

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

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Complainant

vs.

NORBERTO DOMINGO NIERRAS,

Respondent

Docket Number 2013-0020
Enforcement Activity No. 4516093

DECISION AND ORDER

Issued: April 16, 2013

By Administrative Law Judge: Honorable Walter J. Brudzinski

Appearances:

**LT Jonathan D. Shumate
LT Jeremy D. Maginot
Sector New York
For the Coast Guard**

**NORBERTO DOMINGO NIERRAS, *Pro se*
For the Respondent**

SUMMARY

The Coast Guard initiated these proceedings alleging Respondent violated 46 U.S.C. § 7704(c) and 46 C.F.R. § 5.35. At an in-person hearing, the Coast Guard submitted evidence showing Respondent took a drug test conducted in accordance with 46 C.F.R. Part 16 and 49 C.F.R. Part 40, and that Respondent's sample tested positive for marijuana metabolites. Respondent did not contest any of the Coast Guard's evidence or allegations. The undersigned found the Coast Guard satisfied its burden to establish the regulatory presumption that Respondent is a user of dangerous drugs. Respondent submitted no evidence or testimony to rebut that presumption. The undersigned therefore found the Coast Guard's case **PROVED** and ordered Respondent's Merchant Mariner's Credential **REVOKED** in accordance with the law.

ANALYSIS

The undersigned convened an in-person hearing on March 18, 2013 to adjudicate the above captioned matter. The Coast Guard presented the testimony of four (4) witnesses and submitted eleven (11) exhibits in support of its case.¹ Respondent testified on his own behalf but did not submit any exhibits.

The Coast Guard's witnesses and documentary evidence demonstrated Respondent was tested for dangerous drugs on December 21, 2012 and that Respondent's test was a valid pre-employment test in compliance with 46 C.F.R. Part 16. The evidence further showed Ms. Diana Gomez collected Respondent's urine specimen in accordance with 49 C.F.R. Part 40 and sent it to Quest Diagnostics in Norristown, PA, a laboratory federally approved to perform DOT mandatory workplace drug testing. The chain of custody was intact and the evidence showed Respondent's sample tested positive for marijuana metabolites in accordance with 49 C.F.R. Part 40. The Medical Review Officer, Dr. Arthur Hayes (MRO) interviewed Respondent and

¹ All exhibits submitted are listed as part of this Decision and Order in **Attachment A**.

verified the sample and split sample as positive for marijuana metabolites.

Respondent did not cross examine witnesses and did not object to any of the exhibits in evidence. Respondent testified on his own behalf, but did not contest any of the evidence against him. He did not call any witnesses and did not submit any of his own exhibits. Rather, Respondent stated that he is looking for a rehabilitation program to enter so that he can obtain his credential again in the future.

DECISION

At the hearing, both parties waived their rights to submit proposed findings of fact and conclusions of law in accordance with 33 C.F.R. § 20.710(b). Accordingly, the undersigned issued a decision from the bench in accordance with 33 C.F.R. § 20.902(c) including findings of fact and conclusions of law. See Tr. at 167:8 – 173:2. The undersigned found the Coast Guard proved by a preponderance of the evidence it was entitled to the regulatory presumption in 46 C.F.R. § 16.201(b) that Respondent is a user of dangerous drugs. Accordingly, the undersigned concluded Respondent is a user of dangerous drugs and revoked his Merchant Mariner's Credential in accordance with 46 U.S.C. § 7704(c) and 46 C.F.R. § 5.59(b).

WHEREFORE,

ORDER

IT IS HEREBY ORDERED that the Merchant Mariner's Credential issued by the Coast Guard to Respondent Norberto Domingo Nierras is **REVOKED**.

PLEASE TAKE NOTICE that the Administrative Law Judge tendered the Respondent's credential to the Investigating Officer at the close of hearing.

PLEASE TAKE FURTHER NOTICE that service of this Decision and Order on the parties and/or parties' representative(s) serves as notice of appeal rights set forth in 33 C.F.R. §§ 20.1001 – 20.1004, attached hereto as **Attachment B**.

Walter J. Brudzinski
Administrative Law Judge
United States Coast Guard

Date: April 16, 2013

ATTACHMENT A

WITNESSES AND EXHIBITS

Coast Guard's Witnesses:

1. Diana Paola Gomez – urine specimen collector at Bay Park Medical / Occupational Health Services on December 21, 2012.
2. Dr. Kenneth Miller, M.D. – Medical Director for the Seafarers Health and Benefits Plan.
3. Susan Mills – Director, Quest Diagnostics laboratory in Norristown, PA.
4. Dr. Arthur Hayes, M.D. – Medical Review Officer at University Services.

Respondent's Witnesses:

1. Norberto Domingo Nierras – Respondent, testified on his own behalf.

Coast Guard's Exhibits:

- CG 01 - Merchant Mariner Profile form for Norberto Domingo Nierras (1 page).
- CG 02 - Urine Specimen Collection Certification Form for Diana Gomez (1 page).
- CG 03 - Copy of Federal Drug Test Custody and Control Form (CCF) used at the collection site on December 21, 2012 (1 page).
- CG-04 - Curriculum Vitae for Susan Mills (3 pages).
- CG 05 - Federal Register excerpts regarding certified laboratories (5 pages).
- CG 06 - Copy of Federal Drug Test Custody and Control Form sent to Quest Diagnostics (1 page).
- CG 07 - Training certificates for Dr. Arthur Hayes, M.D. (4 pages).
- CG 08 - Copy of Federal Drug Test Custody and Control Form used by Medical Review Officer, Dr. Arthur Hayes, M.D. (1 page).
- CG 09 - Medical Review Officer, Dr. Arthur Hayes' notes related to Respondent Norberto Nierras (2 pages).
- CG 10 - Lab report sent to MRO, Dr. Arthur Hayes from Quest Diagnostics (2 pages).
- CG 11 - MRO, Dr. Arthur Hayes' Final Report (1 page).

Respondent's Exhibits:

Respondent did not offer any exhibits into evidence.

ATTACHMENT B

TITLE 33 - NAVIGATION AND NAVIGABLE WATERS CODE OF FEDERAL REGULATIONS

PART 20 RULES OF PRACTICE, PROCEDURE, AND EVIDENCE FOR FORMAL ADMINISTRATIVE PROCEEDINGS OF THE COAST GUARD

SUBPART J - APPEALS

33 C.F.R. § 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 C.F.R. § 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 C.F.R. § 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;
 - (ii) Reasons supporting the appeal; and
 - (iii) 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 C.F.R. § 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.