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
v.	:	ON APPEAL
	:	NO. 2723
MERCHANT MARINER CREDENTIAL	:	
	:	
Issued to: ROBERT RYAN BOUDREAUX	:	

APPEARANCES

For the Government:
LCDR Megan K. Clifford, USCG
Coast Guard Sector New Orleans
Mr. Andrew J. Norris, Esq.
U.S. Coast Guard Suspension and Revocation
National Center of Expertise

For Respondent:
Mr. David Kish, Esq.

Administrative Law Judge:
Bruce T. Smith

This appeal is taken in accordance with 46 U.S.C. Chapter 77, 46 CFR Part 5 and 33 CFR Part 20.

On October 24, 2017, an Administrative Law Judge (ALJ) of the United States Coast Guard issued Decision and Order (D&O) finding the Coast Guard's Complaint against the Merchant Mariner Credential of Respondent Robert Ryan Boudreaux proved and ordering the suspension of Respondent's Merchant Mariner Credential for a period of sixty days.

The Coast Guard Complaint charged Respondent with one allegation of misconduct. The complaint alleged that Respondent committed misconduct by violating the drug and alcohol policy of his maritime employer, in refusing to submit to company-mandated random alcohol testing on April 9, 2016. The D&O added, by amendment to conform to proof, violation of a Master's lawful order as an additional element of the charged misconduct, and found the charge proved, as to violation of both a company policy and a Master's order. The ordered sanction was a sixty-day suspension of Respondent's credential.

Respondent appeals.

FACTS & PROCEDURAL HISTORY

At all times relevant to these proceedings, Respondent was the holder of a Merchant Mariner Credential issued to him by the United States Coast Guard and was employed as an able seaman by OSG Ship Management (OSG), aboard the M/V OVERSEAS LONG BEACH. [D&O at 3.] Respondent's service on the OVERSEAS LONG BEACH was under the authority of his credential.

For the duration of Respondent's employment with OSG, the company maintained a drug and alcohol policy entitled "OSG Management System SPM-05 – Drug and Alcohol Enforcement Procedures." [D&O at 3.] On January 1, 2016, Respondent signed an appropriate OSG Form, Form QR-CRW-27, indicating, among other things, that he had read the company's Drug and Alcohol Policy and that he agreed to comply with all requirements set forth therein. [*Id.*] Notably, Section 3 of the OSG policy subjects all company employees to random alcohol testing to ensure employee compliance with OSG's zero-tolerance policy on drug and alcohol use by on-duty employees. [*Id.* at 4.]

OSG employs the services of a third-party contractor, American Maritime Safety, Inc. (AMS), to administer its random drug and alcohol testing program. [D&O at 4.] AMS used a computer-based random selection program called "RandomWare" to select subjects for random drug and alcohol testing. [*Id.*] Using RandomWare, AMS provided OSG with lists containing the names of two OSG vessels, a primary and secondary vessel, as selections for random drug

and alcohol testing. Upon receipt of this notice of random testing, OSG relied upon the services of contractor Anderson Kelly, who, in turn, hired a third party provider, in this case All Clear Employee Screening, to conduct the actual drug and alcohol testing of the OSG employees. [*Id.*]

On March 15, 2016, AMS provided OSG with a list of two OSG vessels that had been selected for drug and alcohol testing. [D&O at 4.] The secondary vessel selected at this time was the OVERSEAS LONG BEACH. [*Id.*] Due to this selection, on April 9, 2016, employees aboard the M/V OVERSEAS LONG BEACH, including Respondent, were subjected to both federally-mandated urinalysis drug testing and OSG breathalyzer testing. [*Id.* at 4-5.]

On April 9, 2016, the Master of the OVERSEAS LONG BEACH informed his crew that they were to report to the ship's medical facility for drug and alcohol testing. [D&O at 5.] Sometime later in the day, the vessel's Master telephoned his superiors at OSG, informing them that Respondent had complied with mandatory drug testing but had refused to submit to random alcohol testing. [*Id.* at 5-6.] Although the vessel's Master did not specifically order Respondent, individually, to submit to OSG alcohol testing on April 9, 2016, he did inform Respondent that he would be terminated for cause if he refused to take the alcohol test. [*Id.* at 6.]

On October 18, 2016, the Coast Guard filed a Complaint against Respondent's Merchant Mariner Credential alleging that Respondent had committed an act of misconduct by failing to comply with his company's drug and alcohol policy when he refused to submit to a company-mandated random alcohol test.

On February 10, 2017, Respondent filed an Answer to the Complaint admitting all jurisdictional allegations but denying all of the Complaint's factual allegations.

The hearing in the matter convened on July 11, 2017. After the hearing and final filings by the parties, the ALJ issued his D&O on October 24, 2017.

Respondent filed timely notice of appeal, and perfected his appeal of the charge against him by filing a timely Appeal Brief. The Coast Guard submitted a Reply Brief. Accordingly, this appeal is properly before me.

BASES OF APPEAL

Respondent appeals from the ALJ's D&O, which found proved a single charge of misconduct, for violating company policy and a Master's order. Respondent asserts the following bases of appeal:

I. *The OSG Drug and Alcohol Policy is not a formal, duly established rule because: (A) the Policy is not designed to achieve safety at sea, (B) the Policy is so poorly drafted as not to be a duly established rule, and (C) the Policy violates law and regulation;*

II. *The ALJ findings were not supported by substantial evidence;*

III. *The ALJ findings relied on an exhibit not in evidence;*

IV. *The D&O violates Respondent's constitutional right to equal protection, and rights to due process and privacy;*

V. *The ALJ abused his discretion in limiting expert witness testimony; and*

VI. *Coast Guard abuses of the discovery process justify dismissal of this case.*

OPINION

I.

The OSG Drug and Alcohol Policy is not a formal, duly established rule

Respondent contends that the ALJ erred in concluding that Respondent's refusal to take an alcohol breath test on April 9, 2016, was an act of misconduct, as defined by 33 CFR § 5.27. That section defines "misconduct" as "human behavior which violates some formal, duly established rule. Such rules are found in, among other places, statutes, regulations, the common law, the general maritime law, a ship's regulation or order or shipping articles and similar sources. It is an act which is forbidden or a failure to do that which is required."

The ALJ concluded that the OSG Drug and Alcohol Policy was a formal, duly established rule, as contemplated by § 5.27, and that Respondent's refusal to submit to an alcohol test ordered under that policy violated that rule and amounted to misconduct. [D&O at 21-22.] Respondent maintains that this conclusion was based on errors of law, and provides several alternative arguments in support of that basis of appeal.

(A) The OSG Drug and Alcohol Policy is not designed to achieve safety at sea

The first of Respondent's arguments is that the OSG Drug and Alcohol Policy is not designed to achieve safety at sea, and therefore does not meet the regulatory definition of a "duly established, formal rule," as necessary to support a charge of misconduct.

The OSG Alcohol and Drug Policy is a thirteen-page document that describes OSG's internal policy on drug and alcohol use by employees, including the circumstances in which employees will be tested for drugs and/or alcohol (i.e. pre-employment, periodic, reasonable suspicion, random, post-incident). [CG Ex. 1.] Respondent, like other OSG employees, was required to sign an acknowledgement document, confirming that he had read and understood a list of OSG policy documents, including the Drug and Alcohol Policy, and affirming that he had free access to copies of those policy documents onboard. Respondent most recently signed such an acknowledgment document on January 1, 2016. [CG Ex. 5.]

Respondent argues that the Alcohol and Drug Policy is not a duly established rule, because it is a company-wide policy, and not a ship's regulation or order. [Respondent's Appellate Brief at 26.] It is long settled that a § 5.27 misconduct charge can be predicated upon a Respondent's violation of a company policy designed to achieve safety at sea:

> A private steamship company's policy for maintenance of order and good safety conditions aboard a vessel, governing the conduct of the crew, is precisely the kind of rule that does establish standards for the invocation of the "misconduct" provision of R.S. 4450.[1]
>
> A company policy as to conduct of the crew, relative to matters of safety aboard the ship, is a good norm for judging misconduct. A company policy with regard

[1] Now 46 U.S.C. § 7703.

> to whether a crewmember could act in certain ways or wear certain clothing while ashore, absent some other considerations, could have no connection with safety aboard the ship. Policy as to possession of intoxicants on board the vessel just as obviously does have to do with the ultimate, in these proceedings, question of safety.

Appeal Decision 1567 (CASTRO) at 4, 1966 WL 87832 at 2. The policy at issue in *CASTRO* restricted possession of alcohol aboard ship.

Appeal Decision 2701 (CHRISTIAN), 2012 WL 8946578, held that an employer alcohol policy, which barred employees from reporting to work while under the influence of alcohol, "has a clear nexus to vessel safety and thus provides a valid basis for judging misconduct within 46 C.F.R. § 5.27." *CHRISTIAN* at 4-5, *aff'd sub nom. Christian v. U.S. Dep't of Homeland Sec.*, No. 1:13-CV-598, 2015 WL 11110597 (E.D. Tex. Jan. 30, 2015).

Like the company policies at issue in *CASTRO* and *CHRISTIAN*, OSG's Drug and Alcohol Policy was designed to achieve safety at sea. The Coast Guard requires certain drug and alcohol testing of merchant mariners, but these are only minimum requirements, and maritime employers may require additional substance testing of their employees. *Appeal Decision 2675 (MILLS)* at 11-12, 2008 WL 918525. If a company's policy is a "formal, duly established rule," refusal to submit to a drug or alcohol test required by that policy may establish misconduct under § 5.27. *Id.* at 12.

Respondent argues that the OSG alcohol testing policy was not designed to achieve safety at sea. He supports this argument by noting that no such aim is stated in the policy and by citing the testimony of a Coast Guard witness, the OSG marine labor relations and training specialist, that the alcohol testing policy had commercial motivations. [Respondent's Appellate Brief at 33 n. 96.] He also argues that the policy cannot promote safety at sea, because it applies to all employees, seagoing and shore-based alike. [*Id.* at 32-33.] These arguments are unavailing.

As to commercial motivations, the marine labor relations specialist testified that OSG's drug and alcohol policy is intended to protect the environment and keep OSG's mariners safe.

[Tr. Vol. I at 75.] He also testified that maintenance of a drug and alcohol policy has commercial advantages, because oil companies choose which vessels to charter partly based on proprietary oil industry vessel inspections, and those inspections favor vessels and companies that have written drug and alcohol policies. [*Id.*]

Marine employers derive many commercial benefits from policies designed to achieve safety at sea. Safe, well-run vessels are less likely to incur environmental or safety penalties from regulatory and law enforcement bodies. Shipowners who operate such vessels may obtain lower prices for vessel insurance. Such responsible shipowners may also avoid reputational costs, whether exacted by consumers or by other corporate market participants. The fact that a shipowner derives an economic benefit from its drug and alcohol policy does not exclude that policy from the broad category of policies designed to achieve safety at sea.

Respondent's argument that no policy that is applied to maritime and shoreside staff can be considered as promoting safety at sea is no more convincing. Respondent relies on two district court cases, both holding that federal regulations aimed at promoting safety at sea could not be applied to non-maritime employees. *See Carlson v. County of Ramsey, Minn.*, No. 16-765 (SRN/BRT), 2016 WL 3352196 (D. Minn. June 15, 2016) (46 CFR Part 5 suspension and revocation proceedings apply only to credentialed merchant mariners), *aff'd*, 673 Fed. App'x 601 (8th Cir. 2017); *The Chilmark*, 10 F. Supp. 926 (E.D. Pa. 1935) (federal watchstanding regulations do not apply to non-maritime employees aboard ship). Respondent commits a fallacy in reasoning that, since a federal regulation directed to safety at sea cannot be applied to non-maritime workers, a rule that applies to both maritime and non-maritime employees cannot promote safety at sea. While maritime employers must consider the special challenges of work at sea in crafting company policy, they are not required to maintain two sets of strictly cabined company policies, one for ship and one for shore. The OSG policy itself acknowledges the different standards necessary aboard ship by limiting random drug and alcohol testing to employees aboard ship. [CG Ex. 1 at 8.] The ALJ was correct to conclude that the OSG drug and alcohol policy was designed to achieve safety at sea, as required for a company policy to be considered a duly established rule under § 5.27.

(B) The OSG Drug and Alcohol Policy is so poorly drafted as not to be a duly established rule

As all parties to this matter seem to agree, the policy in question is not well-written. In pertinent part, it reads: "All vessels are enrolled in a random testing program in accordance with the requirements of 46 CFR 16.230 whereby unannounced shipboard testing for drugs and alcohol." [CG Ex. 1 at 8.] Respondent asserts that this language is incomprehensible, and therefore cannot be considered a "formal, duly established rule," as required to support the charge of misconduct. [Respondent's Appellate Brief at 35-36.]

The ALJ rejected this argument, finding that the OSG rule established a random alcohol testing program for all company vessels, to which all company employees were subjected. [D&O at 4, Finding of Fact 6.] The ALJ concluded that this policy amounted to a formal, duly established rule, within the meaning of 46 CFR § 5.27. [D&O. at 17, 21.] This determination will only be reversed if clearly erroneous, or if not supported by substantial evidence, including if based on inherently incredible evidence. 46 CFR § 5.701; *Appeal Decisions 2687 (HANSEN)* at 5, 2010 WL 8500125 (citing *Appeal Decision 2541 (RAYMOND)*, 1992 WL 12008774); *2597 (TIMMEL)* at 4, 1998 WL 34073109.

I affirm the ALJ's determination that, at the relevant time, OSG had a duly established rule requiring its mariners to submit to random alcohol testing. The quoted language is no model of clarity, but additional evidence and testimony presented at the hearing are sufficient to support the longstanding existence and consistent enforcement of a policy of random alcohol testing for OSG's maritime employees. There are certainly advantages to the maintenance of clear and comprehensive written workplace safety policies, and the written language of this policy was neither clear nor comprehensive. However, considering the totality of the evidence as to the application and enforcement of that policy over years of operation, I am satisfied that OSG's alcohol testing policy was a formal, duly established rule of the type contemplated by 46 CFR § 5.27.

The OSG marine labor relations specialist testified that the OSG random alcohol testing program has been in place for the duration of his employment, some 14 years, and, to the best of his knowledge, was in place "way before" his time, "at least 20" years. [Tr. Vol. I at 74.] The

director of membership for AMS, who was tasked with processing random vessel selections for OSG's drug and alcohol testing, testified that, in her experience, OSG invariably requested that its mariners be selected for random alcohol testing at the same rate, and in the same manner, as they were selected for federally-mandated random drug testing. [Tr. Vol. II at 134.] In making these selections, OSG opted to randomly select vessels, whose entire crews would then be tested. OSG's marine labor relations specialist testified that the random selection of vessels is outsourced to a third party, AMS, which uses a computer program called RandomWare to generate random vessel selections from the list of vessels provided to it by OSG. [Tr. Vol. I at 77-78.]

The OSG labor relations specialist testified that, while he has no influence on the RandomWare selection, he does sometimes elect to test an "alternate" selection, rather than the "primary" selected vessel:

> A: I will shape it a little bit. I will look at what vessel has been selected, if I see something that looks like it's a challenge like a vessel is out at sea, and I won't be able to test them within a 45-day window or they are at a port where there's limited testing resources down there, I will let [testing contractor] Anderson Kelly know, hey, let's go for these two vessels.
>
> * * *
> Q: . . . And due to operational exigencies or whatever, you will make the call that, okay we're going to go with the alternate in this case. We're going to go with the primary here?
>
> A: Right. I will let her know, hey, let's do these vessels and then down the road, . . . if weeks go by and they haven't been able to test one, I will look at an alternate on there and say, okay. This vessel is coming in here to Tampa. I know that we've got plenty of resources in Tampa. Let's switch it up there and then let's test an alternate.
>
> * * *
> A: . . . I can choose alternates if I want. There is nothing stating that I can't.

[Tr. Vol. I at 82-84.][2]

[2] The alcohol test that Respondent refused was the result of such an "alternate" selection by OSG's labor relations specialist, who chose to test the vessel listed as alternate in the March 15, 2016 AMS selection (the OVERSEAS LONG BEACH), because the primary vessel had been subsequently selected for a second random drug and alcohol test, by an AMS selection of April 1, 2016. [CG Ex. 3; Tr. Vol. I at 93-94.]

In addition to this evidence of consistent and continuous application of the OSG random alcohol testing program, there is additional evidence demonstrating that Respondent was well aware of the company's interpretation and application of that policy. On June 29, 2015, Respondent completed an internal OSG suggestion form, called a "Management of Change" request. [CG Ex. 6.] The type of change requested was as to "Operating Policies, Procedures and Practices," and the reason for change was "to comp[ly] w[ith] CFRs." [*Id.* at 1.] Respondent proposed that OSG "remove random testing for alcohol as all testing must follow DOT procedures," because the company "must follow DOT's procedures in alcohol testing[,] it follows therefor they cannot give a random test." [*Id.*]

On July 1, 2015, a member of OSG's shoreside management signed the form to confirm the suggestion had been reviewed. [CG Ex. 6 at 2.] Under "Follow Up & Closure Comments," he wrote: "We have reviewed this proposed change to policy and determined that the company is in compliance and may perform an alcohol test as part of random testing if it is noted as part of the Company's D&A Policy." [*Id.*] At hearing, Respondent confirmed the submission and rejection of his change request form. [Tr. Vol. II at 198-201.] He testified that, following OSG's rejection of his suggested change, he still felt the random alcohol testing policy to be in error and contrary to regulations. [*Id.* at 202-03.]

The Master of the OVERSEAS LONG BEACH testified that, in September 2015, he and Respondent had discussed Respondent's concerns about the OSG alcohol testing program. [Tr. Vol. II at 89-90.] The Master then followed up on that discussion with OSG management ashore. [*Id.* at 90.] After confirming that Respondent's Management of Change request had been received and considered by shoreside management, the Master emphasized to Respondent that the existing policy was still in place, and that failure to comply with that policy would result in termination. [*Id.* at 90-91.]

This is not a case about Coast Guard-mandated random drug testing, but I note that the random selection methods described by OSG's labor relations specialist at hearing likely would not pass muster for Coast Guard-mandated random drug testing under 46 CFR § 16.230(c).

Taken together, this evidence is sufficient to show that, whatever the syntactic shortcomings of the written OSG random alcohol testing policy, the company's interpretation of that policy was clear and consistent: its vessels and mariners were subject to random alcohol testing, by saliva or breath sample, and selection for those tests would be made by AMS, on a "whole vessel" basis, with the intervention of the labor relations specialist as to whether the "primary" or "secondary" vessel would be tested. While the "plain" language of the OSG policy leaves something to be desired, there is sufficient evidence in the record to support the conclusion that OSG had a duly established rule requiring its mariners to submit to random alcohol testing.[3]

(C) The OSG Drug and Alcohol Policy violates law and regulation

Respondent asserts that the OSG Drug and Alcohol Policy violates various federal regulations, and cannot, therefore, be considered a formal, duly established rule. The underlying premise, that violation of an unlawful company policy is not misconduct, is supported by reference to Appeal Decisions that establish that a mariner will only be found to have committed misconduct by violation of a Master's *lawful* order. *See, e.g., Appeal Decision 2056 (JOHNSON)*, 1976 WL 179591.

Respondent argues that the OSG policy is unlawful in that it violates 49 CFR § 40.13 by conducting both DOT drug and non-DOT alcohol screens on the same pool of test subjects. [Respondent's Appellate Brief at 42-43.] § 40.13 provides, in part:

> (a) DOT tests must be completely separate from non-DOT tests in all respects.
>
> (b) DOT tests must take priority and must be conducted and completed before a non-DOT test is begun. For example, you must discard any excess urine left over from a DOT test and collect a separate void for the subsequent non-DOT test.

[3] Respondent makes a separate objection to the conclusions of the D&O when he argues that he did not, in point of fact, violate the OSG Drug and Alcohol Policy by refusing to submit to a random alcohol test on April 9, 2016. [Resp. App. Br. at 56.] Respondent urges that the policy's provision, "All vessels are enrolled in a random testing program in accordance with the requirements of 46 CFR § 16.230 whereby unannounced shipboard testing for drugs and alcohol," should be read to require only random *drug* screening, in accordance with 46 CFR § 16.230. Because that regulation does not provide for random alcohol testing, Respondent reasons, the OSG rule does not provide for any random alcohol testing. [*Id.* at 56-57.] This argument is not persuasive. As already stated, there is sufficient evidence in the record to support the conclusion that OSG had a duly established rule requiring its mariners to submit to random alcohol testing.

> (c) . . . you must not perform any tests on DOT urine or breath specimens other than those specifically authorized by this part or DOT agency regulations.

Respondent argues that OSG's policy and practice of drawing random subjects for DOT drug tests and non-DOT alcohol tests from the same pool of eligible subjects violates § 40.13 by impermissibly mingling non-DOT testing with DOT testing.

The D&O considered this argument, and rejected it:

> Respondent, however, misreads both the spirit and the letter of 49 CFR § 40.13. The court believes that the cited regulation is designed to protect the sanctity of DoT tests; not non-DoT tests. The regulation's prohibition on comingling a DoT and a non-DoT test is to protect the integrity of the DoT testing process. This is clearly seen in subparagraph (c), where the employer "must not perform any tests on DOT urine or breath specimens other than those specifically authorized by this part or DOT agency regulations." In other words, the employer must NOT perform its own tests on samples obtained for DoT testing, lest the DoT sample become contaminated or adulterated. In this case, the DoT drug test consisted of a urine specimen; the employer's alcohol test consisted of a breath specimen. There was never a risk of co-mingling breath samples with urine samples.

[D&O at 19.] The ALJ's reasoning is sound, and contains no error of law. The regulations are clearly written to prevent employers from interfering with the DOT chemical testing program by conducting their own, non-DOT chemical testing on federally-mandated DOT samples. The OSG policy uses the same testing "pool" of mariners for both DOT drug tests and non-DOT alcohol tests, a practice which, it might be argued, violates 49 CFR § 40.13(a)'s command that DOT and non-DOT tests be "completely separate . . . in all respects." But the OSG practice, which collects urine samples for the DOT drug test, and breath samples for the non-DOT alcohol test, does not pose any risk of contamination to the DOT testing process. Nor does the collection of a breath sample before a urine sample pose any risk to the integrity of the DOT testing process.

A mariner is not justified in refusing to comply with a company policy because he perceives some technical violation of the CFRs in that policy or its application. Even if the April 9 collection protocol aboard the OVERSEAS LONG BEACH violated 49 CFR § 40.13(a), by combining testing pools and collecting an alcohol breath sample before a drug urine sample,

such violation would only impact the validity of the government-mandated drug screen, not the employer-mandated alcohol screen at issue in this case, given that the alcohol screen was not subject to 49 CFR Part 40. The OSG Drug and Alcohol Policy was not unlawful, so as to relieve Respondent of his duty to comply with it.

Having considered each of Respondent's arguments to the contrary, I find the ALJ did not err in concluding that the April 9, 2016 drug test was an application of a formal, duly established rule, and that Respondent's refusal to submit to that test was a violation of a formal rule, amounting to misconduct under 46 U.S.C. § 7703 and 46 CFR § 5.27.

II.

The ALJ findings were not supported by substantial evidence

Respondent's Appellate Brief challenges the evidentiary support for many of the findings of fact made by the D&O. Many of these challenges amount to arguments for Respondent's testimony and evidence, and against the evidence provided by the Coast Guard. In these proceedings, it is the responsibility of the ALJ to weigh the evidence presented and to determine the weight given to conflicting evidence. *Appeal Decisions 2689 (SHINE)*, 2010 WL 4607369. I will not reweigh conflicting evidence on appeal when the ALJ's determinations are reasonably supported by the record. *Appeal Decision 2597 (TIMMEL)* at 4, 1998 WL 34073109 (citing *Appeal Decision 2504 (GRACE)* at 7, 1990 WL 10011229). I will not revisit evidentiary conflicts where substantial evidence in the record supports the ALJ's finding. In most of the instances cited by Respondent, there is substantial evidence in support of the disputed findings.

However, there are certain findings of fact that are not entirely supported by the evidence. Finding of Fact 17 reads: "On April 9, 2016, the OVERSEAS LONG BEACH's master, Captain Quinn, 'got on the PA and said, drug testing in the hospital.' Respondent knew exactly what his captain intended: that the entire crew was to report to the ship's medical facility for drug and alcohol testing." [D&O at 5.] The ALJ repeats the latter sentence in declaring that the Master had ordered Respondent to submit to an alcohol test, which he violated. [D&O at 11-12.] There

is no direct evidence in the record as to what Respondent understood the captain's PA announcement to mean.

The ALJ found, at Finding of Fact 31, "Captain Quinn did not specifically order Respondent, individually, to submit to the OSG alcohol testing on April 9, 2016." [D&O at 6.] This finding is supported by the record. [Tr. Vol. II at 110.]

I will modify Finding of Fact 17 by deleting the second sentence.

Ultimate Findings of Fact 4, 5 and 6 read:

> 4. On April 9, 2016, Captain Quinn, the master of the OVERSEAS LONG BEACH ordered and directed Respondent and the crew of that vessel to report for drug and alcohol testing.
>
> 5. On April 9, 2016, Respondent refused to submit to his maritime employer's mandated random alcohol testing, in violation of that policy and of his ma[s]ter's order.
>
> 6. Respondent's refusal to comply with his maritime employer's policy regarding random alcohol testing is Misconduct, as was his failure to obey his master's lawful order, per the provisions of 46 CFR § 5.27.

[D&O at 22.]

Since the ALJ found that no specific order for Respondent to submit to alcohol testing was ever made, it is clear that the ALJ considered the Master's PA announcement, detailed at Finding 17, to be the lawful order Respondent violated.

In determining whether a mariner has committed misconduct by violating a Master's lawful order, "The testimony of the Master should be given primary consideration . . . [A] sufficient degree of specificity and certainty on the part of the individual who claims to have given the order is required." *Appeal Decision 2056 (JOHNSON)* at 3, 1976 WL 179591 at 2 (citing *Appeal Decision 1883 (TREVOR)*, 1972 WL 126083).[4]

[4] This insistence on specificity and certainty is consonant with the exceptional force and deference a Master's lawful order is afforded by statute and by the general maritime law. *See Appeal Decision 2616 (BYRNES)* at 10-11,

Here, the Master of the OVERSEAS LONG BEACH, when asked, "Did you order Mr. Boudreaux to take the test?", replied, "No, I did not." [Tr. Vol. II at 110.] Especially in light of this testimony, evidence of a generalized public address announcement of "drug testing in the hospital" does not adequately support the order component of Ultimate Finding of Fact 4. There is insufficient evidence in the record to establish that the Master ordered Respondent (or anyone else) to take the alcohol test, and I will therefore delete the words "ordered and" from Ultimate Finding of Fact 4.

Because they rest on the unsupported finding that the Master of the OVERSEAS LONG BEACH ordered Respondent to submit to alcohol testing, I will omit from Ultimate Findings 5 and 6 any reference to a Master's order and Respondent's violation thereof. (Ultimate Finding 3, which states that violation of a Master's order is misconduct under § 5.27, is irrelevant.)

III.

The ALJ findings relied on an exhibit not in evidence

Respondent argues that the D&O's citation to an excluded exhibit was an abuse of discretion. The Coast Guard offered, as its Exhibit 7, an email exchange between Respondent and a DOT official, discussing agency interpretation of chemical testing CFRs. Respondent objected to admission. [Tr. Vol. II at 18-19.] The ALJ sustained Respondent's objection, and declined to admit CG Exhibit 7. [*Id.* at 19.] The Coast Guard, in its Appellate Brief, agrees that CG Exhibit 7 was not admitted into evidence. [CG Appellate Brief at 35.]

2000 WL 33965629 at 6 (citing *The Styria*, 186 U.S. 1 (1901); *Appeal Decision 2098 (CORDISH)* at 4, 1977 WL 188268 at 3). Holders of merchant mariner credentials are bound by oath to carry out the lawful orders of superior officers. 46 U.S.C. § 7305. By statute, a mariner's disobedience to a Master's lawful command at sea may be punished by confinement at sea, and, on arrival in port, forfeiture of four days' wages or a month's imprisonment. 46 U.S.C. § 11501(4). In consideration of a Master's extraordinary power to compel subordinate mariners' actions, Appeal Decisions in these suspension and revocation proceedings have followed the courts in narrowly defining the category of directives considered to be "Master's orders." *See Johnson v. Isbrandtsen Co.*, 190 F.2d 991, 993 (3rd Cir. 1951) (statutory wage penalty for disobedience of Master's order is limited to "disobedience to specific commands and is not intended to relate to the general discipline on shipboard"), *aff'd*, 343 U.S. 779 (1952). Accordingly, the existence of a Master's order should not be lightly inferred, especially in a non-exigent context.

The ALJ's Finding of Fact 19 reads, "Before April 9, 2016, Respondent had complained to OSG that he felt the company's alcohol testing policy was in violation of law and that he would not submit to random alcohol testing." [D&O at 5.] This finding cites, for support, Transcript Volume I, at pages 101-04, and Coast Guard Exhibits 6 and 7. [*Id.*]

"[A]buse of discretion occurs where a ruling is based on an error of law or, where based on factual conclusions, is without evidentiary support." *Appeal Decision 2610 (BENNETT)* at 20, 1999 WL 33595178 at 11 (quoting Am. Jur. 2D *Appellate Review* § 695 (1997)), *aff'd*, NTSB Order No. EM-187, 2000 WL 967428. Relying on an exhibit excluded from evidence is a clear abuse of discretion. However, not all abuses of discretion are material. Here, the ALJ cited Exhibit 7 along with other, uncontested evidence in support of a single finding of fact. A review of the record shows that those citations—to the transcript and to CG Exhibit 6—adequately support the proposition for which they are cited. The ALJ's citation to the excluded Coast Guard Exhibit 7 in the D&O was harmless error. No corrective action is required.

IV.

The D&O violates Respondent's constitutional right to equal protection, and rights to due process and privacy

Respondent has not articulated any coherent basis on which to find he has been deprived of the equal protection of the law. He argues that the Coast Guard suspension and revocation proceedings have been selectively applied against him and him alone, whereas, in Respondent's view, the Master of the OVERSEAS LONG BEACH was in more egregious violation of OSG policy than he. [Respondent's Appellate Brief at 70-71.]

The Constitution's guarantee of equal protection is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Equal protection of laws does not demand absolute consistency in application of law: "Equal protection, as applied through the due process clause of the 5th amendment, does not mean that there can be no discrimination between groups of similarly situated individuals, but rather means that where there is discrimination it must not be invidious or wholly unreasonable." *Appeal Decision 1971 (MOORE)* at 5, 1973 WL 164965 at 3.

"An essential element of a claim of selective treatment under the Equal Protection Clause is that the comparable parties were similarly situated." *Startzell v. City of Philadelphia, Pa.*, 533 F.3d 183, 203 (3d Cir. 2008). Parties are similarly situated when "they are alike in all relevant aspects." *Id.* As a threshold issue, Respondent has failed to establish that the Master of the OVERSEAS LONG BEACH was similarly situated to Respondent. Respondent asserts that the Master's administration of the April 9, 2016 drug and alcohol screen violated the OSG Drug and Alcohol Policy in various ways. The policy provisions allegedly violated by the Master are completely different in kind from the policy requiring Respondent to submit to alcohol testing. Those provisions provide no basis for a claim that Respondent and the Master were similarly situated.

Nor does Respondent articulate a cognizable due process argument. He asserts that he was denied due process of law because the law or rule that deprived him of his license was incomprehensible, and therefore void for vagueness. [Respondent's Appellate Brief at 70.] This argument is a reformulation of Respondent's substantive argument that the OSG Drug and Alcohol Policy was not a formal, duly established rule. As concluded in part I of this opinion, *supra*, the OSG policy at issue was a formal, duly established rule of which Respondent was aware at the time of his violation. Beyond that, a review of the record reveals that Respondent has been afforded all the process he was due in accordance with the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, and the Coast Guard's own regulations.

Respondent also argues that the D&O violates his Fourth Amendment right to privacy, because the OSG Drug and Alcohol Policy did not meet a reasonableness standard, in the balance of societal interest in workplace safety and individual interests in being free from invasive specimen collection. [Respondent Appellate Brief at 72.] Specifically, Respondent objects to the OSG policy's requirement that all specimen collections be witnessed, contrary to Coast Guard and DOT regulations, which provide for direct observation of urine sampling only in specified circumstances. [*Id.* at 73.] The charge against Respondent is based upon his refusal to submit to an employer-mandated alcohol breath test. I reject the notion that a breath test is invasive. More fundamentally, the employer mandate for an alcohol breath test was a non-

governmental action, which cannot support a constitutional violation-of-privacy claim. Respondent has not articulated any violation-of-privacy claim.

V.

The ALJ abused his discretion in limiting expert witness testimony

Respondent argues that the ALJ abused his discretion by limiting the testimony of two expert witnesses called by Respondent. Both witnesses were proffered as experts on drug and alcohol testing in the maritime sector. Both were allowed to testify on Respondent's behalf, though the ALJ did sustain several Coast Guard objections to various lines of questioning, as to both witnesses.

As to the first expert, a retired manager of the Coast Guard Drug and Alcohol Program, the ALJ sustained a number of objections on relevance grounds. [Tr. Vol. II at 159-61.] The ALJ prevented the first expert from testifying as to whether the OSG Drug and Alcohol Policy was a formal, duly established rule under 46 CFR § 5.27, because that testimony would be a legal conclusion by the expert witness, which conclusion was properly reserved to the ALJ himself. [*Id.* at 162-66.] As to the second expert, a maritime sector human resources executive, the ALJ likewise sustained objections on relevance grounds, and refused to allow questions asking the witness to reach a legal conclusion. [Tr. Vol. II at 183-84.]

The admissibility of evidence in these proceedings is governed by 33 CFR § 20.802, which provides:

> (a) The ALJ may admit any relevant oral, documentary, or demonstrative evidence, unless privileged. Relevant evidence is evidence tending to make the existence of any material fact more probable or less probable than it would be without the evidence.
>
> (b) The ALJ may exclude evidence if its probative value is substantially outweighed by the danger of prejudice, by confusion of the issues, or by reasonable concern for undue delay, waste of time, or needless presentation of cumulative evidence.

These regulations are consistent with the evidentiary standards for formal adjudications under the Administrative Procedure Act, at 5 U.S.C. § 556 (d). ALJs are instructed to regulate and conduct

hearings in a manner that will bring out the relevant and material facts, and will insure a fair and impartial hearing. 5 U.S.C. § 556(c) and 46 CFR § 5.501. This includes limiting the testimony of each witness as deemed necessary to bring out only relevant and material facts. *See Appeal Decisions 2582 (SKINNER)* at 6, 1997 WL 33480810 at 5; *2490 (PALMER)* at 12, 1989 WL 1126147 at 8.

"Though the regulation makes clear that the ALJ 'may admit any relevant oral, documentary, or demonstrative evidence, unless privileged' it does not require that the ALJ admit all evidence proffered." *Appeal Decision 2662 (VOORHEIS)* at 12, 2007 WL 3033576 (quoting 33 CFR § 20.802(a)). "The decision of the Administrative Law Judge to dismiss an expert's testimony will not be overturned unless arbitrary, capricious or an abuse of discretion." *Appeal Decision 2576 (AILSWORTH)* at 19, 1996 WL 33408497 at 7 (citing *Appeal Decision 2365 (EASTMAN)*, 1984 WL 564478).

I find that the ALJ did not abuse his discretion in limiting the testimony of Respondent's two expert witnesses. The ALJ's consideration of agency objections to the proffered testimony was measured and judicious. He allowed Respondent's counsel to make offers of proof, and withheld ruling on objections until he was satisfied that he understood the relative positions of the parties. His exclusions on relevance grounds were well founded.

As to the responses excluded as legal conclusions, Coast Guard ALJs, like other judges, are themselves experts of law, and do not benefit from legal conclusions proffered under the guise of "expert testimony." *Cf. Roundy's Inc. v. Nat'l Labor Relations Bd.*, 674 F.3d 638, 648 (7th Cir. 2012) (upholding ALJ's exclusion of proffered expert testimony on Wisconsin property law); *Morgan v. Barnhart*, 142 F. App'x 716, 721 (4th Cir. 2005) (upholding ALJ decision and explaining why medical experts in Social Security hearings are limited to providing medical opinions, and may not offer legal conclusions).

The ALJ did not abuse his discretion in limiting the testimony of Respondent's two expert witnesses.

VI.

Coast Guard abuses of the discovery process justify dismissal of this case

Finally, Respondent argues that Coast Guard missteps during the discovery process were so egregious as to require the ALJ to dismiss the case against Respondent's credential. A review of the transcript shows that Respondent waived his objection to the Coast Guard conduct. [Tr. Vol. I at 52.]

At issue are the actions of the Coast Guard investigating officer (IO) regarding subpoenas requested by Respondent in this matter. The IO, who is not an attorney, emailed copies of those subpoenas to their subjects before Respondent had the opportunity to properly serve the subpoenas. The IO's email included the proviso, "Please let me know if you have any questions or objections." [ALJ Exs. I, IV.] Respondent characterizes these emails as solicitation to obstruct. The ALJ proposed, as a remedy, that Respondent request a continuance and seek full enforcement of the instant subpoenas in federal court. [Tr. Vol. I at 40.] The ALJ further offered Respondent the opportunity to craft virtually any other remedy to address the due process issues raised by the IO's actions. [Tr. Vol. I at 48.]

The record is unambiguous: Respondent raised this due process concern at hearing, the ALJ gave it full consideration, extending to Respondent the opportunity to request any reasonable remedy, and Respondent then chose to waive his objection and expedite the hearing. On this record, it is not necessary to evaluate the merits of Respondent's objection to the Coast Guard conduct, and I conclude that the ALJ did not abuse his discretion in failing to dismiss the case against Respondent on this basis.

SANCTION

It is necessary to consider whether any modification of the ALJ's sanction is warranted. Given modifications to the D&O, I may determine the sanction *de novo*, considering the totality of the circumstances, including the factors discussed by the ALJ. *See Appeal Decision 2717 (CHESBROUGH)* at 14, 2017 WL 6941489 at 9.

No modification is warranted. The Coast Guard sought a three-month suspension of Respondent's credential. Notably, this three-month proposed sanction was based upon an allegation of misconduct by violation of a maritime employer's policy alone. The complaint made no charge of violation of a Master's order; that allegation was added by the ALJ. [D&O at 11-12.]

As is appropriate where a mariner has committed an offense for which revocation is not mandatory, before determining a sanction in this case the ALJ considered the respondent's prior record and any evidence in mitigation or aggravation. [D&O at 20.] *See* 46 CFR § 5.569(b). The ALJ credited Respondent's clean disciplinary record, and his evident good-faith (though mistaken) belief that his employer's alcohol policy was contrary to regulation. [D&O at 21.] Having found the charge of misconduct proved, and finding several mitigating factors, the ALJ imposed a sixty-day sanction, a one-month reduction from the Coast Guard suggestion. The ALJ's sanction makes no reference to Respondent's purported disobedience of his Master's order. There is no reason to believe the ALJ would have imposed a lesser sanction if he had not found a violation of a Master's order. The ALJ's consideration of Respondent's prior record and evidence in mitigation was fair and reasoned, and the sanction is appropriate for the single act of misconduct charged—refusal to take the employer-mandated alcohol test.

CONCLUSION

The second sentence of Finding of Fact 17 is modified by deleting the second sentence, so that it reads, in its entirety: "On April 9, 2016, the OVERSEAS LONG BEACH's master, Captain Quinn, 'got on the PA and said, drug testing in the hospital.'" The words "ordered and" are deleted from Ultimate Finding 4. The phrase "and of his ma[s]ter's order" is deleted from Ultimate Finding 5. The phrase "as was his failure to obey his master's lawful order," is deleted from Ultimate Finding 6. The remainder of the ALJ's findings and decision, finding proved the misconduct charge against Respondent for violation of a formal, duly established rule, was in accordance with law and supported by substantial evidence. The Order imposed by the ALJ, suspending Respondent's Merchant Mariner Credential for sixty days, is appropriate.

ORDER

The ALJ's Decision and Order dated October 24, 2017, is AFFIRMED, as amended.

Signed at Washington, D.C., this 30 day of DEC ~~2020.~~ 2019