

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

UNITED STATES COAST GUARD
Complainant

vs.

KYLE DANE KLEMME

Respondent

Docket Number 2013-0286
Enforcement Activity No. 4661100

Final Order Assessing Sanction Following Hearing
Issued: April 03, 2014

By Hon. Parlen L McKenna

Appearances:

Mr. Eric A. Bauer
Suspension & Revocation National Center of Expertise

For the Coast Guard

KYLE DANE KLEMME, Pro se

For the Respondent

On January 21, 2014, I issued an Order that granted the United States Coast Guard's (Coast Guard) Motion for Summary Decision (Summary Decision Order) related to Respondent Kyle Dane Klemme's violation of 46 U.S.C. § 7703(3). However, that Order reserved ruling on a proper sanction for Respondent's violation until following a hearing. On February 20, 2014, I conducted a hearing in Phoenix, Arizona. Respondent appeared on his own behalf and Mr. Eric A. Bauer, Esq. represented the Coast Guard. The witnesses who testified and the Exhibits entered into evidence are listed on **Attachment A**. After fully evaluating all the record evidence

and arguments, I find that the appropriate sanction for Respondent's violation is

REVOCAION for the reasons provided herein.

I. Summary of Respondent's Violation of 46 U.S.C. § 7703(3)

The Coast Guard brought these proceedings against Respondent's merchant mariner credential (MMC) pursuant to 46 U.S.C. §§ 7701 *et seq.* and Coast Guard regulations found at 46 C.F.R. Part 5. As explained in the Summary Decision Order, the Complaint sought to revoke Respondent's Coast Guard-issued credential for Respondent's alleged conviction under the National Driver Registration Act (NDRA) in violation of 46 U.S.C. 7703(3). Specifically, I found the allegations **PROVED** that on March 11, 2013, Respondent was convicted of violating Arizona Revised Statute § 28-1383(A)(1), aggravated driving under the influence, which I found to be an offense under the NDRA. Thus, the sole issue to be decided at the hearing was the proper sanction for this proven offense.

II. Findings of Fact

1. Respondent is, and was, the holder of Merchant Mariner Credential (MMC) No. [redacted] at all relevant times herein. CG Exh. 1.¹
2. Respondent was issued his MMC on May 31, 2011. *Id.*
3. On March 11, 2013, Respondent was convicted of violating Arizona Revised Statute § 28-1383(A)(1), aggravated driving under the influence, by the Superior Court of the State of Arizona in and for the County of Coconino. CG Exh. 2.
4. On March 11, 2013, Respondent was convicted of violating Arizona Revised Statute § 13-1201(A), endangerment, a felony, by the Superior Court of the State of Arizona in and for the County of Coconino, in relation to the above-noted conviction. *Id.*
5. Respondent's offense for those convictions involved an incident that occurred on or about October 16, 2010. *Id.* at 2.
6. Respondent was sentenced to four months deferred incarceration and placed on probation for two years following his release from the Arizona Department of Corrections. *Id.*; *see also* CG Exh. 5.

¹ The Coast Guard's Exhibits are identified as "CG Exh. [#]" and reference to the hearing transcript take the form of "Tr. at [page#]:[line #s]".

7. Mr. Amir Hunter is a Probation officer for the Coconino County Adult Probation Department in Arizona. Tr. at 12:7-8.
8. Mr. Hunter is assigned as Respondent's probation officer. Tr. at 12:17-19.
9. The conditions of Respondent's probation included adherence to certain standard terms of probation and his refraining from consuming any substance containing alcohol. CG Exh. 2 at 3; Tr. at 14:4-6.
10. Mr. Hunter conducted repeated alcohol tests on Respondent at his home while he has been on probation. Tr. at 17:6-9.
11. These on-site tests were negative. Tr. at 18:10-14.
12. However, on or about November 3, 2013, Respondent was arrested and given 5 days in jail for violating his probation. CG Exh. 5; CG Exh. 7 at 4; Tr. at 14:7-12; 15:15-19.
13. Specifically, Respondent violated his probation: 1) by submitting a urine sample that tested positive for cocaine on or about September 11, 2013 (Tr. at 15:1-3); 2) admitted to using heroin (Tr. at 15:11-14); 3) submitting five urine samples between April 16, 2013 and September 11, 2013 that were too diluted to assure a valid negative result; and 4) on or about November 4, 2013, consuming alcohol. See also CG Exh. 7 at 1; Tr. at 14:15-25; 23:10-16.
14. Respondent admitted that he used illegal drugs after he obtained his MMC. Tr. at 26:7-10.
15. Specifically, Respondent admitted he submitted a positive urine sample for cocaine on September 11, 2013. Tr. at 26:17-22.
16. Respondent also admitted to using heroin "a few times" in January 2013. Tr. at 26:23-27:8.
17. Respondent knew that such illegal drug use was against the Coast Guard's regulations and as a result, his MMC could be revoked. Tr. at 27:25-28:6; 28:9-13.
18. Nevertheless, Respondent stated that he was going through a bad time, was then unemployed, and was not working under his MMC during the period of time he was using drugs. Tr. at 28:6-9.
19. Respondent denied that he attempted to dilute or otherwise not give a valid urine sample for other drug tests while on probation. Tr. at 27:9-24.²
20. On December 09, 2008, Respondent was convicted of violating Arizona Revised Statute § 28-708, Racing on highway; exhibition of speed, a misdemeanor, by the Page Municipal Court, Page, AZ. CG Exh. 3.
21. On April 18, 2006, Respondent was convicted of violating Arizona Revised Statute § 4-244(41) [u]nder 21 liquor in body, a misdemeanor, by the Page Municipal Court, Page, AZ. CG Exh. 4.

² The Coast Guard did not seek to impeach this testimony or otherwise argue this point. I find Respondent's testimony on this subject credible. Respondent's admitted drug use during the hearing constitutes a sufficient aggravating factor to justify revocation without consideration of the dilution issues.

22. Mr. Nick Lovett is the owner/operator of Marble Canyon Outfitters at Less Ferry in Arizona. Tr. at 33:23-25.
23. Respondent has worked for Mr. Lovett as a licensed mariner since June 1, 2011. Tr. at 34:1-2.
24. Mr. Lovett considers Respondent a good employee and never saw him “show up to work hung over or otherwise under the influence of anything.” Tr. at 34:3-17.

III. Analysis

In Coast Guard suspension and revocation cases, “[t]he sanction imposed in a particular case is exclusively within the authority and the discretion of the [administrative law judge]”. Appeal Decision 2693 (LANGLEY) (2011) (internal quotations omitted). See also 46 C.F.R. § 5.569(a) and 33 C.F.R. § 20.902(a)(2). Coast Guard judges have wide discretion to formulate an order adequate to deter a mariner’s repetition of the violations found. See Appeal Decision 2475 (BOURDO) (1988).

As the Coast Guard correctly highlighted in its Motion for Summary Decision, the Oil Pollution Act of 1990 (Pub. L.101–380) authorized the Coast Guard to conduct criminal record checks and review information from the National Driver Register. The applicable legislative history states “[t]he purpose of this section . . . is to ensure that the Coast Guard can identify vessel personnel with motor vehicle offenses related to the use of alcohol and drugs. Abuse of these substances may evince possible unsafe vessel operations, leading to additional accidents and oil spills.” House Conf. Rep. No. 101–653 at 128.

The Coast Guard’s concerns about Respondent’s potential danger to the public are well-founded. Respondent was convicted of an aggravated DUI and has both a history of substance abuse and impaired driving and also used illegal drugs following his NDRA conviction. Respondent’s demonstrated and admitted substance abuse problems with both drugs and alcohol make it imprudent to allow him to continue holding his MMC. A significant risk exists that

Respondent will be unable to follow all safety rules and regulations and operate a vessel accordingly.

In further aggravation, the Coast Guard argued that Respondent's 2008 proceedings in the City of Page, Arizona Magistrate Court in which Respondent pled guilty to Arizona Revised Statutes § 28-708(A) – Exhibition of Speed – indicate that he has a history of unsafe operation of vehicles. See Motion, Attachment E.

Respondent argued in mitigation that the incident relating to the Coast Guard's charge occurred a year prior to when he applied for his Coast Guard credentials, and the State of Arizona brought the charges 18 months after the incident. See Tr. at 21:11-23.³ Respondent's contentions concerning the timing of his offense and the Arizona authorities' delay in bringing the charges are irrelevant. As discussed in the Summary Decision Order, the Coast Guard is authorized to bring an action seeking suspension or revocation of a mariner's MMC within 3 years of an NDRA conviction. See 46 U.S.C. § 7703(3). The date of the underlying incident is not the trigger for the Coast Guard's jurisdiction and the Coast Guard operated within the statute of limitations under 46 U.S.C. § 7703(3).

Furthermore, Respondent argued with respect to his admitted drug use while holding his MMC that he was going through a bad time, was not working under the license and was not "on the water" while he was using the illegal drugs. Tr. at 28:6-9. Respondent's employer supported the contention that Respondent was not under the influence while at work. Tr. at 34:3-17. While I can appreciate the personal difficulties Respondent was facing, the fact that he was not "on the water" during the periods of his illegal drug use is irrelevant. For example, if charges had been

³ Respondent also raised an alleged issue of being prejudiced by the Coast Guard raising the probation violation issues with respect to his NDRA violation. See Tr. at 23:19-23. Mr. Bauer explained that he had disclosed Mr. Hunter was going to testify at the hearing on February 6, 2014 and that CG Exhs. 5-7 had only then-recently come to the Coast Guard's attention and he notified Respondent of such exhibits prior to the hearing. Tr. at 24:1-14. I therefore offered Respondent time to review these exhibits and determine how he would like to respond to ensure he suffered no prejudice. Tr. at 24:20-23. Respondent elected to proceed without taking any additional time to review

brought against his license for such use, such dangerous drug violations under 46 U.S.C. 7704(c) are holder offenses.

The core question here is the proper sanction for Respondent's proven violation of 46 U.S.C. § 7703(3), not punishing Respondent for his admitted drug use. Nevertheless, such admitted drug use could not only give rise to a separate and independent basis to revoke Respondent's MMC, if such charges were brought; but also, clearly provides more than enough reason to revoke the credential as an aggravating factor for Respondent's NDRA violation. The Coast Guard has adequately demonstrated why revocation is the only appropriate sanction for Respondent's proven NDRA violation under 46 U.S.C. § 7703(3).

While I am sympathetic to Respondent's difficulties and appreciate the forthright manner in which he testified as to his drug use, I cannot find any other sanction proper in this case but revocation. I sincerely hope these experiences are in Respondent's past and that he has turned his life around for the better. Respondent has the strong support of his employer, and I believe that he fully intends to remain on the straight and narrow and effectuate cure per Coast Guard precedent and regulations, as I advised him during the hearing. Assuming that is the case, I would encourage the Coast Guard to look favorably and act expeditiously on an administrative clemency request Respondent might file as a result.

IV. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Coast Guard had jurisdiction under 46 U.S.C. § 7703(3) to bring these proceedings against Respondent's MMC.
2. Respondent's conviction on March 11, 2013 for violating Arizona Revised Statute § 28-1383(A)(1) constitutes an NDRA violation for which Respondent's MMC is subject to suspension or revocation under 46 U.S.C. § 7703(3).
3. Respondent violated 46 U.S.C. § 7703(3) through his March 11, 2013 conviction for violating Arizona Revised Statute § 28-1383(A)(1).

these exhibits or prepare a response. Tr. at 24:24-25; 25:7-8 ("I don't need any time to prepare for it. I know what it is. I know what I did, and I'm here to tell it . . ."). Any claim of prejudice is therefore unfounded.

4. The record demonstrates the proper sanction for Respondent's violation of 46 U.S.C. § 7703(3) is **REVOCATION** based on his previous record associated with driving offenses, the violation of his probation, and his admitted drug use while a holder of his MMC.

WHEREFORE:

ORDER

IT IS HEREBY ORDERED THAT any and all of Respondent **KYLE DANE KLEMME's** Coast Guard-issued credentials are **REVOKED** and must be immediately surrendered to the Coast Guard's Investigating Officer.

PLEASE NOTE THAT either party may appeal this Order and the Summary Decision Order pursuant to the appeal provisions found at 33 C.F.R. Part 20, Subpart J, a copy of which is attached hereto as **Exhibit B**.

SO ORDERED

/s/ Parlen L. McKenna

Hon. Parlen L. McKenna

US Coast Guard Administrative Law Judge

Date:

Exhibit A – List of Witnesses and Exhibits

Coast Guard Witnesses

1. Mr. Amir Hunter, Probation Officer, Coconino County Adult Probation Department in Arizona

Coast Guard Exhibits

1. Copy of Respondent's MMC
2. Minute Entry from the Superior Court, County of Coconino, Arizona dated March 11, 2013
3. City of Page Magistrate Court, Traffic Ticket and Complaint, Judgment and Sentence
4. Print out of record of criminal proceedings with disposition date of 4/18/2006 from Page Municipal Court
5. Letter dated 2/5/14 from Mr. Amir Hunter to Coast Guard IO concerning Respondent's violation of probation
6. Page Police Department Officer Report for incident involving Respondent on 11/03/13
7. Superior Court for the State of Arizona in and for the County of Coconino Petition to Impose Deferred Incarceration Sanction

Respondent Witnesses

1. Respondent Kyle Dane Klemme
2. Mr. Nick Lovett, owner/operator of Marble Canyon Outfitters, Respondent's employer

Respondent Exhibits

NONE OFFERED OR ADMITTED

Exhibit B – Notice of Appeal Rights (33 C.F.R. Part 20, Subpart J)

§ 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.

§ 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.

§ 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.

§ 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.