

MANDATORY DRUG TESTING OF MERCHANT MARINE PERSONNEL

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INTRODUCTION

The U.S. Coast Guard is charged with, among other things, promulgating and enforcing regulations for the promotion of safety of life and property on and under the high seas and waters subject to the jurisdiction of the United States.² The Coast Guard also exercises general regulatory authority over the Merchant Marine, its vessels, and its personnel.³ That authority includes establishing and classifying Merchant Marine personnel credentials as well as establishing professional and medical qualifications for those seeking to obtain credentials.⁴ It also includes authority to require holders of Merchant Mariner Credentials (MMCs) to be tested for alcohol and dangerous drugs.⁵ And, the Coast Guard may deny an MMC to any person who has been convicted of a dangerous drug law of the United States or a state within 10 years of application, or has ever been a user of or addicted to a dangerous drug.⁶

Once a person obtains an MMC and an Administrative Law Judge (ALJ) finds that the MMC holder is, or has been, a user of or addicted to dangerous drugs, the law

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² 14 U.S.C. § 2. Thompson Reuters/West, WESTLAW® through February 2010. Hereinafter, all citations to the United States Code are made to WESTLAW® through February 2010 without further notation. Hereinafter, all citations to the Code of Federal Regulations are to the Electronic Code of Federal Regulations website at <http://ecfr.gpoaccess.gov> without further notation.

³ 46 U.S.C. § 2103.

⁴ 46 U.S.C. § 7101. Merchant mariner licenses, documents, and certificates of registry are now consolidated into what is now referred to as the Merchant Mariner's Credential (MMC). The term "credential" can include license, certificate of registry, MMC, or STCW Endorsement (Standards for Training, Certification and Watchkeeping). 74 Fed. Reg. 11,216 (March 16, 2009).

⁵ 46 U.S.C. § 7702(c) (2). "The testing may include pre-employment (with respect to dangerous drugs only), periodic, random, and reasonable cause testing, and shall include post-accident testing."

⁶ 46 U.S.C. § 7503.

requires that the MMC be revoked.⁷ Further, if an ALJ finds that the MMC holder has been convicted of violating a dangerous drug law of the United States or a state within a 10 year period before the beginning of the administrative proceedings, the ALJ must either suspend or revoke the holder's MMC.⁸ It is clear that these statutes intend to exclude drug users and violators of drug statutes from serving on U.S. vessels.

MARINE EMPLOYERS MUST TEST EMPLOYEES

To discourage the illegal use of controlled substances by credentialed merchant marine personnel and to promote a drug-free and safe work environment for the passage of embarked passengers and for carriage of cargo on U.S. waterways, the Coast Guard requires all marine employers to test their employees for dangerous drugs.⁹ Those dangerous drugs are: marijuana, cocaine, opiates, phencyclidine (PCP), and amphetamines.¹⁰ Marine employers are not permitted to employ anyone to serve as a crewmember unless the individual passes a chemical test for dangerous drugs.¹¹ Marine

⁷ 46 U.S.C. § 7704(c). The authority for the Coast Guard to conduct administrative proceedings against the credentials of merchant marine personnel is found at 46 U.S.C. §§ 7701-7705. Administrative proceedings to suspend or revoke merchant mariner credentials are initiated and conducted in accordance with the Administrative Procedure Act, 5 U.S.C. § 551-599 and the Coast Guard's substantive and procedural rules at 46 C.F.R. pt. 5 and 33 C.F.R. pt 20. ALJ Decisions and Orders may be appealed to the Commandant of the Coast Guard under 33 C.F.R. §§ 20.1001-20.1004. Decisions of the Commandant are appealed to the National Transportation Safety Board (NTSB) under 49 C.F.R. §§ 825.1 - 825.40. Final Orders of the NTSB are appealed to the appropriate U.S. Circuit Court of Appeals (49 U.S.C. § 1153), thence to the Supreme Court of the United States (28 U.S.C. § 1254). Coast Guard ALJ Decisions and Orders are found at homeport.uscg.mil/CGALJ. That website also contains links to Commandant Appeal Decisions and NTSB Decisions.

⁸ 46 U.S.C. § 7704(b).

⁹ See generally, 46 C.F.R. pt. 16. In its Notice of Proposed Rulemaking requiring employers to test mariners for dangerous drugs and alcohol, the Coast Guard stated, "through chemical testing, the Coast Guard expects to discourage drug and alcohol use by merchant marine personnel, an activity which adversely impacts the users, their shipmates, the marine industry, and the public in general." 53 Fed. Reg. 25926 (July 8, 1988). "*Dangerous drug* means a narcotic drug, a controlled substance, or a controlled - substance analog (as defined in section 102 of the Comprehensive Drug Abuse and Control Act of 1970 (21 U.S.C. 802)." 46 C.F.R. § 16.105.

¹⁰ 46 C.F.R. § 16.113; 49 C.F.R. § 40.85.

¹¹ 46 C.F.R. § 16.210 (a). "Crewmember" includes those engaged or employed on board a vessel owned in the U.S. that is required by law or regulation to engage, employ, or be operated by an individual holding a merchant mariner credential or acting under the authority of that credential. 46 C.F.R. § 16.105.

employers must conduct pre-employment,¹² periodic,¹³ random,¹⁴ serious marine incident,¹⁵ and reasonable cause tests for dangerous drugs.¹⁶ The Supreme Court of the United States has upheld workplace drug testing, provided it is reasonable.¹⁷

All testing must comply with the procedures in 46 C.F.R. pt. 40¹⁸ and drug testing laboratories must be certified by the U.S. Department of Health and Human Services under the National Laboratory Certification Program (now called the Substance Abuse and Mental Health Services Administration (SAMHSA)).¹⁹ To ensure compliance, employers who violate the mandatory drug testing regulations are subject to civil penalties.²⁰

The Coast Guard also requires employers to establish an Employee Assistance Program for education and training on drug use.²¹ Each program must include the effects and consequences of drug and alcohol use on personal health, safety, and work environment as well as the manifestations and behavioral cues that may indicate drug and alcohol use and abuse.²²

¹² 46 C.F.R. § 16.210.

¹³ 46 C.F.R. § 16.220.

¹⁴ 46 C.F.R. § 16.230.

¹⁵ 46 C.F.R. § 16.240; 46 C.F.R. § 4.03-2 (definition of serious marine incident); 46 C.F.R. § 4.06-1 (testing shall include tests for evidence of drug as well as alcohol use).

¹⁶ 46 C.F.R. § 16.250. (Reasonable cause also includes alcohol testing).

¹⁷ See, Skinner v. Railway Labor Executives' Association, 489 U.S. 602 (1989) (warrant not required; safety sensitive positions); National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) (drug testing must be reasonable).

¹⁸ 46 C.F.R. § 16.113.

¹⁹ 49 C.F.R. § 40.81. Marine employers must use laboratories on the list of accredited labs published by Substance Abuse and Mental Health Services Administration (HHS/SAMHSA, formerly HHS/NLCP). A notice listing all currently certified laboratories is published in the Federal Register during the first week of each month. For the most current list of SAMHSA approved labs see, 75 Fed. Reg. 5,088-89 (Feb. 1, 2010).

²⁰ 46 U.S.C. § 2115; 46 C.F.R. § 16.115.

²¹ 46 C.F.R. § 16.401.

²² *Id.*

Despite employer-provided drug training and the possibility of having one's credential revoked, Coast Guard records show that in 2007, maritime employers administered 107,562 drug tests. Of that number, 2,202 merchant mariners tested positive for dangerous drugs.²³ While these figures represent a positive test rate of only 1.338%, each mariner testing positive for dangerous drugs presents an elevated threat to safety at sea, especially if that mariner performs the vessel's operating functions such as navigating, steering, controlling, monitoring, or maintaining the vessel's main or auxiliary propulsion equipment. When a mariner tests positive for dangerous drugs, there is an established suspension and revocation procedure that not only promotes safety at sea but also protects mariners' rights.²⁴

SUSPENSION AND REVOCATION PROCEEDINGS

The purpose of suspension and revocation proceedings is to promote safety at sea.²⁵ Suspension and revocation proceedings are remedial and not penal in nature and are intended to help maintain standards for competence and conduct essential to promoting of safety at sea.²⁶ Hearings must be conducted in accordance with the Administrative Procedure Act (APA) and the Coast Guard's substantive and procedural regulations found at 46 C.F.R. pt. 5 and 33 C.F.R. pt. 20.²⁷

²³ Records from the Office of Investigations and Casualty Analysis, U.S. Coast Guard Headquarters, 2100 Second Street, SW, Washington, DC 20539-0001. Many of those tested do not necessarily hold merchant mariner credentials.

²⁴ *See*, UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE REPORT ON COAST GUARD: ADMINISTRATIVE LAW JUDGE PROGRAM CONTAINS ELEMENTS DESIGNED TO FOSTER JUDGES' INDEPENDENCE AND MARINER PROTECTIONS ARE BEING FOLLOWED, GAO-09-489, June 12, 2009.

²⁵ 46 U.S.C. § 7701 (a).

²⁶ 46 C.F.R. § 5.5.

²⁷ 46 U.S.C. § 7702(a); Administrative Procedure Act, (originally enacted as Pub. L. No. 79-404, 60 Stat. 237 June 11, 1946), repealed, recodified, and further amended at 5 U.S.C. §§ 550-559, 701-706, 706, 1305, 3105, 3305, 3344, 4301, 5335, 5372, and 7521); *see also*, 46 U.S.C. § 7701, General Provisions for Merchant Mariner Suspension and Revocation Proceedings; 46 U.S.C. § 7702, Administrative Procedure for Suspension and Revocation; 46 U.S.C. § 7703, Bases for Suspension and Revocation; and 46 U.S.C. § 7704, Dangerous Drugs as Grounds for Revocation.

The parties to suspension and revocation proceedings are the Respondent, the Investigating Officer, and the Administrative Law Judge. For the purposes of this article, the Respondent is the merchant mariner who holds an MMC and has tested positive for dangerous drugs. The Investigating Officer (IO) is the Coast Guard official designated by appropriate authority for the purpose of conducting investigations of marine casualties or matters pertaining to the conduct of credentialed merchant mariners.²⁸ The Administrative Law Judge (ALJ) is the person appointed under the Administrative Procedure Act at 5 U.S.C. § 3305 whom the Commandant of the Coast Guard designates pursuant to § 556(b) of that Act for the purpose of conducting hearings under 46 U.S.C. §§ 7703 or 7704.²⁹ Besides testing positive for dangerous drugs or being convicted of violating a dangerous drug law, mariners are also subject to suspension and revocation proceedings for acts of misconduct, negligence, or incompetence.³⁰

If an MMC holder fails a chemical test for dangerous drugs, the holder's employer must report the test results in writing to the nearest Coast Guard Officer-in-Charge, Marine Inspection.³¹ The IO conducts the requisite investigation and prepares a Complaint to be served on the Respondent with a copy to the ALJ Docketing Center. The

²⁸ 46 C.F.R. § 5.15. The Investigating Officer may also be an attorney but it is not required. In more serious cases, the Coast Guard will also assign an attorney.

²⁹ 33 C.F.R. § 20.102; 46 C.F.R. § 5.19(a). Section (b) states that the Commandant delegates to ALJs the authority to admonish, suspend with or without probation or revoke a merchant mariner credential.

³⁰ *See*, 46 C.F.R. §§ 5.27, 5.29, and 5.31.

³¹ 46 C.F.R. § 16.201(c). The credential holder must be denied employment as a crewmember or must be removed from duties which directly affect the safe operation of the vessel as soon as practicable and is subject to suspension and revocation. *Id.* Under 16 C.F.R. § 16.201(d), if an individual who is not a credential holder fails a chemical test for dangerous drugs, that individual shall also be denied employment as a crewmember or removed from duties which directly affect the safe operation of the vessel as soon as possible.

Chief Administrative Law Judge then assigns the case to the ALJ next in rotation.³² The assigned ALJ has all the powers necessary to conduct a fair, fast, and impartial hearing.³³

In suspension and revocation proceedings resulting from a positive test for dangerous drugs, IOs must propose that the ALJ revoke Respondent's credential.³⁴ However, the IO has the discretion to offer Respondents a settlement agreement to provide Respondent an opportunity to prove he or she is cured of dangerous drug use.³⁵ The authority to offer a settlement agreement in a drug case is derived in part from the pertinent language in 46 U.S.C. § 7704(c) which reads as follows:

If it is shown that a holder has been a user of, or addicted to, a dangerous drug, the [credential] shall be revoked unless the holder provides satisfactory proof that the holder is **cured**. (Emphasis added).

46 U.S.C. § 7704(c)

Settlement Agreements

Settlement agreements provide Respondents an opportunity to prove that they are cured from using dangerous drugs and thereby avoid having their MMCs permanently revoked. As stated in the Coast Guard Marine Safety Manual, Volume V, Part C, Chapter 4, Section E.4.a., the standard settlement agreement provides that the Respondent admit to all jurisdictional and factual allegations in the Complaint. That means Respondent must acknowledge being a holder of an MMC and that his/her sample tested positive for the particular dangerous drug in question. Further, the settlement agreement

³² 33 C.F.R. § 20.201.

³³ 33 C.F.R. § 20.202.

³⁴ 46 U.S.C. §7704(c); 46 C.F.R. § 5.59, and Table 5.569.

³⁵ 33 C.F.R. § 20.502. Coast Guard Marine Safety Manual (COMDTINST M16000.10A), Volume V, Section E.4.a., available at http://www.uscg.mil/directives/cim/16000-16999/CIM_16000_10A. IOs may offer cure settlement agreements to mariners who have not previously tested positive, or in some cases, to those who have tested positive more than three (3) years prior whom the Medical Review Officer still considers to be good candidates for cure. However, the IO may not offer a cure settlement agreement if a serious marine incident triggered the drug test.

must provide that the Respondent's MMC is revoked but that the revocation is "stayed" pending satisfactory completion of all terms in the agreement; and, that the Respondent enroll in an approved drug rehabilitation program which takes approximately 60 days.

Upon successful completion of the drug rehabilitation program, the Respondent must agree to demonstrate complete non-association with dangerous drugs by submitting to a minimum of 12 random, unannounced drug tests to be administered during the following 12 months. The drug tests are to be conducted in accordance with Department of Transportation testing procedures at 49 C.F.R. pt. 40. During that 12 month period, the Respondent is also to attend a substance abuse monitoring program of at least 2 meetings per month.

Upon completing the above requirements, the Respondent is to provide proof thereof to the designated Medical Review Officer (MRO) who shall review the evidence and issue a letter attesting that the mariner is drug-free and that the risk of subsequent drug use is sufficiently low to justify the mariner's return to work.³⁶ Settlement agreements must also provide that upon return to work, the Respondent may also be subject to additional testing up to 60 months for a minimum of 6 tests during the first year if the MRO deems it necessary.³⁷ Finally, the ALJ must approve the settlement agreement.³⁸

The entire program must be completed by a date certain which is usually 13-15 months after entering into the settlement agreement. If Respondent fails to complete the

³⁶ A Medical Review Officer (MRO) must be a licensed M.D. or D.O. who has met the experience and training requirements in accordance with 49 C.F.R. § 40.121. The MRO functions in accordance with 49 C.F.R. §§ 40.122 - 40.169.

³⁷ 46 C.F.R. § 16.201(f).

³⁸ 33 C.F.R. § 20.502.

program, the IO shall file a notice of failure to complete which provides that the Respondent has a right to a hearing before an ALJ solely on the issue of whether he/she has failed to fulfill the terms of the settlement agreement.³⁹

During the period the Revocation is “stayed,” the Respondent deposits his/her MMC with the IO.⁴⁰ Upon successful completion of the settlement agreement, the IO returns the MMC to the Respondent.⁴¹ Further, settlement agreements must prescribe that Respondents may not be employed in any capacity which requires a Coast Guard issued MMC. On more than one occasion, Respondents undergoing cure (without having entered into a settlement agreement) had petitioned the ALJ to allow them to work under the authority of their merchant mariner credentials prior to completing cure. On both occasions, the ALJ allowed the Respondents to work, but on appeal by the IO, the Commandant of the Coast Guard overruled the ALJ. In Appeal Decision 2634 (BARRETTA) (2002 WL 32061809 (CGCDA)), the Commandant held:

The ALJ is not authorized to permit a mariner to sail under the authority of the mariner’s credential until all the requirements of cure have been met. The ALJ can only find that cure has been established after the mariner has successfully completed a bona fide drug rehabilitation program, demonstrated a complete non-association with drugs for one year following completion of the drug rehabilitation program, and the MRO has made a determination in accordance with 46 CFR 16.201(f) that the mariner is drug-free and his risk of illegal drug use again is sufficiently low. During the period of cure, the ALJ may stay the order of revocation and continue the hearing to allow cure, but the ALJ cannot allow the mariner to work under the authority of the mariner’s credential.

³⁹ Respondents may not be able to complete the cure program due to circumstances beyond their control. In those cases, the parties may agree to extend the Settlement Agreement up to 90 days. The ALJ must approve extensions beyond 90 days.

⁴⁰ 46 C.F.R. § 5.201.

⁴¹ 33 C.F.R. § 20.502.

Similarly, in Appeal Decision 2638 (PASQUARELLA) (2003 WL 1891872 (CGCDA)), the Commandant held, “[u]nder BARRETTA . . . the ALJ cannot allow the mariner to work under the authority of the mariner’s credentials prior to completion of cure. This is accomplished by the Coast Guard retaining possession of the document.”

The most important aspect of cure is that a Respondent not only successfully completes the drug rehabilitation program and remain drug free for one year thereafter, but also that the MRO certify Respondent is drug free and that the risk of subsequent dangerous drug use is sufficiently low to justify the mariner’s return to work. This policy promotes safety at sea and provides mariners with an opportunity to cure themselves of using dangerous drugs without having their MMCs permanently revoked.

Hearing Procedure

The IO will not offer a cure settlement agreement if the Respondent had successfully completed such an agreement within the last three years, or if the positive drug test was triggered as the result of a serious marine incident.⁴² In the absence of a cure settlement agreement, a Respondent who has tested positive for dangerous drugs has two choices: 1) defend against the allegations at hearing; or 2) voluntarily surrender his/her merchant mariner credential to avoid hearing.⁴³ If Respondent chooses the latter, the Coast Guard will take no further administrative action with the result being that Respondent permanently gives up all rights to the credential.⁴⁴ To further protect the

⁴²Coast Guard Marine Safety Manual (COMDTINST M16000.10A), Volume V, Section E.4.a., available at http://www.uscg.mil/directives/cim/16000-16999/CIM_16000_10A.

⁴³ 46 C.F.R. § 5.203.

⁴⁴ 46 C.F.R. § 5.203(b) (2).

Respondent's rights, the IO must be convinced that the Respondent fully understands the effects of a voluntary surrender.⁴⁵

Respondents choosing to defend against the allegations at hearing may appear with or without counsel and are entitled to the procedural due process protections accorded by the APA and the regulations at 33 C.F.R. pt 20 and 46 C.F.R. pt. 5.⁴⁶ The procedural aspects of the hearing closely follow a civil trial in federal court without a jury and the standard of proof in Coast Guard hearings is a preponderance of the evidence.⁴⁷

Central to suspension and revocation proceedings resulting from a positive test for dangerous drugs is "[i]f an individual fails a chemical test for dangerous drugs . . . the individual will be presumed to be a user of dangerous drugs."⁴⁸ To trigger this presumption,

the Coast Guard must prove (1) that the respondent was the person who was tested for dangerous drugs, (2) that the respondent failed the test, and (3) that the test was conducted in accordance with 46 C.F.R. Part 16. Proof of those three elements establishes a *prima facie* case of use of a dangerous drug (*i.e.*, a presumption of drug use), which then shifts the burden of going forward with evidence to the respondent to rebut this presumption. If the respondent produces no evidence in rebuttal, the ALJ may find the charge proved on the basis of the presumption alone.⁴⁹

⁴⁵ 46 C.F.R. § 5.203(c). The Investigating Officer will have Respondent sign a written statement indicating that he/she understands the legal effect of voluntarily surrendering the credential.

⁴⁶ Those rights include discovery, having witnesses, records, or other evidence subpoenaed, the right to examine and cross-examine witness, the right to introduce relevant evidence into the record, and the right to testify to facts or relevant information on his/her own behalf, among other things 33 C.F.R. pt 20; and 46 C.F.R. pt 5.

⁴⁷ 33 C.F.R. § 20.701.

⁴⁸ 46 C.F.R. § 16.201(b).

⁴⁹ Appeal Decision 2603 (HACKSTAFF) (1998 WL 34073115 (CGCDA)). 49 C.F.R. pt 40 has replaced the procedures referred to in 46 C.F.R. pt. 16 at the time of the HACKSTAFF Appeal Decision. 46 C.F.R. § 16.201 now states that "[c]hemical testing of personnel must be conducted as required by this subpart and in accordance with the procedures detailed in 49 CFR part 40."

Concerning the first of the above elements, the Investigating Officer must prove the identity of the person providing the specimen; that is, the IO must prove the link between the Respondent and the sample number or the Drug Testing Custody and Control number assigned to the sample which identifies the sample throughout the chain of custody and testing process. It also involves proving the test of that sample. The second element is proved by showing that the Respondent failed the test. This requires proving the test results; proving the MRO's status and qualifications; proving the review of the test results by the MRO; and, proving the MRO's report of the results as "positive."⁵⁰ Proving the third element requires the Investigating Officer to show the test was conducted in accordance with 46 C.F.R. pt. 16 (now 49 C.F.R. pt. 40). This requires proving the collection process; proving the chain of custody; proving how the specimen was handled and shipped to the testing facility; and, proving the testing laboratory's qualifications.⁵¹

The IO proves these elements by introducing the Drug Custody and Control form and then proves the chain of custody to the laboratory. The IO also introduces documents and reports from the laboratory showing the handling and testing of Respondent's specimen. The IO accomplishes this process through testimony of the laboratory director. Finally, the IO introduces testimony and documentation through the Medical Review Officer (MRO) who certifies that particular lab result and testifies to notifying the Respondent and to any statements Respondent might have made during the interview with the MRO. "Only if there is proof - substantial, reliable, and probative evidence - of

⁵⁰ In Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009), the Supreme Court of the United States held, among other things, that in addition to admitting certificates of analysis in drug cases, 6th amendment confrontation clause also requires the state to produce lab analysts so they can be cross-examined. Coast Guard suspension and revocation proceedings are civil-administrative, not criminal. It is not likely that the federal courts will require the Coast Guard to produce the analysts in addition to the testimony of the lab director and the Medical Review Officer.

⁵¹ Appeal Decision 2603 (HACKSTAFF) (1998 WL 34073115 (CGCDA)).

all these elements has the foundation been laid for the presumption of drug use in 46 C.F.R. § 16.201(b).”⁵²

Under the SAMHSA Certification Program, laboratories must meet strict standards to conduct drug and specimen validity tests on urine specimens for federal agencies. To become certified, a laboratory must undergo three rounds of performance testing plus an on-site inspection. To maintain that certification, a laboratory must participate in a quarterly performance testing program plus undergo periodic, on-site inspections.⁵³

CONCLUSION

The Coast Guard’s procedures to exclude drug users from serving on U.S. merchant vessels promote safety at sea. If a mariner tests positive for dangerous drugs, the Coast Guard adjudicates the matter in suspension and revocation proceedings which are remedial and not penal in nature. They are intended to help maintain standards for competence and conduct essential to the promotion of safety at sea. Moreover, the opportunity to rehabilitate by proving cure and the due process protections available in these proceedings also protect mariners’ rights.

⁵² Appeal Decision 2603 (HACKSTAF) (1998 WL 34073115 (CGCDA)). For a more detailed analysis of the steps involved in defending a mariner accused of drug abuse in Coast Guard suspension and revocation proceedings, see Patricia R. Spivey, *Representing the Mariner Accused of Drug Abuse: A Step-By-Step Guide*, 21 TULANE. MAR. L J. 445 (1997).

⁵³ “Supplementary Information,” HHS/ SAMHSA Current List of Laboratories Which Meet Minimum Standards to Engage in Urine Drug Testing for Federal Agencies, 75 Fed. Reg. 5,088 (Feb. 1, 2010).