

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

UNITED STATES COAST GUARD,

Complainant,

vs.

JACOB PAUL FERNANDEZ,

Respondent,

**Docket Number 2023-0365
Enforcement Activity Number 7751250**

DEFAULT DECISION

Issued: February 1, 2024

By: George J. Jordan, Administrative Law Judge

Appearances:

**Paul Tramm
Investigating Officer**

**Daniel B. Schafer, Esq.
Suspension and Revocation Center of Expertise
For the Coast Guard**

**Jacob Paul Fernandez, *Pro se*
For the Respondent**

This matter comes before me based on the United States Coast Guard's (Coast Guard) Motion for Default Order (Motion for Default). As of the date of this order, Jacob Paul Fernandez (Respondent) has not responded to the Motion for Default nor filed an answer to the Complaint. Upon review of the record and pertinent authority, I am **GRANTING** the Coast Guard's Motion for Default and find the allegations in the Complaint **PROVED**.

On or about October 17, 2023, the Coast Guard issued a Complaint against Respondent seeking to revoke his Merchant Mariner Credential (MMC) for violating 46 U.S.C. § 7703(1)(B) and 46 C.F.R. § 5.27 by refusing to take a required drug test. Specifically, the Coast Guard alleges Respondent departed the testing facility prior to the completion of a required drug test.

The Coast Guard served the Complaint on Respondent by express courier with the evidence of delivery showing receipt on October 20, 2023. On November 13, 2023, the Coast Guard filed a Motion for Default serving Respondent again by express courier with the delivery receipt showing acceptance by Respondent on November 16, 2023. To date Respondent has not filed an answer to the Complaint or replied to the Motion for Default.

As Respondent has not filed an answer nor asserted good cause for not filing an answer within the time specified and pursuant to 33 C.F.R. § 20.308, I find Respondent in **DEFAULT**. A default constitutes an admission of all facts alleged in the Complaint and waiver of the right to hearing on those facts. 33 C.F.R. § 20.310(c). I find the following facts **ADMITTED**:

1. On April 13, 2023 Respondent took a required random drug test pursuant to 46 C.F.R. Part 16.
2. Respondent reported to American Diagnostics of Seattle, where Tyson Shellhorn initiated the collection process by completing Step 1 of the Federal Drug Testing Custody and Control Form for Specimen ID# 2070867601, allowing Respondent to select an individually wrapped or sealed collection container from collection kit materials, in accordance with 49 C.F.R. § 40.63.

3. Respondent provided an initial urine specimen with a temperature of 85 degrees Fahrenheit, which is below the acceptable limits of 90-100 degrees Fahrenheit.
4. Prior to the completion of the collection process Respondent failed to remain at the urine collection site.
5. Respondent's failure to remain at the urine collection site is a refusal to take a required drug test pursuant to 46 C.F.R. Part 16, as described by 49 C.F.R. § 40.191(a)(2).
6. Refusal to take a required drug test is Misconduct as described by 46 U.S.C. § 7703(1)(B) and defined by 46 C.F.R. § 5.27.

Upon finding Respondent in default, I must now issue a decision against Respondent. 33

C.F.R. § 20.310(d). A review of record shows the Coast Guard alleged facts sufficient to establish Respondent committed misconduct as described in 46 U.S.C. § 7703(1)(b), 46 C.F.R. § 5.27, 49 C.F.R. § 40.191(a)(2), and as interpreted by Appeal Decisions 2690 (THOMAS) and 2685 (MATT) (2010). Therefore, I find Respondent refused to submit to a properly ordered drug test.

SANCTION

Having found Respondent in default and all of the allegations in the Complaint proved, I now must determine the appropriate sanction. 33 C.F.R. § 20.902(a)(2). It is within the sole discretion of the Administrative Law Judge (ALJ) to determine the appropriate sanction at the conclusion of the case. Appeal Decision 2362 (ARNOLD) (1984). Title 49 C.F.R. § 5.569 contains the Table of Suggested Range of Appropriate Orders (Table) for various offenses. The purpose of this Table is to provide guidance to the ALJ and promote uniformity in orders rendered. Appeal Decision 2628 (VILAS) (2022), aff'd NTSB Order No. ME-174. However, this Table is not binding on an ALJ and either aggravating or mitigating circumstances may support a sanction different from the Table. 46 C.F.R. § 5.569(b)(3).

The Coast Guard proved Respondent committed misconduct by refusing a drug test. The correlating sanction in the Table is outright suspension for 12-24 months. 46 C.F.R. § 5.569(d) tbl. 5.569. When selecting an appropriate sanction from the Table an ALJ can consider aggravating and mitigating factors.

Here, the Coast Guard is seeking a sanction of revocation. When a sanction departs from the guidance set forth in the Table there must be “a clearly articulated explanation of aggravating factors.” Appeal Decision 2455 (WARDELL) (1987), aff’d, NTSB Order No. EM-149 (1988); Appeal Decision 2702 (CARROLL) (2013) (quoting Commandant v. Moore, NTSB Order No. EM-201 (2005)). A sanction of revocation can be appropriate in refusal-to-test cases, but only if there are aggravating circumstances in addition to the refusal. Appeal Decision 2694 (LANGLEY) (2010) (affirming sanction of revocation for refusal to test when respondent also providing a substituted specimen). Thus, I must determine if there are any aggravating factors admitted.

Here, the admitted facts do not contain any aggravating circumstances. In the Complaint the Coast Guard avers Respondent’s provided specimen being five degrees outside the acceptable temperature range is aggravating. However, I do not find this fact aggravating because by itself it does not show Respondent intended to subvert the drug testing scheme and thereby increase the risk of an impaired mariner serving in a safety sensitive position. Id. See Appeal Decision 2702 (CARROLL); Appeal Decision 2455 (WARDELL). No precedent, Coast Guard or otherwise, provides a specimen five degrees outside the acceptable temperature range indicates subversion of the drug testing scheme thereby imperiling the safety of life and property at sea. See Appeal Decision 2708 (SOLOMON) (2015). Therefore, I do not find the circumstance asserted by the Coast Guard aggravating.

Since, the Coast Guard failed to supply any aggravating facts necessary to support a sanction above what is provided in the Table, I find an 18-month suspension appropriate. Specifically, a 12-month outright suspension followed by 6 months' suspension remitted on 6 months' probation. If at any time during probation, Respondent commits any offenses which are grounds for suspension or revocation as listed in Chapter 77 of Title 46, U.S. Code, Respondent's credential will be outright suspended for an additional 6 months.

WHEREFORE

ORDER

IT IS HEREBY ORDERED, all of Respondent's Coast Guard issued credentials, including Respondent's MMC, are **SUSPENDED for 18 MONTHS**, with a 12-month **OUTRIGHT SUSPENSION** followed by an additional 6 months' suspension remitted on 6 months' probation. Respondent's suspension shall begin on the date he surrenders his credentials to the Coast Guard. If at any time during probation, it is found that Respondent committed any offenses which are grounds for suspension or revocation as listed in Chapter 77 of Title 46, U.S. Code then Respondent's credential will be outright suspended for an additional 6 months.

IT IS FURTHER ORDERED, Respondent shall immediately deliver all Coast Guard issued credentials, licenses, certificates, or documents, including the MMC, by mail, courier service, or in person to: Paul Tramm, USCG Sector Puget Sound, 1519 Alaskan Way S. Seattle, WA 98134. In accordance with 18 U.S.C. § 2197, if **Respondent knowingly continues to use the Coast Guard issued MMC, Respondent may be subject to criminal prosecution.**

IT IS FURTHER ORDERED, pursuant to 33 C.F.R. § 20.310(e), for good cause shown, an ALJ may set aside a finding of default. A motion to set aside a finding of default may

be filed with the ALJ Docketing Center in Baltimore. The motion may be sent to the U.S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21202-4022.

PLEASE TAKE NOTICE, service of this Default Order on the parties serves as notice of appeal rights set forth in 33 C.F.R. § 20.1001-20.1004 (Attachment A).

IT IS SO ORDERED

Done and dated, February 1, 2024,
Seattle, Washington



GEORGE J. JORDAN
UNITED STATES COAST GUARD
ADMINISTRATIVE LAW JUDGE

ATTACHMENT A

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.