

**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD**

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Docket No. 00-0704
Case No: PA00001906

vs.

IRA D. SPENCER, III

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DECISION AND ORDER

1. On October 19, 2000 a Complaint was filed against Respondent Ira D. Spencer, III, alleging violation of 46 U.S.C. 7703 in that he wrongfully refused to submit to a random drug test. Specifically, it is alleged that “. . . on August 1, 2000 at Manteo, NC the Respondent received a letter from the Maritime Consortium, Inc. which stated that the Respondent was required to report to the collection site for random drug testing within 24 hours of receipt of the letter.” Mr. Spencer failed to do so and that failure is alleged to have constituted an act of Misconduct as defined in Coast Guard regulations codified at 46 CFR 5.27.
2. The Respondent’s Answer was submitted December 4, 2000. He admitted all the Jurisdictional Allegations of the Complaint. Also, he admitted the Factual Allegations except for paragraph number 2. That paragraph reads as follows:

“2. The Respondent wrongfully refused to submit to the random drug test.”
3. A hearing was scheduled for January 25, 2001 at Norfolk, Virginia. The Investigating Officers appearing for the Coast Guard Marine Safety Office, Hampton Roads, were LT Jacqueline Twomey and LT Scott Higman. Mr. Spencer was represented by counsel, Donald

Marcari, Esq., of Jones Marcari Russotto Walker & Spencer.

4. At the hearing, the following witnesses testified for the Coast Guard:
 - a. Tamarra Thomas
 - b. Rebecca Norton
 - c. Ira D. Spencer, III

The Coast Guard submitted the following exhibits:

- IO-1 - The Maritime Consortium, Inc. Drug Testing Handbook
 - IO-2 - Copy of The Maritime Consortium, Inc. contract with Ira D. Spencer, III
 - IO-3 - Copy of Random Test Notification dated 7/28/00
 - IO-4 - Letter of 9/1/00 from The Maritime Consortium notifying the Coast Guard that Mr. Spencer failed to test.
 - IO-5 - The Maritime Consortium Inc., log of telephone conversation between Mr. Spencer and Ms. Norton
5. The Respondent testified on his own behalf. Essentially he stated that on August 1, 2000 he did receive a letter from The Maritime Consortium directing him to provide a urine sample for a chemical test for dangerous drugs at a designated collection site at Manteo, NC within 24 hours of receipt of the letter. Mr. Spencer is the operator of an uninspected fishing vessel providing half-day charter service for recreational fisherman. The vessel is moored at Oregon Inlet Fishing Center, North Carolina. He further testified that morning and afternoon charters for out-of-town fishermen on August 2, 2000 had already been scheduled and could not be canceled. He contacted the collection site during the day and was told that the facility closed drug testing at 1600. He also contacted The Maritime Consortium but was provided no alternative testing site. After taking out the two charters, he completed the form accompanying the Consortium's directive where he explained why he was unable to take the

drug test.

6. The following witnesses testified on the Respondent's behalf:

- a. Judy Williams
- b. Michael (Sean) Hayes
- c. Jack Francis
- d. Billy Long
- e. Alfred Feickert
- f. Gerald Craddock
- g. Ira D. Spencer, III

The Respondent submitted the following exhibits:

- RSP A – Affidavit of Lynn S. Bryant
- RSP B – Affidavit of Richard A. Johnson
- RSP C – Affidavit of Ricky M. Eaton
- RSP D – Affidavit of Thomas Robert Maher
- RSP E - Affidavit of Devin Cage
- RSP F – Affidavit of Roger W.R. Sears, D.D.S.
- RSP G – Affidavit of Jeffrey D. Jacobson
- RSP H – Letter from Walter L. Holton, M.D.

7. A court reporter was retained to make a tape recording of the entire hearing. Under the Coast Guard contract requirements applicable at the time, she submitted the tape recordings to another court reporting firm with which the Service had a contract to develop transcripts. A transcript was produced on February 27, 2001 but it is fraught with errors and omissions and does not include important portions of the hearing. For example, the entire testimony of two

witnesses (Judy Williams and Michael Hayes) is missing. Additionally, the Respondent Mr. Spencer testified but cross- examination by Mr. Marcari and redirect examination by LT Higman is not included. Also, the rulings on the admission of Respondent's exhibits are not in the transcript. Importantly, the Authentication of the Record where the reporter certifies, "This is to certify that the Testimony herein In the Matter of Perry Boyd, Respondent" is a certification from another case. No such authentication is made for the Spencer case.

8. The state of the transcript in this proceeding is totally unacceptable and is so serious that the record is fatally defective. It is simply not possible to write a comprehensive decision. Fortunately, I announced my decision at the conclusion of the hearing. It is set out on pages 180-183 of the transcript. That portion of the transcript appears to be accurate. Accordingly, that decision is hereby adopted as the Decision and Order in this case. It dismisses the Complaint. A copy of those pages is attached hereto as Attachment A.
9. Attached hereto as Attachment B is a copy of a letter from the court reporter who was present at the hearing and who taped the proceeding. She highlights the inadequacies of the transcript created by the other firm.

ORDER

It is hereby **ORDERED** that the Complaint issued against Ira D. Spencer, III is dismissed with prejudice.

PETER A. FITZPATRICK
Administrative Law Judge

Done and Dated on April , 2001
Norfolk, Virginia