

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

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UNITED STATES COAST GUARD  
Complainant

vs.

PETER GARCIA

Respondent

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Docket Number 2010-0119  
Enforcement Activity No. 3694807

**ORDER AND NOTICE OF REVOCATION FOLLOWING RESPONDENT'S  
FAILURE TO COMPLETE SETTLEMENT AGREEMENT**

**Issued: July 30, 2012**

**By Hon. Parlen L. McKenna**

**Appearances:**

**LT Christina M. Jones  
Sector San Francisco**

**For the Coast Guard**

**ALFRED G. JOHNSON, Esq.**

**For the Respondent**

**Procedural Background**

On March 12, 2010, the United States Coast Guard (Coast Guard) initiated suspension and revocation proceedings against Respondent by filing a Complaint alleging use of or addiction to the use of dangerous drugs under 46 U.S.C. § 7704(c) and 46 C.F.R. § 5.35 in connection with a drug test that came back positive for amphetamines. The parties subsequently

entered into a Settlement Agreement,<sup>1</sup> and on March 25, 2010, the case was assigned to me for review and disposition. On March 30, 2010, I issued a Consent Order approving the Settlement Agreement.

On January 18, 2012, the Coast Guard filed a Notice of Failure to Complete Settlement Agreement. The Coast Guard filed this Notice because Respondent allegedly failed to supply evidence of his successful completion of the Settlement Agreement's terms.

On February 9, 2012, Respondent's counsel filed a request for hearing. Respondent's filing requested that a hearing be set "to redetermine the facts and conclusions resulting in the issuance of the Notice . . . ." Hearing Request at 1. Furthermore, Respondent requested that the records at the Coast Guard Docketing Center and Respondent's Merchant Mariner's Records be modified "to reflect that action and be again modified . . . to show that the sanction remains stayed pending such a hearing." *Id.* at 1-2. Finally, Respondent asked that additional time be provided to comply with the Settlement Agreement's terms.

On February 10, 2012, this case was reassigned to me for review and disposition.

On February 21, 2012, the Coast Guard filed a Motion in Opposition to Respondent's Request for Hearing, which argued: 1) Respondent's failure to timely respond to the Notice of Failure to Complete Settlement Agreement rendered such a request ineffectual; 2) no basis exists to re-determine the facts and conclusions resulting in the Notice of Failure to Complete Settlement; 3) Respondent's request for cancellation and dismissal of the Notice of Failure to Complete Settlement Agreement is without basis; and 4) Respondent's request for his records at the Docketing Center and his Merchant Mariner's records to be modified to reflect that the sanction of revocation remains stayed should be denied.

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<sup>1</sup> The Motion for Approval of Settlement Agreement and Entry of Consent Order was filed on March 24, 2010.

On June 19, 2012, I conducted a prehearing telephonic conference call with the parties to discuss the issues surrounding Respondent's Request for Hearing. Mr. Gerald Wheatley, Esq., appeared for the Coast Guard and Respondent was represented by his counsel, Mr. Alfred G. Johnson, Esq. As a result of that conference call, I provided Respondent 10 days to submit all information concerning Respondent's compliance with the terms of the Settlement Agreement.

On June 19, 2012, Respondent's counsel submitted a letter enclosing two letters: 1) a letter dated June 1, 2011 from Program Director Fermin Loza, Walden House, indicating that Respondent "is a resident at Walden House Residential Substance Abuse Program" where he had been admitted on March 13, 2012; and 2) a letter dated June 17, 2012 from Bruce G. Levy, MFT. The Levy letter indicated that Respondent began a recommended Day Treatment Program on March 11, 2010 but did not complete the program. The Levy letter also stated that Respondent subsequently admitted himself to a six-month Residential Treatment Program on March 13, 2012.

On June 21, 2012, the Coast Guard responded to Respondent's submission via an electronic mail directed to my attorney-advisor, which argued that revocation was the appropriate result for Respondent's failure to complete the terms of the Settlement Agreement and that the conclusions by the Walden House and Mr. Levy that Respondent is ready to return to work beginning June 11, 2012 is "absolutely incorrect and fails to even mention the existing S[ettlement] A[greement] and its terms and provisions."

### **Analysis**

A respondent is obligated to perform the terms of a Settlement Agreement or face the consequences that automatically occur for such failure. Therefore, the purpose of these proceedings is limited to determining whether, in fact, Respondent violated the terms of the Settlement Agreement as the Coast Guard alleges and not to litigate the underlying violation. See Appeal Decision 2669 (LYNCH) (2007). The sole issue for hearing is whether, in fact,

Respondent completed the terms of the Settlement Agreement or has a legally sufficient basis to excuse such failure. However, Coast Guard precedent and regulations do not permit a judge to excuse a respondent's failure on equitable grounds or otherwise rewrite the terms of an executed Settlement Agreement so that a respondent can come into compliance. See 33 C.F.R. § 20.502(c) (settlement decision must contain an express waiver of "[a]ny further procedural steps before the ALJ; and . . . all rights to seek judicial review, or otherwise challenge or contest the validity, of the decision" and the decision "resolves all matters needing to be adjudicated.").

Here, the Coast Guard alleged that Respondent has not provided evidence of his completion of the Settlement Agreement's terms. The Settlement Agreement specifically outlined Respondent's obligations, as well as the procedural mechanisms and substantive results of any failure. Under the Settlement Agreement, Respondent agreed to: (1) participate in a random, unannounced drug-testing program for a minimum period of one year (with 12 DOT-compliant, random drug tests spread reasonably throughout the year) following successful completion of a drug rehabilitation program; (2) attend a substance abuse monitoring program (like AA/NA) for a minimum period of one year with at least two meetings per month; (3) obtain and file a return to work letter from the designated MRO; (4) be subject to increased, unannounced testing for a period of up to 60 months, with the period and frequency of such testing determined by the MRO; (5) pay all expenses associated with the completion of these terms; (6) deposit his Coast-Guard-issued credentials with Sector San Francisco until successfully completing the terms of the Settlement Agreement; (7) not perform any function that requires a Coast Guard-issued credential or endorsement; (8) advise the Coast Guard of any change of address and/or telephone number by mail; and (9) submit all evidence to the designated IO. Settlement Agreement at ¶ 3.

The Coast Guard acknowledged that Respondent completed the initial steps of enrolling in a drug rehabilitation program on March 11, 2010 but since that time allegedly has failed to

prove any further evidence of satisfactorily completing the cure elements outlined above. See Motion in Opposition to Respondent's Request for Hearing at 2.

Respondent's Request for Hearing asked for the "cancellation and dismissal of the Notice of Failure to Complete Settlement Agreement" and a hearing "to redetermine the facts and conclusions resulting issuance of the Notice". Request for Hearing at 1. Respondent also requested that Respondent's records "be modified to reflect . . . that the sanction remains stayed pending such a hearing." Id. at 1-2. Respondent did not provide any details about his compliance with the Settlement Agreement's terms but asked for "additional time for him to comply with the terms of the agreement", which represents an admission that he did not complete the terms. Id. at 2.

The Settlement Agreement clearly indicated that if the Coast Guard reviewed and rejected Respondent's evidence of compliance, an order of Revocation would be "automatically invoked" unless Respondent requested a hearing by filing a written request within 10 days of receiving the notice of failure to complete. Settlement Agreement at ¶ 4.c. The Coast Guard filed its Notice of Failure to Complete Settlement Agreement on January 18, 2012 and served it via certified mail, return receipt. Respondent's Request for Hearing was sent on February 9, 2012, which is outside the 10 days the Settlement Agreement mandated for submission of a request to be heard.

Such a procedural defect is not necessarily fatal to Respondent's Request for Hearing. While the Request for Hearing should not be rejected out of hand because of this delay, it also should not be automatically excused. Respondent has failed to demonstrate good cause for such failure and did not explain why it was not timely filed, with circumstances justifying this late filing. Respondent's failure to file a timely request for hearing (without demonstrating good cause for such failure) is a sufficient basis to reject Respondent's Request for Hearing.

Of more concern with respect to Respondent's Request for Hearing is whether he complied with the terms of the Settlement Agreement. Respondent seemingly admitted that he did not complete the Settlement Agreement's terms in his Request for Hearing and was asking only for additional time to complete the cure process outlined in that agreement.

The Settlement Agreement contained specific mechanisms for Respondent to request an extension of time to complete the agreement. See Settlement Agreement at ¶ 9 ("The final completion date . . . may, by mutual agreement of the parties, be extended up to 90 days . . . . If the parties request an extension greater than 90 days, they must file a request with the ALJ Docketing Center for approval by an Administrative Law Judge, who may approve the extension only on a showing of good cause.") (emphasis added). Importantly, such extensions are only available through mutual consent of the parties and only on a showing of good cause for extensions greater than 90 days. The undersigned is not empowered to unilaterally extend or rewrite the terms of the Settlement Agreement.

Respondent's later submission failed to provide specific evidence of his completion with the terms of the Settlement Agreement. Respondent has offered no valid basis to show why the Notice of Failure to Complete Settlement Agreement was either incorrect or otherwise legally defective. Mere argument that Respondent needs additional time to complete his cure does not suffice. The record demonstrates that Respondent failed to complete his obligations under the Settlement Agreement in the time provided.

Respondent's breach of the Settlement Agreement by his failure to timely comply with its terms results in the self-effectuating consequences outlined under Section 4 and Section 7 of the Settlement Agreement. Respondent's Coast Guard-issued merchant mariner credential is therefore **REVOKED**.

Nevertheless, Respondent may seek to avail himself of the administrative clemency process (outlined at 46 C.F.R. Part 5, Subpart L). The Coast Guard Investigating Officer can

provide details about this process should Respondent wish to submit an application for clemency under those procedures.

**WHEREFORE:**

**ORDER**

**IT IS HEREBY ORDERED THAT** any and all Coast Guard-issued merchant mariner credentials held by Respondent Peter Garcia are **REVOKED** pursuant to the terms of the Settlement Agreement and his failure to complete the same.

**SO ORDERED.**

**Hon. Parlen L. McKenna**  
**Acting Chief Administrative Law Judge**  
**U.S. Coast Guard**

Date: