

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

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Complainant

vs.

NEIL A. WEBB, JR.

Respondent.

Docket Number: CG S&R 2009-0228
CG Case No. 3488744

DECISION AND ORDER

Issued: June 11, 2012

Issued by: Michel J. Devine, Administrative Law Judge

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 Document issued to Neil A. Webb, Jr., the respondent in this case. The Complaint dated May 29, 2009 alleges that Respondent, a holder of Coast Guard issued credentials, violated 46 U.S.C. 7703(1)(B) and 46 CFR 5.27 by refusal to complete a pre-employment drug test conducted on April 27, 2007. The Complaint further states that during the test a specimen was collected from respondent and that its temperature was "out

of range.” The allegations also assert that the documentation of the test was reviewed and ruled as a refusal to test by Dr. Hani J., Khella, a Medical Review Officer.¹

On June 18, 2009, Respondent, through counsel filed an Answer denying part of the jurisdictional allegations as stating a legal conclusion. Respondent admitted the factual allegations that he provided a urine specimen for a pre-employment drug test but denied facts alleging that he refused to provide a second specimen for an improper reason.

An evidentiary hearing was held in Norfolk, Virginia on September 17, 2009. 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 beginning of the hearing Respondent through counsel stipulated to jurisdiction, but continued to contest the factual allegations regarding refusal to complete a pre-employment drug test.

At the hearing, Mr. James Staton, Lt(jg) Dianna Bailey and Lieutenant Hector Pacheco entered an appearance on behalf of the Coast Guard. Respondent also appeared at the hearing represented by attorney Deborah C. Waters.

The Coast Guard presented the sworn testimony of two witnesses and submitted four exhibits which were admitted into evidence. Respondent testified on his own behalf at the hearing. His wife also testified and one exhibit was submitted and admitted 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. An order directing outright suspension of Respondent’s

¹ The original complaint was executed and served on Respondent on or about May 29, 2009.

Merchant Mariner Document for a period of fourteen (14) months was issued. The findings of fact and conclusions of law may be summarized as follows:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent Neil A. Webb, Jr. 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 and an individual participating in a pre-employment drug test is acting under authority of a merchant marine credential under 46 CFR 5.57.
2. On April 27, 2007, Respondent submitted to a pre-employment drug test. The Respondent provided a urine specimen that was collected, and determined to be less than ninety (90) degrees of temperature which is inconsistent with normal human body temperature. The temperature is checked within four minutes of taking the specimen in keeping with guidance pursuant to Department of Transportation (DOT) regulations.
3. The lack of a valid specimen collection was subsequently verified by a Medical Review Officer in accordance with 49 CFR Part 40.
4. The Medical Review Officer testified that it was not physiologically possible for a human to produce a urine specimen that was below 90 degrees and that according to studies a specimen could not cool so fast as to be less than 90 degrees in temperature within four minutes of collection.
5. There is no legitimate medical explanation for the cold temperature specimen provided by the Respondent.

6. Respondent signed the drug test forms including the shy bladder form (Exhibit 4) which contained an express statement that leaving before providing another specimen would constitute a refusal to test.
7. Respondent's testimony regarding a need to leave for other employment does not excuse leaving early.
8. The Coast Guard has proved by a preponderance of reliable and credible evidence that Respondent refused to complete a pre-employment drug test, constituting misconduct under 46 U.S.C. 7703(1)(B) and the underlying regulations.
9. Official Notice is taken of Appeals Decision 2578, (CALLAHAN)(1996) and of Commandant v. Moore, NTSB Order No. EM-201 (2005).

SANCTION

I have carefully reviewed the record and considered all of the evidence presented in this matter beginning with the Complaint and Answer and note that the proposed sanction of revocation would exceed the suggested range of sanctions contained in Table 5.569 of 46 CFR 5.569. The single violation of misconduct for refusing a drug test indicates a range of sanctions from 12 to 24 months outright suspension. Respondent failed to complete the pre-employment drug test on April 27, 2007. There was no evidence of any prior offenses by Respondent.

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 arguing that the cold specimen presented along with Respondent's early departure indicating avoidance of a drug test should be comparable to a positive drug test and that revocation is appropriate even considering the application of Commandant v. Moore, NTSB Order No. EM-201 (2005)(upward departure to revocation not upheld without an explanation of aggravating factors).

In opposition Respondent presented argument of the need to go to other employment and that he somehow did not understand that action could be taken for failure to complete the testing. Respondent has been a mariner for a substantial period of time and stated he has taken other drug tests. In view of his knowledge and the clear language of the forms the argument that he was unaware that action could be taken for failure to complete the drug test is not credible. However, applicable 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). After considering all of the evidence in the record including the fact that a mariner's failure to complete a pre-employment drug test is a serious offense that could result in the revocation of that individual's Coast Guard issued license and/or document. However, under the limited facts and circumstance of this case, I find that the Coast Guard has not provided sufficient evidence of aggravating factors to support exceeding the suggested range contained in the table. The Respondent argument in mitigation that either his non-compliance should be excused or a minimal sanction assessed fails to address the problem presented that avoiding a test until some other time frustrates the purpose of the test to insure that a mariner does not have a drug or alcohol abuse problem that would 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. Therefore, I find that fourteen (14) months outright suspension is the appropriate sanction.

WHEREFORE,

ORDER

IT IS HEREBY ORDERED THAT the Merchant Mariner's Document and all other Coast Guard licenses, certificates and documents issued to Respondent Neil A. Webb are **SUSPENDED OUTRIGHT for a period of FOURTEEN (14) MONTHS.** Respondent's credentials have been surrendered to the U.S. Coast Guard Sector Hampton Roads Office, 200 Granby Street, Norfolk, Virginia 23510 and shall be retained by the Coast Guard during the period of suspension.

IT IS HEREBY FURTHER ORDERED THAT the suspension Merchant Mariner's Document and all other Coast Guard licenses, certificates and documents issued to Respondent Neil A. Webb, Jr. shall begin as of May 27, 2009 and shall be completed as of July 27, 2010.

PLEASE TAKE FURTHER NOTICE that Service of this Order on the parties and/or parties representatives serves as notice of appeal rights as set forth in 33 C.F.R. § 20.1001 -1003. (Attachment B).

Done and dated June 11, 2012
Norfolk, VA

MICHAEL J. DEVINE
Administrative Law Judge

ATTACHMENT A
WITNESS AND EXHIBIT LIST

Coast Guard Witnesses

Nawal Boufrou

Hani. J. Khella, MD

Respondent Witnesses

Neil A. Webb, Jr.

Mrs. Yolanda Webb

Coast Guard Exhibits

- 1 Medical Review Officer Report dated April 27, 2007
- 2 Copy of Merchant Mariner Document 042808 issued to Neil Anthony Webb, Jr.
- 3 Federal Drug Testing Custody and Control Form # Y14893631 (Copy 1 Laboratory) indicating collection date of April 27, 2007 (consisting of 3 pages) .
- 4 Nowcare Shy Bladder and Direct Observation Procedures Form, completed on April 27, 2007.

Respondent Exhibits

- A. Voluntary Surrender Form noting submission of Respondent's Merchant Mariner Document on May 27, 2009.

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.