

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

UNITED STATES COAST GUARD

Complainant

vs.

ALFRED LOUIS DE SIMONE

Respondent

Docket Number 2012-0046
Enforcement Activity No. 4230254

ORDER

Bench Decision Issued: June 7, 2012

By Administrative Law Judge: Honorable Michael J Devine

Appearances:

**LT Jonathan D. Shumate
Sector New York**

For the Coast Guard

ALFRED LOUIS DE SIMONE, Pro se

For the Respondent

This Order is issued in accordance with 33 C.F.R. § 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 Alfred L. DeSimone, the respondent in this case. The Complaint, dated January 26, 2012, alleges Respondent, a holder of Coast Guard issued credentials, violated 46 U.S.C. § 7704 and 46 C.F.R. § 5.35 (use of or addiction to dangerous drugs) on July 17, 2011, by presenting himself for random drug testing as required by his employer; that his specimen was collected and resulted in a positive test for marijuana metabolites.

On February 20, 2012, Respondent filed an Answer in which he generally denied the allegations.

An evidentiary hearing was held in New York, New York on June 7, 2012. 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 C.F.R. Part 20.

At the hearing, LT Jonathan Shumate, Investigating Officer, and CWO James Gillette, entered an appearance on behalf of the Coast Guard. Respondent appeared at the hearing on his own behalf (*pro se*) and was accompanied by his father.

After an opening statement the Coast Guard presented fifteen (15) Exhibits which were admitted into evidence. Exhibits 1-6 and 8-16 were offered and admitted into evidence. Exhibit 7 was withdrawn and not offered. Seven witnesses testified on behalf of the Coast Guard. Respondent cross-examined the Coast Guard witnesses, but did not present any evidence of his own. The witness and exhibit lists are contained in Attachment A.

At the conclusion of the hearing, both parties waived the opportunity to file written argument and proposed findings of fact and conclusions of law. As permitted by 33 C.F.R.

20.710 and 20.902, an oral decision was rendered finding the jurisdictional and factual allegations proved and Respondent's credentials were revoked. The findings of fact and conclusions of law are summarized as follows:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent Alfred Louis DeSimone 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 17, 2011, Respondent submitted to a random drug test conducted in accordance with 46 C.F.R. Part 16. Respondent engaged in official matters relating to his Merchant Mariner credentials by reporting for drug testing.
3. Respondent admitted he is the holder of MMD 176896. Therefore since he was the holder of a MMD and performing activities under the authority of his credentials, Jurisdiction for this suspension and revocation proceeding exists under 46 C.F.R. § 5.57 and was not disputed at the hearing.
4. Department of Transportation procedures were followed by the collector who obtained a specimen from Respondent on July 17, 2011.
5. Respondent's original specimen collected on July 17, 2011 was forwarded for testing and resulted in a positive test result for marijuana metabolites.
6. The MRO reviewed the results with Respondent and determined no valid excuse or medical explanation for the positive test result.
7. Based on the testimony of the lab director and the MRO, the positive test result was verified in accordance with 49 C.F.R. Part 40.

8. The Coast Guard presented a prima facie case of use of a dangerous drug in this matter. In keeping with Appeal Decision 2584 (SHAKSPEARE) (1997), a prima facie case of dangerous drug use, based on a urinalysis test, results when (1) a party is tested for use of a dangerous drug; (2) the test results show a positive result for a dangerous drug; and (3) the drug test is conducted in accordance with 46 C.F.R. Part 16. That includes following the Department of Transportation procedures in 49 C.F.R. Part 40.
9. There is no valid medical explanation for the positive test result. Respondent failed to provide sufficient evidence to rebut the presumption he is a user of dangerous drugs that arises under 46 C.F.R. § 16.201.
10. Based on the record as a whole, the Coast Guard has proved by a preponderance of reliable and credible evidence that Respondent is a user of dangerous drugs under 46 U.S.C. 7704(c) and the underlying regulations.

WHEREFORE,

ORDER

IT IS HEREBY ORDERED THAT the Merchant Mariner's credential and all other Coast Guard licenses, certificates, and documents issued to Respondent Alfred Louis DeSimone are **REVOKED**. Respondent's Merchant Mariner Document was surrendered to the Coast Guard at the conclusion of the hearing. Respondent must immediately surrender any other Coast Guard issued credentials to the Coast Guard, Sector New York Office, 212 Coast Guard Drive, Staten Island, New York 10305. If you knowingly continue to use your documents, you may be subject to criminal prosecution.

PLEASE TAKE NOTICE that, within three (3) years or less, Mr. De Simone may file a motion to reopen this matter and seek modification of the order of revocation upon a showing that the order of revocation is no longer valid and the issuance of a new license, certificate, or document is compatible with the requirement of good discipline and safety at sea. The revocation order may be modified upon a showing that the individual:

- (1) Has successfully completed a bona fide drug abuse rehabilitation program;
- (2) Has demonstrated complete non-association with dangerous drugs for a minimum of one year following completion of the drug rehabilitation program; and
- (3) Is actively participating in a bona fide drug abuse monitoring program.

See generally 33 CFR 20.904; 46 CFR 5.901. The drug abuse monitoring program must incorporate random, unannounced testing during that year. Appeal Decision 2535 (SWEENEY).

PLEASE TAKE FURTHER 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.

<hr/> Michael J Devine US Coast Guard Administrative Law Judge	
Date: <table border="1"><tr><td>June 11, 2012</td></tr></table>	June 11, 2012
June 11, 2012	

ATTACHMENT A

WITNESS AND EXHIBIT LIST

Coast Guard Witnesses

1. Angie DeJesus-Cardona
2. Richard Williamson
3. Erin S. Beller
4. Anthony P. Hadden
5. Michael Duley
6. Mitchell F. Lebard
7. Dr. Byron Dean, MRO

Coast Guard Exhibits

1. Copy of MMD 176896 (issued to Alfred DeSimone)
2. AMS's letter on random selection
3. Report of positive drug test
4. Letter from Richard Williamson, AMSEA
5. Federal Chain of Custody form (collector copy) showing respondent signature.
6. Custody & control form from Anderson Kelly Associates to Medtox
7. ****Withdrawn and not offered****
8. Certificate of specimen collector training for Anthony Hadden
9. CV for Mitchell LeBard lab director
10. Federal Chain of Custody form (Lab copy) 2010.
11. Federal register notices for certified labs
12. Medical review officer certification for Byron Dean
13. Federal Chain of Custody form (MRO Copy) showing positive results and signed by MRO Byron Dean.
14. MRO report dated 08/08/2011
15. Electronic record notes of MRO Byron Dean in discussion with Respondent 08/08/2011
16. Passport of Collector

Coast Guard Requested and Official Notice was granted of Application of the following:

1. 46 USC Chapter 77; 46 CFR Parts 5 and 16; and 33 CFR Part 20; and 49 CFR Part 40
2. Commandant Decisions on Appeal (CDOA): Appeal Decision 2584 (SHAKSPEARE) (1997); Appeal Decision 2632 (WHITE) (2002); Appeal Decision 2697 (GREEN) (2011).

Respondent Witnesses

None presented

Respondent Exhibits

None offered

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.