

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

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Complainant

vs.

BRIAN GRANT PINKSTON

Respondent

Docket Number 2010-0446
Enforcement Activity No. 3851230

DECISION AND ORDER

Issued: March 08, 2011

By Administrative Law Judge: Honorable Michael J Devine

Appearances:

**PO2 Meredith N. Schoen
Sector Lower Mississippi**

For the Coast Guard

BRIAN GRANT PINKSTON, Pro se

For the Respondent

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 revocation of the Merchant Mariner's Credential issued to Brian Pinkston, the respondent in this case. The Complaint dated September 27, 2010 alleges that Respondent, a holder of Coast Guard issued credentials, violated 46 U.S.C. 7703(1)(B) and 46 CFR 5.27

(misconduct) on July 22, 2010 by presenting himself for random drug testing as required by his employer; that when his specimen was collected the collector noticed a chemical smell. On July 22, 2010 the collector directed Respondent to provide another specimen but this specimen was required to be an observed specimen; Respondent failed to provide a specimen of sufficient quantity; and that he thereby failed to complete a random drug screening; and that such failure to complete the drug testing constitutes a refusal to test under 49 CFR 40.191.

On October 16, 2010, Respondent filed an Answer in which he admitted to the jurisdictional allegations, admitted to the factual allegations regarding participating in a random drug test and failing to provide a sufficient specimen but denied that his actions constitutes a refusal to test and asserted an affirmative defense of shy bladder.

An evidentiary hearing was held in Tulsa, Oklahoma on March 3, 2011. 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, Petty Officer Meredith Schoen, Investigating Officer and James Fayard, assistant Investigating Officer, entered an appearance on behalf of the Coast Guard. Respondent also appeared at the hearing on his own behalf (*pro se*).

After an opening statement the Coast Guard presented thirteen (13) Exhibits which were admitted into evidence. Coast Guard Exhibit 14, offered in rebuttal, was not admitted because it had not been exchanged in discovery in keeping with the regulations. Both jurisdiction and the facts alleged in the Complaint were admitted by Answer. Respondent presented his own sworn testimony and also presented four (4) exhibits (A through D) which were admitted into evidence. Respondent did not offer any other matters into evidence. The witness and exhibit lists are contained in Attachment A.

At the conclusion of the hearing, an oral decision was rendered finding the jurisdictional and factual allegations proved and stating the sanction. The findings of fact and conclusions of law are summarized as follows:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent Brian Grant Pinkston 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 July 22, 2010, Respondent submitted to a random drug test. The Respondent engaged in official matters relating to his Merchant Mariner Credentials by reporting for drug testing.
3. Respondent admitted jurisdiction by Answer. Jurisdiction is also clear under 46 CFR 5.57 and was not disputed at the hearing.
4. The collector noted a chemical smell from the specimen provided by Respondent on July 22, 2010.
5. Because she had noted a chemical smell, the collector directed Respondent to provide a second specimen for testing before leaving the testing facility on July 22, 2010.
6. In keeping with procedures the collector required Respondent to provide the second specimen as an observed specimen.
7. Respondent did not provide an observed specimen sufficient for testing on July 22, 2010.
8. On July 22, 2010, Respondent departed the drug testing facility without providing an observed specimen sufficient for testing.
9. The failure to provide a specimen for testing was not because of a pre-existing medical condition as described in 49 CFR 40.193 or 49 CFR 40.195.

10. Respondent's action in leaving the facility and failing to provide a sufficient observed specimen for testing constitutes a refusal to test under 49 CFR 40.191.
11. There is some evidence of a psychological problem of shy bladder in regard to Respondent's failure to provide an observed specimen.
12. To the extent that the defense of shy bladder requires proof of a pre-existing condition, Respondent Exhibit B raises that issue but does not provide sufficient evidence of shy bladder under the specific facts of this case.
13. Although Respondent's original specimen collected on July 22, 2010 could have been discarded in keeping with the regulations, it was forwarded for testing and resulted in a negative test result with no indication of it being a diluted specimen shown in Exhibit A.
14. The collector's actions in this matter did not invalidate the chain of custody for the specimen that was tested by the lab. Appeals Decision Hensley 2688 (2010).
15. Exhibit A does not excuse the failure to provide an observed specimen but has been considered in mitigation in determining an appropriate sanction.
16. 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 5.27; 49 CFR 40.191) by failing to complete the random drug test on July 22, 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 Brian Grant Pinkston are **SUSPENDED ON PROBATION FOR A PERIOD OF TWELVE (12) MONTHS**, commencing on the date of this Order. The suspension will be remitted upon successful completion of the period of probation. Respondent may continue to work under his license during probation, however, if another suspension and revocation charge is proved against Respondent or if probation requirements stated below are not successfully completed the Coast Guard may enforce the twelve month suspension.

IT IS HEREBY FURTHER ORDERED THAT in addition to the twelve month period of suspension on probation, Respondent is required to comply with completing six (6) random drug screening tests that comply with DOT regulations at the direction of either the Coast Guard or his employer during the twelve (12) months of probation. Failure to complete any of these tests in keeping with the regulations will constitute a violation of probation. Violation of probation will result in execution of the twelve month suspension.

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 to Respondent if requested.

Michael J Devine
US Coast Guard Administrative Law Judge

Date: March 08, 2011

ATTACHMENT A

WITNESS AND EXHIBIT LIST

Coast Guard Witnesses

1. Teresa Crain Johnston Enterprises, Inc. Representative
2. Georgene Osborne (Panhandle Service Representative)
3. Kimberly Rosson (Collector)
4. Frank Peretti, MD (MRO)

Coast Guard Exhibits

1. Copy of Merchant Mariner License for Respondent Brian Pinkston
2. Johnson Enterprises, Inc. Drug and Alcohol Policy
3. Respondent Pinkston signed acknowledgement of Johnston Enterprises Drug and Alcohol Policy.
4. Certificate of completion of drug and alcohol supervisor training
5. Crew List of ELIZABETH ANN on July 22, 2010
6. Panhandle Employer Services Inc. Random Selection Procedures
7. Random Selection – selected participants for July 22, 2010
8. Kimberly Rosson Certification as a Collector
9. Collector's copy of the Federal Chain of Custody Form (FCCF) for original urinalysis (Y21563205)
10. Statement from Collector
11. Collectors copy of the FCCF for refusal test (Y215563203)
12. MRO copy of FCCF refusal to test form
13. MRO results of Department of Transportation (DOT) controlled substance test
14. Evidence of prior drug conviction (rejected and not admitted into evidence).

Respondent Witnesses

1. Brian G. Pinkston (Respondent)

Respondent Exhibits

- A. Copy of drug screen 7/22/2010
- B. Medical findings Timothy R. Burnmaster, ARNP
- C. Laboratory copy of federal drug testing custody and control form
- D. Results of DOT controlled Substance test from Dr. Peretti

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.