SARAH ANN*, 38 U.S. 387 (U.S. 1839) is not applicable to this matter.

10. Respondent did not notify anyone at the testing facility of any emergency or alleged kidnapping, nor was any police report ever submitted regarding the alleged incident.
11. To the extent there is evidence of a perceived potential emergency it may be considered in mitigation. Respondent's record of lengthy prior service without other violations is considerate in mitigation.
12. Based on the record as a whole, the Coast Guard has proved by a preponderance of reliable and credible evidence that Respondent violated 46 U.S.C. 7703 and the regulations (46 CFR 5.33; 49 CFR 40.191) by failing to complete the pre-employment drug test on June 8, 2010

WHEREFORE,

**ORDER**

**IT IS HEREBY ORDERED THAT** the Merchant Mariner's Credential and all other Coast Guard licenses, certificates and documents issued to Respondent Brenda Colleen Grays are **SUSPENDED OUTRIGHT FOR A PERIOD OF TEN (10) Months**, commencing on August 6, 2010.

**IT IS HEREBY FURTHER ORDERED THAT** following completion of the ten month period of outright suspension, the Merchant Mariner's Credential and all other Coast Guard licenses, certificates and documents issued to Respondent Brenda Colleen Grays are **SUSPENDED ON PROBATION FOR A PERIOD OF TWO (2) Months on SIX (6) Months Probation.**

**PLEASE TAKE NOTICE** that Service of this Order on you serves as notice of your right to appeal as set forth in 33 C.F.R. § 20.1001 -1003. (Attachment B). A copy of the transcript will be provided upon request.

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**Michael J Devine**  
**US Coast Guard Administrative Law Judge**

Date: November 30, 2010

**ATTACHMENT A**  
**WITNESS AND EXHIBIT LIST**

**Respondent Witnesses**

1. Jamie Williams
2. Brenda C. Grays
3. Ricky A. Williams
4. Ronald V. Grays
5. Sterelle Grays (Stipulation of expected testimony read into the record).

**Coast Guard Exhibits**

- 1 Document from Seafarers Health and Benefit Plan regarding testing procedures
- 2 Written Statement of Respondent Brenda C. Grays dated 8/6/2010.
- 3 Copy of Respondent's Merchant Mariner Credential
- 4 Stipulation to jurisdiction and facts alleged in the complaint.

**ATTACHMENT B**  
**NOTICE OF 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;
    - (j) Reasons supporting the appeal; and
    - (k) 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.