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

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	:	DECISION OF THE
	:	VICE COMMANDANT
vs.	:	
	:	ON APPEAL
Merchant Mariner License	:	
	:	NO. 2659
	:	
Issued to: EDWARD ALLEN DUNCAN	:	

This appeal is taken in accordance with 46 U.S.C. § 7703, 46 C.F.R. § 5.27 and the procedures set forth in 33 C.F.R. Part 20.

By a Decision and Order (hereinafter "D&O") dated March 15, 2005, an Administrative Law Judge (hereinafter "ALJ") of the United States Coast Guard at Alameda, California, revoked the license of Mr. Edward A. Duncan (hereinafter "Respondent") upon finding proved a charge of misconduct. The specification found proved alleged that on September 29, 2004, Respondent, while serving as master of the tug KLICKITAT, wrongfully operated the vessel with a blood alcohol concentration (hereinafter "BAC") of 0.04 or higher, a prohibited action under 33 C.F.R. § 95.020.

PROCEDURAL HISTORY

The Coast Guard filed its Complaint against Respondent's Coast Guard license on October 12, 2004. [D&O at 2] Via a letter dated October 27, 2004, Respondent's counsel, Mr. Frank T. Mussell, announced his appearance in the matter and requested an

extension of time within which to file an Answer on Respondent's behalf.[1] Thereafter, on November 2, 2004, Mr. Steven L. Verhulst filed an Answer to the Complaint on Respondent's behalf. [Id.] Via a letter dated November 4, 2004, Mr. Mussell, Respondent's attorney of record, informed the ALJ Docketing Center that he had withdrawn his representation of Respondent and that Mr. Verhulst, who filed Respondent's Answer in the matter, would represent Respondent. [Id.]

On November 3, 2004, the Coast Guard ALJ Docketing Center issued a "Notice of Assignment" which informed Respondent that his case would be handled by Coast Guard ALJ Parlen McKenna. Thereafter, via a "Scheduling Order and Notice of Hearing" dated November 9, 2004, the ALJ scheduled the hearing in the matter for December 16, 2004.

The Hearing in this matter convened on December 16, 2004, in Portland, Oregon. [D&O at 2] At the hearing, Respondent appeared with counsel and admitted all jurisdictional allegations, but challenged the factual allegations contained within the Complaint. [Id.] The Coast Guard Investigating Officers (hereinafter "IOs") offered the testimony of four witnesses and introduced ten exhibits into the record during the hearing. Respondent offered the testimony of four witnesses and introduced two exhibits into the record. [Id.]

Eleven days after the hearing, the ALJ held a telephone conference with the parties, seeking to reach agreement on a compromise by which Respondent would agree to an 18-month license suspension, treatment for alcohol abuse, and a promise to avoid

[1] The record shows that Respondent's extension request was never addressed by the ALJ; however, Respondent suffered no harm from this defect because his Answer was filed within the time requirement set forth in 33 C.F.R. § 20.1003.

the consumption of any alcohol as long as he maintained a mariner's license. [Transcript of Teleconference of Dec. 27, 2004 (hereinafter "Tr. 2") at 4-5] Respondent countered with an offer to accept a 6-month period of suspension, consistent with certain conditions outlined at the earlier hearing. [Transcript (hereinafter "Tr.") at 5] The Coast Guard considered the counter-offer not to be in the best interest of the safety of the maritime community and, given Respondent's failure "to demonstrate any acceptance of blame or responsibility," argued for a sanction of revocation. [Id.]

The ALJ issued his D&O, finding the misconduct charge proved and ordering the revocation of Respondent's merchant mariner license on March 15, 2005. Respondent filed his Notice of Appeal on April 11, 2005. Respondent perfected his appeal by filing his Appellate Brief on May 9, 2005. Therefore, this appeal is properly before me.

APPEARANCES: Mr. Steven L. Verhulst, Esq., Karpstein & Verhulst, P.C., 220 NE Third Avenue, Hillsboro, Oregon, for Respondent. The Coast Guard was represented by Chief Warrant Officer Russell S. Pogue and Senior Chief Gary Vencill, USCG, Marine Safety Office Portland, Oregon.

FACTS

At all relevant times, Respondent was the holder of a Coast Guard issued merchant mariner credential. [D&O at 3] On the evening of September 29, 2004, while acting under the authority of the credential, Respondent boarded the tug KLICKITAT and began serving as the vessel's master. [D&O at 3; Tr. at 4]

Shortly after Respondent boarded the vessel, the KLICKITAT's sole deckhand noticed the distinctive smell of alcohol on Respondent's breath and observed that he was "slurring" his speech. [Tr. at 8-9] Immediately thereafter, and due to communication

from the deckhand, Respondent's supervisor relieved Respondent of his duties and ordered him to submit to a blood alcohol test. [D&O at 3; Tr. at 7-10, 27-30] One of Respondent's colleagues drove Respondent to Columbia Memorial Hospital, in Astoria, Oregon, for a breathalyzer test at about 9:30 p.m. on September 29, 2004. [D&O at 3; Tr. at 39] On the way to the hospital, Respondent's colleague also noticed that Respondent smelled of alcohol. [D&O at 3; Tr. at 39-40]

Helena M. Graves, a qualified lab technician at the Columbia Memorial Hospital, administered a breathalyzer test to Respondent using the Lifeloc Phoenix B breathalyzer machine. [Tr. at 3-4; IO Exhibit 4] In accordance with customary procedures, Ms. Graves began the test by explaining both the test, itself, and the proper procedures of the test to Respondent. Although Ms. Graves noticed "the smell of alcohol very strongly" on Respondent during her initial discussions with him, she indicated that he was cooperative throughout their initial discussions. [D&O at 5; Tr. at 50-51] However, when the actual test was conducted, Respondent did not remain cooperative. [D&O at 4-5] Rather than providing an adequate air sample by breathing long breaths of air into the testing apparatus, as he was instructed to do, Respondent gave "short puffs" of air, causing the testing apparatus to indicate that an "invalid test" had been conducted. [D&O at 4-5; Tr. at 51-67] Although Ms. Graves explained the testing procedures to Respondent several times, three attempts to test Respondent using the "automatic" setting[2] on the testing apparatus yielded the same results. [D&O at 5; Tr. at 51]

[2] At the Hearing, Ms. Graves explained that in the typical testing situation, the breathalyzer remains in the "automatic" setting and the testing apparatus, itself, takes a sample of the tested individual's breath for testing during normal expiration. However, in this case, because Respondent did not breathe out a sufficient amount of air for an "automatic" test, Ms. Graves had to conduct a further test with the testing apparatus in the "manual" setting. With the machine in the "manual" setting, Ms. Graves pushed a button

Thereafter, Ms. Graves conducted a "manual" test of Respondent in an attempt to obtain a usable air sample from Respondent's "short puffs" of air. [D&O at 4-5; Tr. at 51-52] The manual sample, taken at 11:22 p.m., yielded a "positive test result," showing that Respondent had a BAC of .103. [D&O at 4; Tr. at 52-53] A confirmatory manual test, taken 19 minutes later, showed that Respondent's BAC was .100. [IO Exhibit 4]

BASIS OF APPEAL

This appeal is taken from the ALJ's D&O finding proved the charge of misconduct and ordering the revocation of Respondent's Merchant Mariner License. Respondent raises only one basis of appeal:

> *The ALJ erred when he found that Ms. Graves, the breath alcohol technician, was "certified" to perform breathalyzer tests on the Lifeloc Phoenix B testing machine.*

OPINION

In this case, the ALJ found that the Coast Guard "PROVED by a preponderance of reliable, probative and substantial evidence that on September 29, 2004, Respondent wrongfully operated a vessel with a blood alcohol concentration above .04 or more." [D&O at 4] On appeal, Respondent does not deny consuming alcohol on the day of the incident or that to operate a vessel while under the influence of alcohol would constitute misconduct. Instead, Respondent questions one of the factual findings upon which the ALJ's ultimate conclusion was based, specifically that "the collector [who performed Respondent's test] was certified to perform breathalyzer tests on the Lifeloc Phoenix machine." [D&O at 3, Finding of Fact No. 9] Respondent contends that the ALJ's

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on the machine as Respondent breathed out to take the air sample tested. With the machine in this setting,

finding in this regard was not "supported by substantial evidence" because "no evidence had been presented to prove that the Breath Alcohol Technician…was certified to operate the breath testing machine used in this case, the Lifeloc Phoenix B." [Appellate Brief at 1] While Respondent "concedes that the Coast Guard has introduced evidence . . . that Ms. Graves…had been trained on the Lifeloc Phoenix B," Respondent asserts that the evidence in the record shows only that the technician was "trained" on the use of the machine, not that she was "certified" to use the machine. [Id. at 2-3] Respondent concludes that because "[t]raining and certification are not the same," the ALJ's Order must be overturned. [Id.] I do not agree.

A careful review of the record shows that the ALJ believed that in order for the Coast Guard to make a *prima facie* showing of operation under the influence of alcohol—based on the results of a breathalyzer test—the breathalyzer test was required to have been administered in accordance with Department of Transportation [hereinafter "DOT"] drug and alcohol testing regulations, at 49 C.F.R. Part 40. [*See* Tr. at 31-32; 147-149] Indeed, during the hearing, Respondent's counsel asserted that it was required, under DOT regulations, that the individual who administered the breathalyzer test be "certified" in the operation of the breath testing apparatus used during the administration of the relevant breathalyzer test. [Tr. at 148] The ALJ accepted this assertion and confirmed that if proof of such certification was not entered into the record, Respondent would "win" the case. [Tr. at 148-149] Neither Respondent nor the ALJ were correct in so concluding.

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even a "short" puff of air can yield a testable quantity. *See* Tr. at 51.

While the Coast Guard has implemented regulations that require that the chemical testing of mariners for dangerous drugs be conducted in accordance with DOT procedures set forth in 49 CFR Part 40, it has not done so with respect to the alcohol testing of mariners. In fact, the Coast Guard has expressly stated that DOT Alcohol Testing Procedures, also found in 49 C.F.R. Part 40, do not apply to the maritime industry. *See* Coast Guard Chemical Testing Regulations, 66 Fed. Reg. 42,964, 42,965 (Aug. 16, 2001) (revising 46 C.F.R. Parts 4, 5, and 16); *See also* Marine Safety Manual, Vol. 5, Commandant Instruction M16000.10, Chap. 2, subpara. 2.B.3.c.(4). Therefore, DOT regulations regarding the qualification of the technician—which, contrary to Respondent's assertion, require that the technician be "qualified" to use the testing apparatus, not "certified" to do so[3]—are inapplicable to this case.

Pursuant to 33 C.F.R. § 95.020(b), 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 . . . or more." The applicable regulations further state that acceptable evidence of intoxication may come from one of two sources: (1) observation of the individual's physical and behavioral characteristics; or (2) via a chemical test. *See* 33 C.F.R. § 95.030.

Unlike DOT regulations found in 49 C.F.R. Part 40, the Coast Guard's alcohol testing regulations do not establish specific procedural requirements for the alcohol testing of marine employees. The Coast Guard addressed the lack of such regulatory specificity in the Final Rule implementing 33 C.F.R. Part 95 as follows:

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[3] 49 C.F.R. Part 40 only uses the term "certified" in one place. "To qualify to perform the duties of a BAT, law enforcement officers who have been certified by state or local governments to conduct breath alcohol testing are deemed to be qualified as BATs." 49 C.F.R. § 40.213(h)(2).

> Section 95.030 now simply states that personal observation of apparent intoxicated behavior or a chemical test are acceptable as evidence of intoxication. This evidence may then be submitted at an administrative or judicial proceeding where the actual determination of intoxication would be made. The rule does not preclude the use of other evidence at a hearing, nor does it mandate the use of the specified evidence . . . . The acceptability of a particular test required by a marine employer will be established during an administrative or judicial proceeding.

[Operating a Vessel While Intoxicated, 52 Fed. Reg. 47,526, 47,530 (Dec. 14, 1987) (codified at 33 C.F.R. Part 95)] Accordingly, in this case, it was the ALJ's responsibility to determine whether the evidence presented, including evidence involving the administration of the chemical test and the qualification of the technician, was sufficient to show that Respondent was "under the influence of alcohol" under the standard articulated in 33 C.F.R. Part 95. For the reasons discussed below, I find that the ALJ was correct to conclude that the record contained such evidence and, as a result, Respondent's basis of appeal is not persuasive.

It is the sole purview of the ALJ to determine the weight of the evidence and to make credibility determinations. Appeal Decisions 2472 (GARDNER), 2156 (EDWARDS), and 2116 (BAGGETT). In this case, although Respondent questions the technician's qualifications, the ALJ clearly found her testimony to be credible and her qualifications more than sufficient. Indeed, a review of IO Exhibit 6 shows that the technician attended numerous training courses on the administration of breathalyzer tests, in general, and at least one course regarding the breath testing apparatus used in this case. [IO Ex. 6; see also IO Ex 7; Tr. at 48] In addition, the record clearly shows that the technician was "qualified" to use the Lifeloc Phoenix B. Moreover, there is nothing in the record to suggest that the results obtained by the technician were not fully reliable.

Indeed, Respondent's own expert witness testified that the breathalyzer machine used to perform Respondent's test appeared to be properly calibrated and functioning properly, and that the technician appeared to have conducted the test properly. [Tr. at 123-27] Therefore, I do not find the ALJ's determination that the record contained substantial evidence to show that Respondent operated the M/V KLICKITAT while under the influence of alcohol to be arbitrary, capricious, or an abuse of his discretion. The ALJ's finding in that regard was supported by substantial evidence in the record and will not be disturbed.

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 basis of appeal to be without merit.

ORDER

The Decision and Order of the ALJ is AFFIRMED.

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

Signed at Washington, D.C. this 15th of September, 2006