

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

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Complainant

vs.

JOSHUA MICHAEL OYER

Respondent

Docket Number: CG S&R 2015-0166
CG Case No. 5139168

ORDER

Issued: September 18, 2015

Issued by: Michel J. Devine, Administrative Law Judge

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 (Coast Guard) initiated this administrative action seeking revocation of the Merchant Mariner's Credential issued to Joshua Michael Oyer (Respondent). The Complaint dated May 11, 2015, alleges Respondent, a holder of Coast Guard issued credential 000222542, violated 46 U.S.C. § 7704 and 46 C.F.R. § 5.35 (use of or addiction to dangerous drugs). Specifically, on April 20, 2015, Respondent presented himself for a pre-employment drug test as required by his employer, his specimen was collected, and that collection resulted in a positive test for marijuana metabolites.

On May 28, 2015, Respondent filed an Answer in which he admitted the factual allegations but denied the jurisdictional allegations.

The undersigned Administrative Law Judge (ALJ) held an evidentiary hearing in Norfolk, Virginia on September 10, 2015. 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 procedural regulations codified at 33 C.F.R. Part 20.

At the hearing, LT Bradley Bergan, Investigating Officer, and LT Miah Brown, Assistant Investigating Officer, entered an appearance on behalf of the Coast Guard. Respondent appeared at the hearing on his own behalf (*pro se*). The Coast Guard presented twelve (12) exhibits, all admitted into evidence, and presented the sworn testimony of two (2) witnesses. Respondent testified on his own behalf and had no exhibits. The witness and exhibit list is contained in Attachment A.

At the outset of the hearing, the Coast Guard moved to have all facts alleged in the Complaint found proved through Respondent's admissions in his Answer. Respondent's Answer admitted all facts in the Complaint, and he did not dispute the facts at the hearing; therefore, the undersigned ALJ granted the Coast Guard's motion. At the conclusion of the hearing, the ALJ rendered an oral decision finding the jurisdictional and factual allegations proved and stated the sanction. The findings of fact and conclusions of law are summarized as follows:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

All findings of fact and conclusions of law listed below are derived from the hearing held on September 10, 2015, contained in the hearing transcript, including all witness testimony, and all exhibits presented during the hearing.

1. Respondent is the holder of Merchant Mariner's Credential 000222542 and held this credential at all relevant times herein. Therefore, Respondent and the subject matter of this proceeding are properly within the jurisdiction of the Coast Guard and the undersigned in accordance with 46 U.S.C. Chapter 77, 46 C.F.R. Part 5, and 33 C.F.R. Part 20.
2. On April 20, 2015, Respondent submitted to a pre-employment drug test. Respondent engaged in official matters relating to his Merchant Mariner Credentials by reporting for drug testing.
3. The collector followed all applicable Department of Transportation (DOT) procedures during the April 20, 2015 pre-employment specimen collection from Respondent.
4. Respondent's specimen was sent to Lab Corporation of America and tested positive for marijuana metabolites. Lab Corporation of America followed the testing procedures established in 49 C.F.R. Part 40.
5. The MRO reviewed the results with Respondent and determined there is not a valid medical explanation for the positive test results.
6. Respondent testified that he wished to take whatever action is necessary to retain his credentials and did not deny the positive test results.
7. The Coast Guard presented a prima facie case of use of a dangerous drug in this matter. In keeping with Appeal Decision 2625 (SHAKESPEARE) (2002), a prima facie case of dangerous drug use based on urinalysis test results is presented 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, which includes compliance with Department of Transportation procedures in 49 C.F.R. Part 40.

8. There is no valid medical explanation for the positive test result, and Respondent failed to provide sufficient evidence to rebut the presumption that he is a user of dangerous drugs that arises under 46 C.F.R. § 16.201.
9. 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, the Merchant Mariner's Credential and all other Coast Guard licenses, certificates and documents issued to Respondent Joshua Michael Oyer are **REVOKED**. Respondent's Merchant Mariner credentials have been surrendered to the U.S. Coast Guard Sector Hampton Roads Office, 200 Granby Street, Norfolk, Virginia 23510 and shall be processed appropriately. Respondent must immediately surrender any other Coast Guard issued credentials to the Coast Guard, Sector Hampton Roads, 200 Granby Street, Suite 700, Norfolk, VA 23510. If Respondent knowingly continues to use his documents, he may be subject to criminal prosecution.

PLEASE TAKE NOTICE, within three (3) years or less, Mr. Oyer 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 C.F.R. § 20.904; 46 C.F.R. § 5.901. The drug abuse monitoring program must incorporate random, unannounced testing during that year. Appeal Decision 2535 (SWEENEY).

PLEASE TAKE FURTHER NOTICE, Service of this Order on you serves as notice of your right to appeal as set forth in 33 C.F.R. § 20.1001-1004. (Attachment B). A copy of the transcript will be provided to Respondent if requested.

Done and dated September 18, 2015
Baltimore, MD

Michael J Devine
US Coast Guard Administrative Law Judge

Date:

ATTACHMENT A

WITNESS AND EXHIBIT LIST

Coast Guard Witnesses

1. Meredith Law
2. LTJG Miguel Maldonado

Coast Guard Exhibits

1. Merchant Mariner Credential (MMC) Details
2. Photographs of Merchant Mariner Credential (MMC) and Transportation Worker Identification Card (TWIC)
3. Positive Drug Test Notification
4. Collector Certification and Training Documents
5. Chain of Custody and Control Form
6. Donor Instructions and Acknowledgment for Submitting to a Drug Test
7. Instructions for Completing DOT Federal Drug Testing Custody and Control Form
8. Shy Bladder Log
9. SAMHSA Certified Lab List
10. Chain of Custody and Control Form (Laboratory Copy)
11. Medical Review Officer Certification Documents
12. Chain of Custody and Control Form (Medical Review Officer Copy)

Respondent Witnesses

1. Joshua Oyer (Respondent)

ATTACHMENT B

NOTICE OF APPEAL RIGHTS

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.