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

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Complainant

vs.

MICHAEL VINCENT WAZ

Respondent

Docket Number 2009-0200
Enforcement Activity No. 3472660

DECISION AND ORDER

Issued: January 28, 2011

By Administrative Law Judge: Honorable Walter J. Brudzinski

Appearances:

CPO Thomas J. Davan
Sector Buffalo
For the Coast Guard

MICHAEL VINCENT WAZ, *Pro se*
For the Respondent

DECISION AND ORDER

On May 27, 2009, the Coast Guard at Sector Buffalo, New York issued its Complaint against Respondent alleging "Use of, or addiction to the use of dangerous drugs," in violation of 46 U.S.C. § 7704(c) and 46 C.F.R. § 5.35. The Coast Guard alleges that on April 7, 2009, Respondent provided a urine sample for a drug test which Quest Diagnostics later determined to contain marijuana metabolites. In his timely Answer, Respondent denied the allegations.

Shortly before the date set for hearing the parties entered into a standard cure Settlement Agreement (agreement). The agreement's material terms are detailed in "Attachment A" but in pertinent part, Respondent agreed to undergo at least 12 random, unannounced drug tests over a one-year period following successful completion of the drug rehabilitation program and complete the Settlement Agreement's terms by November 11, 2010. In accordance with paragraph 1 of the Settlement Agreement, the parties filed their Motion for Approval of Settlement Agreement and Entry of Consent Order on July 27, 2009. The undersigned issued the Consent Order Approving Settlement Agreement on the same day.

Respondent did not complete the 12 random tests, nor did he attend 2 NA/AA meetings per month. Moreover, Respondent did not obtain a letter from the Medical Review Officer (MRO) indicating he is drug-free and that the risk of his subsequent use of dangerous drugs is sufficiently low to justify return to work. Therefore, the Coast Guard Investigating Officer filed his Notice of Failure to Complete Settlement Agreement. In his Request for Hearing on the issue of whether he complied with the agreement's requirements, Respondent's states the following:

> After looking over the agreement I said [to the IO] I would not sign the agreement, because of the once a month urine analysis, because of the implication that I was a drug abuser. I told him [the IO] I would follow through with the court hearing. Then he says he would take the clause out of it, and with three clean urine tests during my counseling I would not have to worry about the once a month urine test. There were two people at my house that day who heard me with the officer, and my reluctancy to sign, the officer telling me that three clean urine tests would be enough.

On January 11, 2011, the parties and the undersigned participated in a pre-hearing teleconference. During the teleconference, Respondent, who is self-represented, stated that he had not taken the random drug tests as agreed to in the Settlement Agreement because of the former Investigating Officer's representations as indicated above. Respondent acknowledged the signature on the settlement agreement was his and further acknowledged that he had not attended all AA/NA meetings and had not obtained a letter from the Medical Review Officer (MRO). The undersigned inquired if the parties would be willing to extend the agreement's completion date which would allow Respondent extra time to complete the requirements but Respondent responded in the negative, claiming he had a separate agreement with the former Investigating Officer as indicated in his Request for Hearing letter.

The parties and the undersigned agreed that Respondent had not complied with the expressed, unambiguous terms of the written and approved Settlement Agreement. The undersigned also found that the written agreement, and not extrinsic representations, is controlling. Paragraph 1 states, "this Settlement Agreement and Consent Order are binding on Respondent . . . [and shall] constitute a full settlement of this proceeding . . .." The signed agreement is the only agreement the undersigned approved on July 27, 2009 in accordance with 33 C.F.R. § 20.502. The record is devoid of any subsequent notice or motion to amend the terms of agreement. An otherwise unambiguous, written agreement cannot be modified by evidence of earlier or contemporaneous agreements that might add to, vary, or contradict the writing. See, Restatement (Second) of Contracts § 159 (1981) (current through August 2010) and Black's Law Dictionary (9th ed. 2009) (parol-evidence rule). Therefore, no genuine issue of material facts exists which would require an additional evidentiary hearing to find extrinsic facts and make credibility determinations on whether Respondent has completed the written agreement's terms.

As further discussed during the pre-hearing teleconference, Respondent's claims concerning the circumstances under which he signed the agreement are separate from this narrow review of whether he failed to complete the agreed upon terms of the written and approved agreement. To address those separate claims Respondent may file a Petition to Reopen under 33 C.F.R. § 20.904.

WHEREFORE,

ORDER

IT IS HEREBY ORDERED that Respondent's MMD is **REVOKED**.

PLEASE TAKE NOTICE that the Settlement Agreement provides, at paragraph 4, "[t]**he ALJ's ruling on this request and any subsequent hearing will be final.**" This means that direct appeal from this Order under 33 C.F.R. §§ 20.1001 – 1004 is unavailable. Instead, any party may separately petition to re-open these proceedings in accordance with 33 C.F.R. § 20.904 (Attachment B) and then appeal the Administrative Law Judge's decision on re-opening in accordance with 33 C.F.R. §§ 20.1001 – 1004.

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Walter J. Brudzinski
Administrative Law Judge
United States Coast Guard

Date: January 28, 2011

ATTACHMENT A

THE SETTLEMENT AGREEMENT'S TERMS

The Settlement Agreement (agreement) reflects that Respondent admits to the jurisdictional allegations; that he waives his right to a hearing and to appeal; that both parties agree to the agreement's terms; and, that the Administrative Law Judge's consent order approving those terms **shall constitute the full settlement of this proceeding**. (Emphasis added).

Specifically, the agreement provides Respondent's MMD shall be REVOKED but the revocation is stayed to allow Respondent to complete the agreement's terms satisfactorily. Respondent shall enroll in a certified drug rehabilitation program and provide evidence of enrollment by September 11, 2009; he shall successfully complete the drug rehabilitation program by November 11, 2009; and, most importantly in these proceedings, he shall participate in a random, unannounced drug testing program for a minimum period of one-year following successful completion of the drug rehabilitation program. During the one year period, Respondent agrees to take at least 12 random tests spread reasonably throughout the year. The random tests must be conducted in accordance with Department of Transportation procedures found at 49 C.F.R. Part 40. He shall also attend a substance abuse monitoring program such as AA/NA for a minimum period of one-year following successful completion of the drug rehabilitation program.

Upon completion of the above, Respondent is to obtain and file a copy of the Medical Review Officer's (MRO's) letter stating he is drug-free and that the risk of his subsequent dangerous drug use is sufficiently low to justify returning to work. He is also subject to increased, unannounced testing for a period up to 60 months in accordance with 46 C.F.R. § 16.201(f)(2). While undergoing drug rehabilitation and the unannounced drug testing program, he may not perform any function that requires a Coast Guard issued credential.

Respondent must complete the requirements by November 11, 2010 and submit all evidence and documentation to the Coast Guard Investigating Officer (IO). After reviewing the evidence and documentation, the IO may 1) accept it and return Respondent's credential; 2) notify Respondent of any deficiencies and provide 30 days for Respondent to correct them; or 3) reject the evidence. If the IO rejects the evidence, the IO notifies Respondent and the ALJ Docketing Center. As per the agreement, this action triggers an Order of Revocation unless the Respondent requests a hearing (in writing and within ten (10) days after receiving the notice of failure to complete) before an Administrative Law Judge (ALJ) "on the Coast Guard's rejection of the Respondent's evidence [of completion]."

If the Respondent requests a hearing before an ALJ, then Revocation is stayed until the ALJ issues a final order. If Respondent fails to provide any evidence and documentation demonstrating that he completed the agreement's conditions by the dates required, then the IO will notify him and the Docketing Center of his failure to complete, and, unless Respondent requests a hearing before an ALJ within ten (10) days, his MMD is Revoked in accordance with the agreement. The agreement expressly provides **"The ALJ's ruling on this request and any subsequent hearing will be final."** (Emphasis in original).

The IO and the Respondent signed the Settlement Agreement and submitted it to the undersigned Administrative Law Judge together with a "Motion for Approval of Settlement Agreement and Entry of Consent Order" on July 27, 2009. That same day, the undersigned issued a Consent Order approving the agreement's terms in accordance with 33 C.F.R. § 20.502.

ATTACHMENT B

REOPENING

33 C.F.R. § 20.904 Reopening.

(a) To the extent permitted by law, the ALJ may, for good cause shown in accordance with paragraph (c) of this section, reopen the record of a proceeding to take added evidence.

(b) Any party may move to reopen the record of a proceeding 30 days or less after the closing of the record.

(1) Each motion to reopen the record must clearly set for the facts that the movant would try to prove and the grounds for reopening the record.

(2) Any party who does not respond to any motion to reopen the record waives any objection to the motion.

(c) The ALJ may reopen the record of a proceeding if he or she believes that any change in fact or law, or that the public interest, warrants reopening it.

(d) The filing of a motion to reopen the record of a proceeding does not affect any period for appeals specified in subpart J of this part, except that the filing of such a motion tolls the running of whatever time remains in eh period for appeals until either the ALJ acts on the motion or the party filing it withdraws it.

(e)(1) At any time, a party may file a petition to reopen with the Docketing Center for the ALJ to rescind any order suspending or revoking a merchant mariner's license, certificate of registry, or document if –

(i) The order rests on a conviction –

(A) For violation of a dangerous-drug law:

(B) Of an offense that would prevent the issuance or renewal of the license, certificate, or document; or

(C) Of an offense described in subparagraph 205(a)(3)(A) or (B) of the National Driver Register Act of 1982 (23 U.S.C. 401, note); and

(ii) The respondent submits a specific order of court to the effect that the conviction has been unconditionally set aside for all purposes.

(2) The ALJ, however, may not rescind his or her order on account of any law that provides for a subsequent conditional setting-aside, modification, or expunging of the order of court, by way of granting clemency or other relief after the conviction has become final, without regard to whether punishment was imposed.

(f) Three years or less after an S&R proceeding has resulted in revocation of a license, certificate, or document, the respondent may file a motion for reopening of the proceeding to modify the order of revocation with the ALJ Docketing Center.

(1) Any motion to reopen the record must clearly state why the basis for the order of revocation is no longer valid and how the issuance of a new license, certificate, or document is compatible with the requirement of good discipline and safety at sea.

(2) Any party who does not respond to any petition to reopen the record waives any objection to the motion.