UNITED STATES OF AMERICA
DEPARTMENT OF HOMELAND SECURITY
UNITED STATES COAST GUARD

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| UNITED STATES OF AMERICA<br>UNITED STATES COAST GUARD | : | DECISION OF THE |
| | : | VICE COMMANDANT |
| vs. | : | |
| | : | ON APPEAL |
| MERCHANT MARINER LICENSE | : | |
| | : | NO. 2666 |
| | : | |
| Issued to: Bruce Allen Spence | : | |

This appeal is taken in accordance with 46 U.S.C. § 7701, *et seq.*, 46 C.F.R. Part 5, and the procedures in 33 C.F.R. Part 20.

By a Decision and Order (hereinafter "D&O") dated July 6, 2004, an Administrative Law Judge (hereinafter "ALJ") of the United States Coast Guard at Norfolk, Virginia, revoked the license of Mr. Bruce Allen Spence (hereinafter "Respondent") upon finding proved one charge of *violation of law or regulation* and two charges of *misconduct*.

The *violation of law or regulation* charge was based on the Coast Guard's allegation that Respondent, while serving as Master of the M/V COMMANDER, submitted to a random alcohol test that revealed that Respondent had a Blood Alcohol Concentration (hereinafter "BAC") of .176%. The misconduct charges were based on allegations that Respondent wrongfully refused to submit to both a confirmation blood alcohol test and a random drug test.

PROCEDURAL HISTORY

The Coast Guard filed its Complaint against, and sought revocation of, Respondent's Coast Guard issued merchant mariner license on February 19, 2003. [D&O at 2] After Respondent's counsel filed an Answer and requested several continuances in this matter, the hearing took place in Norfolk, Virginia, on January 27 and 28, 2004. [*Id.*] During the hearing, Respondent admitted to all jurisdictional allegations, but denied that he had been intoxicated on the date in question or that he had refused to provide additional samples for alcohol and drug testing. [*Id.*] At the hearing, the Coast Guard entered nine exhibits into the record and elicited the testimony of four witnesses. [*Id.*] Respondent objected to the validity of Investigating Officer (hereinafter "IO") Exhibit 8 (the Report of the Initial Alcohol Test) and the ALJ reserved ruling on the exhibit. [*Id.*] Respondent entered seven exhibits into the record and elicited the testimony of four witnesses on his behalf. [*Id.*] Following the completion of the hearing, the ALJ admitted IO Exhibit 8 into the record. [D&O at 3]

The ALJ issued the D&O on July 6, 2004. Respondent filed his Notice of Appeal on July 23, 2004. On September 3, 2004, Respondent requested a 60-day extension of time within which to file his Appellate Brief. The Coast Guard ALJ Docketing Center granted Respondent's request for such extension via a letter dated September 7, 2004. On November 7, 2004, Respondent requested a 120-day extension of time within which to file his Appellate Brief because Respondent's counsel was scheduled to be on active duty with the U.S. Navy. After being unable to contact Respondent's counsel regarding the duration of the extension, via a letter dated December 9, 2004, the ALJ Docketing Center granted Respondent a second 60-day extension of time upon finding that active military

duty in the Navy constituted good cause to allow such extension. Pursuant to a later agreement between the parties, Respondent was granted a further 30-day extension of time on February 10, 2005. Respondent filed his Appellate Brief in the matter on March 10, 2005, within the time allotted by the final extension. The Coast Guard filed a Reply to Respondent's Appellate Brief on April 13, 2005. Accordingly, this appeal is properly before me.

APPEARANCES: Respondent was represented by Mr. Robert K. Lansden, Esq., 125 East Pine Street, P.O. Box 473, Ponchatoula, Louisiana. The Coast Guard was represented by LT Boris K. Towns and LTJG Robert S. Butts of U.S. Coast Guard Marine Safety Office Morgan City, Louisiana.

FACTS

At all relevant times, Respondent was the holder of and was acting under the authority of a Coast Guard issued merchant mariner license. [D&O at 3; Transcript (hereinafter "Tr.") Vol. 2 at 5; IO Exhibit 1] On September 11, 2001, Respondent was employed by Gulf Tran to serve as Master of the M/V COMMANDER. [D&O at 3; Tr. Vol. 1 at 44, 48; Tr. Vol. 2 at 40] The M/V COMMANDER is a 95 gross ton passenger vessel that is required, by its Certificate of Inspection, to be manned by a master, mate, and two deckhands. [D&O at 5; Respondent's Exhibits A & B] The crew compliment may be reduced to one master and two deckhands if the vessel is away from a shore side dock for less than 12 hours. [Id.]

On the evening of September 11, 2001, the M/V COMMANDER was ordered to return to shore. [D&O at 5] At that time, the vessel was offshore serving wells near the East Cameron 23 oil platform. [D&O at 5; Tr. Vol. 2 at 10-11] On September 12, 2001,

the vessel arrived at Crane Brothers' Dock in Grand Cheniere, Louisiana. [Id.] At that time, Respondent had been aboard the vessel for nearly one month and had one more week until his tour was to be complete. The M/V COMMANDER was scheduled to undergo a crew change the following week. [D&O at 6; Tr. Vol. 2 at 13, 56, 64-65]

On the evening of September 12, Respondent went ashore and had a few beers before returning to the vessel to sleep. [D&O at 6; Tr. Vol. 2 at 20-21] In the meantime, Eagle Consulting, the vessel's manager, arranged for Mr. J.L. Harrell, a company representative, and Mr. Monty W. Savoy, a certified drug and alcohol test technician and collector, to conduct unannounced drug and alcohol testing of the crew on board both a nearby vessel and the M/V COMMANDER on the morning of September 13, 2001. [D&O at 8-9]

During the early morning hours of September 13, 2001, Captain Cliff Fulton awoke Respondent and informed him that there were people aboard the vessel. [D&O at 7; Tr. Vol. 1 at 171] Shortly thereafter, Respondent met Mr. Harrell who informed Respondent that he was going to be required to take both drug and alcohol tests because he was aboard the vessel. [D&O at 7; Tr. Vol. 2 at 22-23] Respondent was the second person to be tested. [D&O at 9; Tr. Vol. 1 at 126-128; Tr. Vol. 2 at 67] An alcohol test administered to Respondent at 5:15 a.m. on September 13, 2001, revealed that Respondent had a BAC of .176%. [D&O at 9; Tr. Vol. 1 at 191, 245; Tr. Vol. 2 at 67; IO Exhibit 8] After Respondent was made aware of his test results, he refused to both take a confirmatory alcohol test and to provide a urine sample for drug testing purposes. [D&O at 9; Tr. Vol. 1 at 196-199, 202; IO Exhibits 9 & 10] Shortly thereafter, Mr. Kelly Loupe, Safety Manager for Gulf Tran boarded the M/V COMMANDER in an attempt to

ascertain what had happened. [D&O at 9-10; Tr. Vol.1 at 40-45, 64, 66-73] Upon Mr. Loupe's arrival aboard the vessel, both Respondent and Captain Fulton informed him that they had "quit." [D&O at 10; Tr. Vol. 1 at 63] That being said, Respondent did not notify Mr. Loupe that he had quit until after he refused the administration of the drug and alcohol tests. [D&O at 10; Tr. Vol. 1 at 60] In spite of his "quitting," Gulf Tran relieved Respondent of all of his duties because he had tested positive for alcohol. [D&O at 10; Tr. Vol. 1 at 67-68]

## BASES OF APPEAL

This appeal has been taken from the ALJ's D&O, finding proved all charges and ordering the revocation of Respondent's mariner license. On appeal, Respondent raises the issues summarized below:

I. *The ALJ erred by finding the misconduct allegations proved because neither Linder Oil nor Eagle Consulting (the vessel's managers) should be considered Respondent's "marine employer" as defined in 46 C.F.R. § 16.105;*

II. *The ALJ's findings are arbitrary, capricious, clearly erroneous, and based on inherently incredible evidence; and,*

III. *Revocation of Respondent's license was an unduly harsh sanction, in this case, given Respondent's record of no prior disciplinary actions.*

## OPINION

### I.

*The ALJ erred by finding the misconduct allegations proved because neither Linder Oil nor Eagle Consulting should be considered Respondent's "marine employer" as defined in 46 C.F.R. § 16.105.*

Respondent first argues that the ALJ erred by finding the allegations of misconduct proved because neither Linder Oil, nor Eagle Consulting—the parties who arranged for the chemical testing of the individuals aboard the M/V COMMANDER—

were Respondent's "marine employer" as used in 46 C.F.R. part 16 ("Chemical Testing"). I disagree.

Title 46, C.F.R. § 16.105 defines "marine employer" as "the owner, managing operator, charterer, agent, master, or person in charge of a vessel, other than a recreational vessel." The definition extends far beyond the company that employs and pays a mariner, but includes the company that charters the vessel on a particular occasion. Appeal Decision 2641 (JONES).

In his Findings of Fact, the ALJ concluded that Respondent's actual employer, Gulf Tran, had a contract to charter the vessel with Linder Oil Company, which had subcontracted several charter responsibilities to Eagle Consulting. [D&O at 3-5] On that issue, in the "Findings of Fact" portion of his D&O, the ALJ found as follows:

> 9. At the time of the incident in question, Eagle Consulting was the company in charge of managing Linder Oil Company's day-to-day field operations on the oil platforms. Eagle Consulting determined when and how the vessels that Linder Oil Company had contracted for with Gulf Trans were used. . . .
>
> 10. Eagle Consulting's duties also included drug and alcohol testing for what Linder Oil perceived its obligations to be under the rules and regulations.

[*Id.* at 4-5, citations to transcript omitted] Therefore, as charterers of the M/V COMMANDER, both Linder Oil and Eagle Consulting met the Coast Guard's definition of "marine employers". As a result, the ALJ did not err in concluding that either company acted within the scope of the Coast Guard's drug testing regulations when they directed Respondent to submit to random drug and alcohol testing. In this context, Respondent's argument that neither Linder Oil nor Eagle Consulting were his employers is without merit.

II.

*The ALJ's findings are arbitrary, capricious, clearly erroneous, and based on inherently incredible evidence.*

On appeal, Respondent argues that there was an insufficient factual basis for the ALJ's findings and conclusions. As such, he contends that the findings in the ALJ's D&O were clearly erroneous and must be set aside. Once I have concluded that Respondent had done nothing wrong, he argues, I should restore his Coast Guard license.

It is well-settled that I may only reverse the ALJ's decision if his findings are arbitrary, capricious, clearly erroneous, or based on inherently incredible evidence. *See, e.g.*, Appeal Decisions 2584 (SHAKESPEARE), 2570 (HARRIS), *aff'* NTSB Order No. EM-182 (1996), 2390 (PURSER), 2363 (MANN), 2344 (KOHAJDA), 2333 (AYALA), 2581 (DRIGGERS), and 2474 (CARMIENKE). A review of the record shows that there are two factual questions important to a proper resolution of this matter: (1) was the evidence, including the observations of the witnesses and the results of Respondent's breath alcohol test (hereinafter "BAT"), accurate and reliable such that it shows that Respondent was "intoxicated" at the time of the test; and (2) did Respondent "refuse" to give a second breath sample for confirmatory alcohol testing and a urine sample for drug testing? Respondent contends that the ALJ came to the wrong conclusions on each of these questions based on a misunderstanding of the relevant facts and the applicable law. I disagree.

The first question of fact is whether the evidence establishes that Respondent was "intoxicated" or "under the influence of alcohol" at the time of the test. *See* 33 C.F.R. § 95.045(b); Appeal Decision 2551 (LEVENE). The test for determining whether the

Coast Guard has statutory and regulatory grounds for removing a mariner's license for violation of a regulation is a "preponderance of the evidence." 33 C.F.R. § 20.701; *See* Decision on Appeal 2637 (TURBEVILLE). "Acceptable evidence of when a vessel operator is under the influence of alcohol . . . includes, but is not limited to: (a) Personal observation of an individual's manner, disposition, speech, muscular movement, general appearance, or behavior; or (b) A chemical test." 33 C.F.R. § 95.030(b).

The relevant regulation reads as follows: "An individual is under the influence of alcohol . . . when . . . [t]he individual is operating a vessel other than a recreational vessel and has an alcohol concentration of .04 percent by weight or more in their blood." 33 C.F.R. § 95.020(b). A review of the record shows that there is considerable evidence to support the ALJ's conclusion that Respondent was intoxicated, including Respondent's admission that he had been drinking beer for "three or four hours" into the early morning hours on the date of the incident. [Tr. Vol. 2, at 20] Moreover, the testing official testified that he had "smelled alcohol" on Respondent's breath before administering the initial BAT. [Tr. Vol. 1, at 183-84] Moreover, the record contains Respondent's initial BAT results which show that he recorded a BAC level of 0.176%. [IO Exhibit 8] Although that key exhibit, IO Exhibit 8, contains what Respondent acknowledges to be his signature, he contends that he never was informed as to his actual BAC level, having signed the form before the comments section was completed. [Tr. Vol. 2, at 27-30] While those assertions could be true, they do not substantially undermine the ALJ's conclusion that Respondent was intoxicated. Respondent admitted, and his counsel stipulated, that he had participated in that BAT. [Tr. Vol. 2, at 51, Vol. 1, at 194] Immediately after administering the test to Respondent, the certified collector recorded a

BAC of 0.176%, or more than four times the maximum level permitted by regulation. The testing official testified that he had calibrated the machine properly and followed all of the other procedural requirements. [Tr.Vol. 1 at 181, 186-89, 223] He also testified that he signed the form immediately after Respondent did, after notifying Respondent that he had failed the test and advising him of the results. [*Id.* at 238-39] Indeed, Respondent admitted being told that he had failed the test, and that he would have to leave the vessel as a result. [Tr. Vol. 2 at 31-32, 50-52, 58] Based upon this evidence, the ALJ did not err in concluding that Respondent was intoxicated.

Throughout the course of the hearing, Respondent also contended that he never refused to give a confirmatory DOT BAT or a urine test for illegal drugs. Indeed, he stated that he was never asked to do so. [Tr. Vol. 2 at 28] Instead, he testified that after the initial BAT, and after being informed that he had failed the initial BAT, he took his bags, left the vessel, and caught a ride to Florida. [*Id.* at 32, 36] A review of the record shows that Respondent's testimony, in this respect, is directly contradicted by the testimony of Mr. Savoy, the testing technician, Mr. Harrell, his employer's representative, and documents filled out at the time of the refused tests. [IO Exhibit 9 and 10] While it is true that neither of these refusal forms contain Respondent's signature, each contains the signatures of the other two persons officially present at the time. [*Id.*]

The ALJ, who saw and heard the witnesses, clearly did not believe Respondent when he testified, under oath, that he was not intoxicated and never refused to provide additional samples on the morning in question. [D&O at 10] Prior Commandant Decisions on Appeal make clear that "[q]uestions of fact are for the [ALJ] to decide." Appeal Decision 2609 (DOMANGUE). In this case, the ALJ concluded that the

Government had met its burden of proving both that Respondent was intoxicated and that he refused to participate in the additional tests as alleged. [D&O at 10] Because the ALJ's determinations, in this regard, are supported by substantial evidence in the record, they will not be disturbed.

III.

*Revocation of Respondent's license was an unduly harsh sanction, in this case, given Respondent's record of no prior disciplinary actions.*

Respondent cites 46 C.F.R. § 5.569 to support his argument that a sanction of revocation is inappropriate in this case. [Respondent's Appellate Brief at 4-5] To that end, Respondent contends that the applicable regulations make clear that an appropriate sanction for "refusal to provide specimens for chemical tests" is a suspension of a mariner's credential for a period of 12-24 months. [Respondent's Appellate Brief at 4-5] To further support his arguments in mitigation, Respondent notes that he has an otherwise unblemished record as a merchant mariner, is well respected as a master, and has never used illegal drugs or failed a previous drug test. [*Id.*]

In his D&O, the ALJ addressed the severity of the sanction as follows:

> I find that a mariner's refusal to take a chemical test for drugs and alcohol when ordered to do so by a marine employer, as part of the required Coast Guard drug testing program, must result in the revocation of that individual's Coast Guard issued license and/or document regardless of the type of test involved (post accident, pre-employment, random, probable cause, or periodic). There can be no distinction between the type of DOT drug test involved and the sanction issued. Each type of test is an integral part of the Congressional and Coast Guard's effort to root out substance abuse in the merchant marine. All refusals raise the specter of the mariner's illicit drug use and place in doubt the ability of a mariner to safely carry out his/her duties and responsibilities of the vessel. Therefore, revocation is the appropriate sanction.

[D&O at 20] Prior Commandant Decisions on appeal make clear that the selection of an appropriate order is the responsibility of the ALJ and he has wide discretion as to the choice of the appropriate sanction. *See* 46 C.F.R. § 5.569(a); Appeal Decisions 2640 (PASSARO), 2618 (SINN), 2609 (DOMANGUE), and 2543 (SHORT). While the ALJ may look to the Suggested Range of an Appropriate Order Table, 46 C.F.R. Table 5.569, for information and guidance as to the typical order associated with a particular charge, he may increase or decrease the sanction as he sees fit. 46 C.F.R. § 5.569; Appeal Decisions 2640 (PASSARO) and 2618 (SINN). As such, it has long been held that an ALJ's order will only be modified on appeal if it is clearly excessive or an abuse of discretion. *See, e.g.*, Appeal Decisions 2640 (PASSARO), 2422 (GIBBONS), 2391 (STUMES), 2362 (ARNOLD), 2313 (STAPLES), 2256 (BURKE) and 2245 (MATHISON),.

Upon a thorough review of the record, I believe that the sanction imposed by the ALJ is neither excessive nor an abuse of discretion. Indeed, as the ALJ notes in his D&O, "[r]efusal to submit to a chemical test raises a serious doubt about a mariner's ability to perform safely and competently in the future." [D&O at 19] This fact is amplified by the prevailing rationale that, "if a mariner could refuse to submit to chemical testing and face a lesser Order [than revocation], it is difficult to imagine why anyone who may have used drugs would ever consent to be tested." [D&O at 19-20, citing Appeal Decision 2578 (CALLAHAN).] As a consequence, many Executive Branch agencies involved in transportation safety consider refusal to take a test for alcohol or illegal drugs to equate to a positive (adverse) test result. *See* Exxon Shipping Co. v. Exxon Seamen's Union, 73 F.3d 1287, 1294 (3rd Cir. 1996)(dicta). In this case, Respondent, after being found to be intoxicated, refused not only to take a confirmatory

alcohol test, but also a requested drug test. Under such circumstances and with the rationale articulated above in mind, I find that the ALJ did not abuse his discretion in assessing a sanction of revocation in this case.

## CONCLUSION

The actions of the ALJ had a legally sufficient basis and his decision was not arbitrary, capricious, or clearly erroneous. Competent, reliable, probative, and substantial evidence existed to support the findings and order of the ALJ. Therefore, I find Respondent's bases of appeal to be without merit.

## ORDER

The Decision and Order of the Administrative Law Judge is AFFIRMED.

V. S. CREA
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C. this 7th of August, 2007.