UNITED STATES OF AMERICA
U.S. DEPARTMENT OF HOMELAND SECURITY
UNITED STATES COAST GUARD

UNITED STATES COAST GUARD

Complainant

vs.

DANIEL JAMES ARGAST

Respondent

Docket Number 2015-0263
Enforcement Activity No. 5206886

DECISION AND ORDER

Issued: July 07, 2016

By Administrative Law Judge: Honorable Michael J. Devine

Appearances:

LT MIAH A. BROWN
Sector Hampton Roads

and

CDR CHRISTOPHER F. COUTU, ESQ.
USCG SR-NCOE

For the Coast Guard

OWEN DUFFY, Esq.

For the Respondent

Table of Contents

I. PRELIMINARY STATEMENT

The United States Coast Guard (USCG) initiated this Suspension and Revocation proceeding seeking revocation of Daniel James Argast's (Respondent) Merchant Mariner Credential Number 000284890 by filing a Complaint on August 12, 2015. This action is brought pursuant to the authority contained in 46 U.S.C. § 7703(1)(B) and its underlying regulations codified at 46 C.F.R. Part 5 and 33 C.F.R. Part 20.

On October 14, 2015, the Coast Guard filed an Amended Complaint alleging Respondent violated 46 U.S.C. § 7704 by testing positive for dangerous drugs as described in 46 C.F.R. § 5.35. Specifically, the Coast Guard alleges on May 28, 2015, Respondent participated in a non-Department of Transportation (DOT) drug test and his specimen tested positive for cocaine metabolites.

On October 21, 2015, Respondent filed an Answer to the Amended Complaint admitting to all jurisdictional allegations and the factual allegations in paragraphs three (3) and eight (8). Respondent's Answer denied factual allegations in paragraphs one (1), two (2), four (4), five (5), six (6), and seven (7) of the Amended Complaint. Respondent's Answer also asserted various defenses.

On October 30, 2015, Respondent submitted a Motion to Dismiss the Amended Complaint contending the undisputed evidence showed his specimen was not properly collected because the collector was a co-worker in the same testing pool. The Coast Guard opposed Respondent's Motion contending that the Chief Mate was not a co-worker since Respondent was in the Engineering division and that the collection was properly completed with safeguards such as tamper-proof seals. On November 18, 2015,

the undersigned ALJ issued an Order denying Respondent's Motion without prejudice because there remained facts in dispute.

On December 3 and 4, 2015, the Court conducted a hearing in this matter in accordance with the Administrative Procedure Act (APA) as amended and codified in 5 U.S.C. §§ 551-559, and Coast Guard procedural regulations set forth in 46 C.F.R. Part 5 and 33 C.F.R. Part 20. Commander Christopher Coutu, Esq., Lieutenant Miah Brown, Investigating Officer, and Lieutenant Bradley P. Bergan, appeared on behalf of the Coast Guard, and Owen F. Duffy, Esq., appeared on Respondent's behalf. At the hearing, the Coast Guard called seven (7) witnesses and offered twenty-four (24) exhibits for admission. Respondent called six (6) witnesses and offered ten (10) exhibits.[1] During the hearing, rulings on Coast Guard (CG) Exhibits 22, 23 and 24 were deferred pending further briefing by the parties. Likewise, rulings on Respondent's Exhibits (Resp. Ex.) I and J were deferred pending further briefing of the parties. The Coast Guard subsequently withdrew its objection to Respondent's Exhibits I and J. After considering the positions of the parties, including arguments presented at the hearing and in post-hearing briefs, I find Coast Guard Exhibits 22, 23 and 24 and Respondent's Exhibits I and J are relevant and are admitted into evidence in this matter.

The parties filed final arguments and proposed findings of fact and conclusions of law on January 28, 2016. The record is closed and ripe for a decision.

After careful review of the entire record, including the witness' testimony, applicable statutes, regulations, and case law, the Court finds the Coast Guard **PROVED** one count of use of or addiction to the use of dangerous drugs pursuant to 46 U.S.C. § 7704 and 46 C.F.R. § 5.35.

II. FINDINGS OF FACT

Upon review of the entire record taken as a whole, the Court makes the following findings of fact:

1. At all relevant times herein, Respondent held Merchant Mariners Credential Number 000284890. (Transcript of Record (TR) Vol. 1 at 6; TR Vol. II at 165; Resp. Ex. D).

2. Respondent has been a Civilian Mariner (CIVMAR) employee of Military Sealift Command (MSC) since August 3, 2012. (TR Vol. II at 70).

3. MSC is an Agency of the United States Department of the Navy. See Coast Guard Exhibit 2 (CG-02); CG-04; See also Padro v. Vessel Charters, Inc., 731 F. Supp. 145, 146 (S.D.N.Y. 1990).

4. MSC maintains a Memorandum of Agreement with the United States Coast Guard whereby the Coast Guard recognizes that CIVMARs are subject to the Navy's Drug Free Workplace Program and allows MSC procedures to be used to avoid subjecting CIVMARs to multiple and redundant federal drug testing standards. (TR Vol. I at 22-25; CG-02; CG-04 at 1).

5. USNS MERCY and other USNS ships are "public vessels" as defined in 46 U.S.C. § 2101 and exempt from mandatory USCG inspection pursuant to 46 U.S.C. § 2109. (CG-02).

6. The chemical drug testing procedures used by MSC differ from those set forth in 49 C.F.R. Part 16, but MSC is authorized by the U.S. Coast Guard to use alternative testing procedures pursuant to an Interagency Agreement between USCG and Military Sealift Command. (CG-2; CG-04).

7. Instead of 49 C.F.R. Part 40 procedures, MSC uses the technical guidelines for drug testing to test civilian mariners' samples provided by the Department of Health and Human Services. (CG-03).

8. On May 27, 2015, Respondent served as the Second Engineer and throttleman aboard the hospital ship USNS MERCY. (TR Vol. I at 125, 135; TR Vol. II at 80-81); id.

9. On May 27, 2015, the USNS MERCY was under the command of Captain Thomas Guidice. (TR Vol. I at 137; CG-13).

[1] A list of the witnesses and exhibits offered by both parties is contained in Attachment A.

10. During departure from the port of Pearl Harbor, Hawaii on May 27, 2015, the USNS MERCY allided with the USS Arizona Memorial's boat landing platform in Pearl Harbor, Hawaii.[2] (CG-14; TR Vol. I at 126).

11. Captain Giudice informed his command that the May 27, 2015 allision of the USNS MERCY with the USS ARIZONA's landing platform potentially caused $10,000.00 or more in damage. (TR Vol. I at 129, 137).

12. Captain Giudice initially determined that as the Master of the ship and overall command of the ship's operation he should be subject to drug and alcohol testing and provided a specimen for drug testing with the Chief Mate acting as collector for his specimen. (TR Vol. I at 131-132, 142).

13. Mr. Jack Taylor, the Director of Military Sealift Command and Commander, Military Sealift Fleet Support Command (MSFSC), discussed the allision with his staff and determined that post-accident drug testing should be conducted for all involved personnel and crewmembers. (TR Vol. I at 94-99, 107-08, 130, 138-139 and 149; CG-13).

14. MSC and Captain Giudice determined what personnel should be tested based on what positions they were occupying at the time of the marine casualty. Respondent, as the throttleman during the allision, was among the crew members to be drug tested, along with other individuals in the Engine Control Room and those on the bridge during the allision. (TR Vol. I at 96-97, 130-132, 138-139; TR Vol. I at 155-158; CG-13).

15. Captain Giudice was the collector for a drug test specimen from Chief Mate John French who was required to provide a specimen as one of the personnel on the bridge at the time of the allision. (TR Vol. I at 96-97 and 130-132; 138-141; TR Vol. I at 155; CG-13).

16. As the throttleman in the engine control room at the time of the allision, Respondent was obliged to execute Captain Giudice's orders, ultimately controlling the vessel's propulsion. (TR Vol. I at 97, 132-139; CG-13).

17. Captain Giudice directed his Chief Mate, John French, the Ship's drug workforce coordinator to conduct the urine collection for the drug testing. (TR Vol I at 36-38, 125-26, 161-62).

18. On May 28, 2015, Respondent submitted a urine sample to Chief Mate John French in the Chief Mate's office/stateroom. (TR Vol. I at 183).

[2] Under maritime law, "[a]n allision is a collision between a moving vessel and a stationary object." *In re Omega Protein, Inc.*, 548 F.3d 361, 366 (5th Cir. 2008) (quoting Thomas J. Schoenbaum, Admiralty & Maritime Law § 14-2 (4th ed. 2004)).

19. After reporting to Chief Mate French, both Respondent and Chief Mate French signed the Navy Urine Specimen Collection Checklist and initialed beside each of the collection procedures set forth in the document. (CG-07).

20. Chief Mate French followed most but not all of the collection procedures set forth in the Navy Urine Specimen Checklist even though both he and Respondent initialed each procedure. (TR Vol. 1 at 44:17-25 and 45:1-25; TR Vol. 2 at 90:3-5.)

21. Respondent's urine sample, and other urine samples, remained in Chief Mate French's office/state room until the vessel reached its next available mailing port in Fiji. (TR Vol. I at 60, 117, 189, 201; CG-11).

22. Chief Mate French verified that the specimens had not been tampered with and the samples were shipped from Fiji via FedEx to the SAMHSA certified testing laboratory on June 11, 2015, scheduled for delivery on June 16, 2015. (TR Vol. I at 60, 189, 201; CG-11).

23. Captain Giudice reviewed all of the documentation for urinalysis before they left the ship. (TR Vol. I at 139, 144).

24. On June 18-19, 2015, Respondent's urine sample (number 1339504) tested at a level of 253 ng/ml for cocaine metabolites. That result was positive above the confirmation cutoff number of 100 ng/ml for cocaine metabolites. (TR Vol. I at 222-223, 275; CG-12).

25. When a urine sample is positive for cocaine metabolites, prolonged delays between urine sample collection and urinalysis typically gives a lower concentration of cocaine metabolites than testing occurring closer in time to the urine collection. (TR Vol. I at 231-232).

26. Dr. Cooper, a Medical Review Officer (MRO) confirmed the positive laboratory results. (TR Vol. I at 274-275; CG-19).

27. Dr. Fiero, a Medical Review Officer from the same company as Dr. Cooper reconfirmed the positive chemical test results. (TR Vol. I at 273-275; 280-283; CG-19).

28. On August 6, 2015, seventy (70) days after providing a urine sample on the USNS MERCY, Respondent voluntarily provided a hair specimen and submitted it to LabCorp for a hair drug test. (TR Vol. II at 103, 133; Resp. Ex. I).

29. One and a half inches of hair can provide information concerning drug-use for approximately ninety (90) days prior to collection. (TR Vol. II at 103, 133).

30. The August 6, 2015, hair test was submitted to LabCorp as a "first time collection" and not a "confirmation screen" or a "follow-up test." (TR Vol. II at 130-131, 144-145, 160; CG-23 and CG-24; TR Vol. II at 162-163).

31. LabCorp has an Agreement with Psychemedics Corporation in Culver City, California to conduct hair testing analysis for LabCorp and Psychemedics Corporation conducted the testing of Respondent's hair specimen. (TR Vol. II at 130- 143, CG-23 and 24).

32. When reviewed as a "first time collection" Respondent's hair test received a designation indicating it was "negative" for cocaine based on test results showing no dangerous drug levels above the preliminary cutoff. Even if below the cutoff level the hair specimen may still indicate the presence of cocaine metabolites. (TR Vol. II at 162-163; TR Vol. II at 134, 146).

33. Respondent's August 6, 2015 drug hair test indicated the presence of cocaine metabolites in the specimen at a level below the cutoff for an initial test. (CG-01).

34. Respondent's hair specimen confirmed the presence of cocaine metabolites, and would have been sent for further GCMS testing and considered positive for use of cocaine, a dangerous drug if it had been submitted as a follow-up or confirmatory test. (TR Vol. II at 160-163).

III. DISCUSSION

A. Jurisdiction

Jurisdiction is a question of fact and must be determined before the substantive issues of the case are decided. Appeal Decision 2620 (COX) (2001). Jurisdiction is established for the purposes of suspension and revocation proceedings when the use of a dangerous drug is charged, so long as the respondent is a current holder of any Coast Guard issued credential. See Appeal Decision 2668 (Merrill) (2007). The Coast Guard has jurisdictional authority to suspend or revoke a mariner's credentials if the mariner is shown to be a user of, or addicted to the use of a dangerous drug. 46 U.S.C. § 7704(c). Cocaine is a "dangerous drug" as contemplated by 46 U.S.C. § 7704. See 46 U.S.C. § 2101(8a).

In this case, Respondent admits to the jurisdictional allegations in the Amended Complaint and does not contest he was the holder of an MMC at the time the Coast Guard charged him with use of a dangerous drug. See Answer to Amended Complaint at 1; Respondent's Post Hearing Brief at 7. Additionally, compliance with drug testing requirements also supports jurisdiction. 46 C.F.R. § 5.57. Therefore, the Coast Guard has jurisdiction to adjudicate this matter. See Appeal Decision 2668 (Merrill) (2007)

B. Burden of Proof

The purpose of Coast Guard suspension and revocation proceedings is to promote safety at sea. 46 U.S.C. § 7701. To assist in this goal, Coast Guard Administrative Law Judges have the authority to suspend or revoke mariner credentials if a mariner commits certain violations. See 46 U.S.C. Ch. 77. Under Coast Guard procedural rules and regulations, the Coast Guard bears the burden of proof and shall prove any violation by a preponderance of the evidence. See 33 C.F.R. §§ 20.701-702; see also Appeal Decision 2485 (YATES) (1989). In this case, the Coast Guard seeks to prove, by a preponderance of the evidence, that Respondent is the user of or is addicted to the use of dangerous drugs. Respondent may bear the burden of proving any asserted affirmative defenses. 33 C.F.R. §§ 20.701-702.

C. Use of or Addiction to the Use of Dangerous Drugs

1. Elements of the Charged Violation and Parties' Contentions Regarding Sufficiency of the Evidence and MSC Procedures

Title 46 U.S.C. § 7704(c) is the statute that provides the basis for the charge in this matter. In the single violation asserted, the Coast Guard alleged Respondent submitted to an employer mandated post-accident drug test, he subsequently tested

positive for cocaine, and based upon those results, the Coast Guard argues it has been shown he is the user of dangerous drugs.

The minimum elements necessary to prove use of or addiction to the use of dangerous drugs, under 46 U.S.C. § 7704(c) and 46 C.F.R. § 5.35, requires the Coast Guard prove by a preponderance of the evidence:

(1) The respondent is a holder of a merchant marine document or license, and
(2) The respondent was the user of or addicted to a dangerous drug.

Here Respondent has not disputed he holds an MMC, therefore, the first element is proven. The second element may be proven by various means, including observation, possession and drug testing. Coast Guard precedent provides authority that permits proof of dangerous drug use by any admissible evidence. However, the Coast Guard retains the burden of proof as required by 33 C.F.R. Part 20. The Coast Guard's primary evidence to support the charged violation is Respondent's May 2015, employer required, non-Part 16 drug test, which provided a positive result for cocaine metabolites. Although the Coast Guard recognizes the May 2015 collection is a non-Part 16 test, the Coast Guard contends the presumption provided by 46 C.F.R. 16.201(b), may still apply to find Respondent is a user of or addicted to the use of dangerous drugs.

Pursuant to Coast Guard regulations, a prima facie case to prove use of a dangerous drug based solely on DOT chemical testing is shown when three elements are proved: 1) the respondent was the person who was tested for dangerous drugs, (2) the respondent failed the test, and (3) the test was conducted in accordance with 46 C.F.R. Part 16 (including the 46 C.F.R. § 16.201 requirement to use the procedures in 49 C.F.R. Part 40). Appeal Decision 2904 (FRANKS) (2014).

The Coast Guard also argues a subsequent hair drug test, which Respondent presented at the hearing,[3] combined with rebuttal evidence presented by the Coast Guard, corroborates the May 2015 test and constitutes sufficient evidence to prove Respondent has been a user of dangerous drugs as alleged in the Complaint.

Respondent argues the May 2015 test is insufficient to prove Respondent is a user of or addicted to the use of dangerous drugs. Specifically, Respondent argues: 1) the urine test was not properly conducted; 2) a chain of custody was not properly maintained over Respondent's urine sample; and 3) Respondent's evidence rebuts any allegations of drug use established by the Coast Guard.

The Court notes this case presents some unusual facts for a dangerous drug charge because the procedures followed for conducting urinalysis were not DOT procedures under 49 C.F.R. Part 40 nor 46 C.F.R. Part 16. Instead, the Coast Guard approved MSC's request to use generally equivalent procedures pursuant to a Memorandum of Agreement with MSC to satisfy both military requirements and the interests of safety at sea. TR Vol. I at 255, 270-271; CG-02; CG-04. MSC vessels are "public vessels" operated to support Navy missions and are exempt from commercial vessel requirements. See 46 U.S.C. §§ 2101(24) and 2109; CG-02.

Although both parties cite Appeal Decision 2704 (FRANKS) (2014) in support of their arguments, I find neither FRANKS nor any other Commandant's Decision on Appeal (CDOA) directly on point for this matter. FRANKS resolved a confusion of CDOA caselaw that implied sufficient compliance with the testing procedures of 49 C.F.R. Part 40 alone, without also meeting 46 C.F.R. Part 16 requirements, satisfied the

[3] Respondent voluntarily submitted a hair specimen for drug testing in August 2015 and presented the initial results from that specimen as evidence at the hearing. (Vol. II Tr. at 103-112; Resp. Ex. I and J).

third element of the regulatory requirements to obtain the presumption of drug use from a positive chemical test result. Some of the analysis in that decision, beyond the failure of the Coast Guard to demonstrate the drug test was ordered for one of the five permissible bases provided by 46 C.F.R. Part 16, is either not applicable to the case at bar or may be considered dicta.[4]

2. Whether the Presumption in 46 C.F.R. § 16.201(b) May Apply to a Drug Test conducted pursuant to MSC Equivalent Procedures

Pursuant to 46 C.F.R. § 16.201(b), "if an individual fails a chemical test for dangerous drugs under this part, the individual will be presumed to be a user of dangerous drugs." As set forth in Appeal Decision 2637 (Tuberville) (2003), "[f]or the presumption to arise, the Coast Guard must prove: (1) that the Respondent was the person who was chemically tested for dangerous drugs; (2) that Respondent failed the chemical test for dangerous drugs; and (3) that the test was conducted in accordance with 46 C.F.R. Part 16." Appeal Decision 2603 (HACKSTAFF) (1998); Appeal Decision 2592 (MASON) (1997); Appeal Decision 2589 (MEYER) (1997).

The Coast Guard does not dispute the May 2015 MSC drug testing requirements do not comply with the drug testing regulations in 46 C.F.R. Part 16. Specifically, because Part 16 includes the requirement to comply with the DOT drug testing regulations contained in 49 C.F.R. Part 40. The Coast Guard asserts the test required by MSC is compliant with equivalent Health and Human Services (HHS) guidelines, and is

[4] The Commandant's decision makes it clear that compliance with 49 C.F.R. Part 40 cannot avoid the requirement that a directed drug test be for a valid purpose as provided by 46 C.F.R. Part 16. In FRANKS the alleged reason for the chemical test was periodic testing but no basis for conducting a periodic test was ever placed in evidence. Mariners may not be singled out for required chemical testing under the regulations in the absence of demonstration of a proper basis for testing. Testing may also be required in keeping with company policy.

thereby reliable, and constitutes sufficient evidence to prove Respondent is a user of or addicted to the use of a dangerous drug. See Appeal Decision 2704 (FRANKS) (2014).

The Coast Guard also argues that when HHS standards are met, the Court should apply the presumption of drug use set forth in 46 C.F.R. § 16.201(b) because MSC's drug testing program is "in essence, the same for the selection of mariners as well as for the sample's subsequent analysis and review." The Coast Guard contends that because MSC used HHS procedures which "mirror" procedures articulated by 46 C.F.R. Part 16, the presumption of use in 46 C.F.R. § 16.201(b) may be applied.

The Court rejects the Coast Guard's argument. I find the regulatory presumption of 46 C.F.R. Part 16 does not apply absent actual compliance with those regulations. The record shows the Coast Guard cannot meet the third element for the presumption, that the test was conducted in accordance with 46 C.F.R. Part 16, because MSC does not use the 49 C.F.R. Part 40 DOT Testing regulations. Even the Amended Complaint identifies the May 2015 test as "a non 46 C.F.R. Part 16 test. . ." Even though MSC is authorized to use somewhat equivalent drug testing procedures, the Coast Guard concedes the collection procedures used by MSC differ from those in 49 C.F.R. Part 40. Since the MSC procedures are not the same as DOT testing regulations in 49 C.F.R. Part 40, **I find the presumption set forth in 46 C.F.R. § 16.201(b) does not apply to this case**.

Although the regulatory presumption is not available in this case, the Coast Guard may present whatever evidence is admissible to attempt to prove its case. See Appeal Decision 2542 (DEFORGE) (1992) citing Appeal Decision 2252 (BOYCE) (1981); 46 C.F.R. § 5.501. After hearing all of the evidence, the ALJ must then make an

independent determination of whether the evidence submitted is sufficient to prove Respondent was a user of dangerous drugs.

3. Whether the May 28 Drug Test was Directed for a Permissible Purpose

In general, when the Coast Guard presents evidence of a government directed drug test under 46 C.F.R. Part 16, the reason for requiring the mariner to be tested must fit within one of the five (5) permissible bases (pre-employment, random, post-accident, reasonable cause or periodic). If the mariner participated in a drug test as a condition required by the employer or some other reason rather than one of the five bases listed under the regulations then the limitations of FRANKS may not apply.

The Coast Guard contends this matter is an employer required test while Respondent asserts it is a hybrid situation where the matter can be said to fall somewhere between a USCG mandated drug test and a non-USCG mandated drug test. See Respondent's Post-Hearing Brief at 9. The MSC/HHS guidelines control when an MSC mariner may be required to participate in a drug test. The HHS Guidelines provides for testing for the following reasons: "(a) Federal agency applicant/Pre-employment test; (b) Random test; (c) Reasonable suspicion/cause test; (d) Post-accident test; (e) Return to duty test; or (f) Follow-up test." See Section 2.2 Mandatory Guidelines for Federal Workplace Drug Testing Program. See 73 Fed. Reg. at 71880. (Nov. 25, 2008).

Respondent's contention of a "hybrid" is not an unreasonable argument since USNS vessels are operated by civilians, but are also public vessels. Public vessels are exempt from commercial vessel requirements, but MSC agreed to conduct a testing program in the interests of safety at sea and national defense. See CG-02 at 2-4; 46 U.S.C. § 2109; 46 C.F.R. § 6.06. Therefore, I find the MSC policy adopted through

approval of the MOA makes the initial test conducted in this matter an employer policy test. I also find that regardless of whether the May 28, 2015 drug test in this matter is considered government directed or employer directed, it satisfies the concerns of FRANKS supra, that the mariner test be directed for one of the permissible bases identified as proper bases for testing whether under 46 C.F.R. Part 16, or MSC/HHS guidelines because it was a properly required post-casualty drug test under either procedure.

Pursuant to MSC's policies set forth in the Civilian Marine Personnel Instruction (CMPI) 792 (CG-03) and MSC Safety Management System Instruction for Post-Accident/Incident or Unsafe Practice Drug and Alcohol testing (CG-04), urine drug testing shall be performed with the concurrence of the MSFSC Director, or his delegate, when a mishap or unsafe practice occurs which results in . . . damage equal to or above $10,000.00. CG-04 at 2, para. 3.3. The MSC policy further requires urine testing of persons reasonably suspected of having caused or contributed to an accident with more than $10,000 in damage may be subject to drug testing. CG-03 at 20. Here, the record shows MSC complied with these requirements.

The evidence demonstrates on May 27, 2015, the USNS MERCY allided with a fixed object as she maneuvered to depart Pearl Harbor, Hawaii. Captain Giudice subsequently opined that part of the damage was caused by his "full bell" command, which was executed on the vessels propulsion and resulted in damage to the USS Arizona Memorial. TR Vol. I at 129, 132-134. Respondent testified he was the engineer throttleman that complied with speed commands, either ahead or astern. See TR Vol 2 at 82. Accordingly, it was reasonable for MSC to consider the throttleman, whose duties

include responding to propulsion commands, could have contributed to the casualty on May 27, 2015.

After the incident, Captain Giudice concluded the USNS MERCY caused damage exceeding $10,000.00. TR Vol. I at 137. That same day, Captain Giudice consulted with MSC Deputy Director Frank Cunningham. The Deputy Director specifically listed the engineer manning the throttle control as an example of the personnel the Captain should test. See CG-13; TR Vol. I at 135; Vol. II at 80-81.

Therefore, the Court finds MSC reasonably determined the damage from the allision exceeded $10,000.00. The Court also finds Captain Giudice properly consulted with the MSC Director's office and MSC's determination to direct the May 27, 2015, watchstanders including Respondent to submit to a post-accident drug test on May 28, 2015, was within MSC guidance and authority. Given Respondent's position as the throttleman responding to speed commands, it was reasonable to consider he might have contributed to the casualty in this case. Therefore, all the requirements set forth in CMPI 792 are satisfied.

As noted above, this case is not directly aligned with CDOAs applying Part 16 to a chemical test in order to apply the regulatory presumption of dangerous drug use if a prima facie case under 46 C.F.R. Part 16 is proven. FRANKS does not address this situation where a Department of Defense (DOD) entity (MSC) has obtained Coast Guard authorization through an MOA to use an alternative to 46 C.F.R. Part 16. Accordingly, to the extent FRANKS holds that dismissal may be appropriate if the Government fails to

demonstrate compliance with the limited reasons for chemical testing contained in 46 C.F.R. Part 16, those concerns are satisfied here.[5]

4. Whether the Evidence of a Positive Drug Test is Sufficient to Prove Respondent is a User of or Addicted to the Use of a Dangerous Drug.

Having determined the May 28, 2015, drug test was directed for a proper purpose, post-accident testing after a marine casualty, the Court now turns to whether the evidence presented by the Coast Guard is sufficient to prove Respondent is a user of or addicted to the use of dangerous drugs. As stated above, the Coast Guard bears the burden of proof.[6] Although I find the regulatory presumption is not applicable in this case, the Coast Guard may prove use of a dangerous drug by presenting sufficient evidence[7] to establish the following three elements: 1) Respondent was the person who was tested for dangerous drugs; 2) Respondent failed the drug test; and 3) the test was conducted in accordance with procedures and safeguards to support a finding that the evidence of a positive result is sufficiently reliable and persuasive to support a finding of use of a dangerous drug. Cf. Appeal Decision 2603 (HACKSTAFF) (1998). See also Appeal Decision 2653 (ZERINGUE) (2005); Appeal Decision 2584 (SHAKESPEARE) (1997).

[5] Franks directs the Court to subject the non-Part 16 test to "close scrutiny to ensure that Part 16 has not been circumvented." There is no basis to find the test was required by some sort of pretext. A review of the evidence in this case shows the May 2015 employer-based test was not an attempt to circumvent Part 16, but directed as part of MSC procedures that are authorized by the United States Coast Guard. (Memorandum of Agreement between the Navy and the USCG). See CG-02, Signed by Admiral Shannon (USN) and Admiral Servidio (USCG). The agreement expressly permits MSC to set forth certain testing guidelines in its MSC Government Operations Safety Management System (SMS) (CG-04) and more specifically in the Civilian Marine Personnel Instruction (CMPI) 792 (CG-03).

[6] Where the basis of proof for the charged violation is a positive urinalysis test, the Coast Guard must establish by substantial and reliable evidence that a merchant mariner is a user of or addicted to dangerous drugs. Appeal Decision 2560 (CLIFTON) (1995).

[7] "The Administrative Law Judge may properly consider any fact which sheds light on the proof or falsity of a charge. Appeal Decision 2252 (BOYCE) (1981). Any relevant and material evidence may be considered. 46 C.F.R § 5.501. (Appeal Decision 2542 (DEFORGE) (1992).

If the Coast Guard establishes sufficient[8] evidence to demonstrate Respondent is a user of or addicted to dangerous drugs,[9] Respondent may then present evidence to rebut the evidence of drug use presented by the Coast Guard.

a. **Whether the May 2015 Drug Test Collection Procedures were Sufficient for the Respondent's Urinalysis Specimen.**

Respondent does not dispute the scientific validity of the urinalysis drug testing or the certification of the U.S. Army Lab, but argues a number of required procedures were violated when Chief Mate French collected his sample after the May 27, 2015 incident. Respondent argues the procedural violations render his specimen invalid. Specifically, Respondent argues: 1) Respondent was not provided proper written notice before the test was conducted; 2) Chief Mate French did not have recent training to be a collector and lacked experience as a collector; 3) Chief Mate French did not follow some MSC procedures when collecting Respondent's specimen; 4) the chain of custody was not properly maintained and 5) Chief Mate French was a co-worker from the same testing pool and therefore was not a proper collector.

The Coast Guard contends none of the alleged technical infractions, even if true, are sufficient to cast doubt on the May 2015 test's reliability. Relying on CDOAs, the Coast Guard notes technical infractions such as those argued by Respondent are insufficient to invalidate a test because they do not cast doubt on the chain of custody or the specimen's integrity. See Appeal Decision 2542 (DEFORGE) (1992).

[8] Prior decisions may be considered for determining what may be considered sufficient evidence in a suspension and revocation proceeding. FRANKS makes clear non-Part 16 tests are sufficient if they are accompanied by "modest additional evidence to prove that the presence of metabolite in a non-Part 16 test means [] the mariner used dangerous drugs. . ." and so long as the Coast Guard is able to link the test results to the mariner and prove the reliability of the non-Part 16 test. FRANKS at 8.

[9] A credibility determination is not required to meet the standard for denying a motion to dismiss at the end of the Coast Guard's case. As long as the evidence, if believed, would be sufficient to prove the charged

i. Respondent was the Person Tested for Dangerous Drug with specimen #1339504 (Respondent alleged error (1))

Although it is clear from the record Respondent was not required to present a photo ID, he was a known member of the crew of USNS MERCY and to the collector. Chief Mate French knew him so there is no failure to identify the correct person for the specimen collected on May 28, 2015. See Respondent testimony TR Vol. II at 115. This is sufficient to satisfy the collection procedure concerns. See DEFORGE, supra. Additionally, Respondent's Answer to the Amended Complaint and the evidence at hearing including his own testimony shows Respondent signed a Drug Custody and Control Form (CCF) for providing specimen ID# 1339504 for the urinalysis test sample collected on the USNS MERCY on May 28, 2015. CG-07 and 10; TR Vol. I at 42-45, 51-60, 182-90; TR Vol. II at 86-90. The CCF also verifies that Respondent submitted to a drug test on May 28, 2015. CG-07, 10, and 11. Chief Mate John French testified to the specific procedures he followed when conducting the collection of the urinalysis specimens on May 28, 2015, for the USNS MERCY, including Respondent's urine specimen and testified that the procedures were followed in accordance with MSC CMPI 792. CG-03; TR Vol. I at 179-204. A minor technical error regarding photo identification is not sufficient to exclude the evidence of collection of a sample in this matter.

ii. Chief Mate French's Collector Training, Experience, and Chain of Custody Procedures were Sufficient (Respondent alleged errors 2, 3 and 4)

Chief Mate French was a certified urinalysis collector having completed training. CG-06 and TR Vol I at 40-43. HHS guidelines provide that collectors should receive

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violation, the Judge may deny the motion to dismiss and then permit Respondent to present any rebuttal

refresher training every five years. MSC granted a waiver of the five-year requirement, and Chief Mate French's training was just beyond the five years. TR Vol. I at 73, 85-86; CG-06. Respondent also challenges Chief Mate French's experience, and argues he was unqualified to conduct the urinalysis.

As long as the collector has had the requisite training and provides testimony regarding the procedures followed, the collection may be sufficient. Chief Mate French completed the collector training as documented by CG Exhibit 06 and testified he previously assisted in urinalysis collections and collected approximately twenty (20) previous samples. Chief Mate French and Respondent testified that they reviewed and initialed the checklist and Respondent initialed the tamper proof seals for his specimen. The evidence shows Respondent's specimen was placed in a plastic bag and sealed. After collection of the specimens, Chief Mate French put the specimens in a box and placed them in the refrigerator in his stateroom. Although there was some testimony that the stateroom was not locked at all times I do not find this constitutes a compromise of the custody of the specimens prior to shipment to the U.S. Army Lab. The evidence shows that the specimens were in sealed packages consistent with Section 5.4 of the HHS Guidelines and MSC Procedures and remained intact prior to shipment and were verified to be intact on arrival at the lab. Although there were some technical errors in this matter, the facts are sufficient to indicate the collection of specimens was sufficient and the custody of the samples was sufficiently maintained. Technical infractions such as those argued by Respondent are insufficient to invalidate a test where they do not cast doubt on the chain of custody or the specimen's integrity. See Appeal Decision 2688 (HENSLEY) (2010).

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evidence.

Respondent raised questions concerning the length of time between collection of the specimens and their shipment to the lab and implied that proper custody of the specimens was not maintained. Dr. Smith, Forensic Toxicologist, testified that delay from time of donation to delivery to the laboratory for testing would not increase any positive test results and instead would potentially result in a lower test result over time. TR Vol. I at 231-32. The specimens collected were shipped to the U.S. Army Forensic Drug Testing Facility in Maryland from the ship's next port call in Fiji. CG-11; TR Vol I at 59-61. Chief Mate French retained the specimens in his refrigerator until they were shipped out and verified that the specimens plastic bags and seals were intact. TR Vol I at 189, 199-201, 203-05.

I find no persuasive evidence showing Respondent's specimen was in anyway adulterated or tampered with and no evidence that would invalidate the custody and control procedures leading up to the specimen's shipment to the testing facility (U.S. Army Forensic Toxicology Drug Testing Laboratory at Fort Meade, Maryland). The Army Forensic Toxicology Drug Testing Laboratory (Army Lab) is a SAMSHA certified facility. CG-15; TR Vol. I at 211-15. Dr. Smith of the Army Forensic Toxicology Drug Testing Laboratory testified that the specimens from the USNS MERCY, including specimen number 1339504 were received at his facility intact and the tamper proof seals were intact. CG-16; TR Vol I at 220-222. Dr. Smith also testified regarding the chain of custody and testing procedures at the lab and the positive test result for specimen number 1339504. Based on all of the evidence in the record, I find that the chain of custody and shipment inspection procedures at the Army Laboratory were sufficient to demonstrate they were in substantial compliance with HHS and CMPI 792 procedures.

iii. Whether Chief Mate French should have been Disqualified as Collector because he was a co-worker from the same testing pool (Respondent alleged error 5)

Respondent argues that Chief Mate French was a co-worker and therefore within the same unit/testing pool and the urinalysis test should be rejected on that basis. Resp. Ex. A, at Chapter 1, (pg 1).[10] The undersigned Judge notes MSC/HHS procedures do not define the term "co-worker." But a review of the facts demonstrates that Chief Mate French and Respondent were not co-workers. Although the Chief Mate was part of the crew of the USNS MERCY, there is no dispute that Respondent was in the Engineering Division and not supervised by the Chief Mate. TR Vol I at 181-82. It is clear from the record that Respondent worked for the Chief Engineer and was not in daily contact with Chief Mate French. Nothing in the record shows Respondent and Chief Mate French had a working relationship and Respondent cites no evidence showing why the two should be considered co-workers. Therefore, I find Chief Mate French and Respondent were not "co-workers" as contemplated in the MSC/HHS Guidelines and procedures.

Whether the Chief Mate should be considered part of the same "testing pool" is also somewhat unclear. Mr. Eudell Walker, MSC coordinator, considered all of the Civilian Mariners working for MSC to be within the same testing pool. TR Vol. I at 78-79. Respondent argues that either the entire crew of the USNS MERCY or at least all of the personnel tested as a result of the allision should be considered in the same testing pool. The guidelines are apparently designed to avoid collusion among co-workers to circumvent the validity of the testing scheme and to prevent an individual from collecting their own specimen. 73 Fed. Reg. at 71862. (Nov. 25, 2008). Chief Mate French was not

a co-worker and his position as Chief Mate does not add or detract from the review of the significance of any errors in the collection process. The procedural errors in this case do not present a fatal flaw listed in the guidelines. Resp. Ex. A at Chapter 9, (pgs 29-30). Considering all of the evidence in the record, I find no evidence of collusion nor any attempt to circumvent the validity of the testing scheme which would merit excluding the test on this basis.

Here the evidence shows Chief Mate French was also tested after the May 27, 2015, allision, but Captain Giudice collected his specimen. TR Vol I at 140. Under MSC procedures, the Chief Mate was the designated person for conducting urinalysis for the vessel unless a Medical Officer was assigned to the ship. The USNS MERCY did not have a medical officer assigned. Although Respondent contends other members of the crew could have collected specimens instead of the Chief Mate, there was nothing shown that anyone other than the Master who previously been a Chief mate was trained in collection procedures. Upon receipt at the U.S. Army Lab, the specimens received were found to be intact. Although there remains a concern because the Chief Mate was also required to be tested, his specimen was separately collected by the Captain, and thereby separate from the testing pool the Chief Mate collected. The need for the Navy to permit the USNS MERCY to continue on its mission and the need for timely post-casualty testing in the interests of safety at sea under 46 C.F.R. § 5.5 are valid concerns, but are also balanced with the requirement for providing mariners appropriate due process regarding their profession and credentials under 46 U.S.C. § 7702. While this is a close issue, in the absence of any evidence of tampering with the plastic bags or seals for the

[10] Chapter 1, Collector section provides restrictions including excluding from eligibility as a collector "A co-worker who is in the same testing pool or who works with an employee on a daily basis must not serve

collected specimens, the Coast Guard's evidence was sufficient to avoid summary decision or dismissal at the close of the Coast Guard's case.[11]

D. Whether Respondent's Specimen Was Positive for a Dangerous Drug

1. Cocaine is a Dangerous Drug

The Amended Complaint alleges use of or addiction to the use of a dangerous drug in violation of 46 U.S.C. § 7704. Cocaine is a controlled substance within the definition of "dangerous drug" as provided in 46 U.S.C § 2101(8a). There is no dispute that cocaine was the substance identified as the basis for a positive test, nor whether it is a dangerous drug under U.S. law. Respondent's defense focused on contesting the validity of the sample and reliability of the testing procedures.

2. The Laboratory Found that Specimen ID # 1339504 Yielded a Positive Drug Test Result

As noted above, neither party asserted a specific challenge to the scientific validity of the urinalysis testing for drugs by a certified laboratory. The U.S. Army Forensic Toxicology Drug Testing Laboratory tested Respondent's specimen for dangerous drugs and returned a positive result for cocaine metabolite (Benzoylecgonine) at a level of 253 ng/ml. CG-16; CG-14. The record shows the Army Lab is certified by the Department of Health and Human Services to perform testing under federal regulations. TR Vol. I at 214-216; CG-15; 80 Fed. Reg, 31054-55 (June 1, 2015). The Coast Guard presented the testimony of Dr. Smith, the lab director to explain the receipt and processing of specimens at the Army Lab in general and the process for Respondent's test results. The Coast Guard also offered CG-15 (80 Fed. Reg. 31054-

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as a collector when that employee is tested."

31055 (June 1, 2015)) in support of the laboratory testing meeting all HHS requirements. Dr. Smith also testified that he oversees the entire testing facility and ensures that the individuals are trained in the standard operating procedures of the facility and are capable of carrying out that job. TR Vol. I at 216-259.

The MRO, Dr. Jerome Cooper, received the results from the Army Lab and verified the test as positive for cocaine metabolite. CG-19; TR Vol I at 267-76. The positive test results were reconfirmed by Dr. Fiero. TR Vol I at 280-81.

The evidence shows collection of Respondent's specimen substantially complied with collection and chain of custody procedures through shipment to the Army Lab. The Army Lab was certified for HHS testing, and the testimony of Dr. Smith, along with the evidence presented of the lab procedures for proper verification of specimen seals being intact on arrival and chain of custody and testing of the specimen, are sufficiently reliable to meet the burden of proof in regard to providing sufficient evidence of use of dangerous drugs.

The evidence presented satisfied the standard of proof (preponderance of the evidence) sufficiently to survive a motion to dismiss at the close of the Government case in chief had such a motion been asserted.[12] Pursuant to the regulations, Respondent was entitled to present evidence on his own behalf to rebut the evidence presented by the Coast Guard.

E. Respondent's Evidence was Not Persuasive and Not Sufficient to Rebut the Evidence Presented by the Coast Guard.

[11] The Court had denied Respondent's pre-hearing Motion to Dismiss on this issue.

[12] On October 30, 2015, Respondent submitted a Motion to Dismiss the amended complaint contending the undisputed evidence shows his specimen was not properly collected because the collector was a co-worker in the same testing pool. On November 18, 2015, an Order was issued denying Respondent's Motion without prejudice because there remained facts in dispute.

Respondent, in his brief, argues a number of points regarding alleged deficiencies in the collection of his specimen and the chain of custody procedures for his urinalysis test. In rebuttal, Respondent presented evidence regarding the May 28, 2015, collection procedures on the USNS MERCY, including his own testimony. TR Vol. II at 86-92. The testimony and evidence regarding the retention of the collected specimens in the Chief Mate's refrigerator, verification by the Chief Mate before shipment that the specimens were intact and subsequent verification by the Army Lab that the specimens were received intact, with no break of the tamper proof seals, is sufficient for the Court to find the chain of custody for Respondent's specimen to be sufficient in this matter.

During his testimony, Respondent denied using cocaine and testified he voluntarily submitted a hair specimen for drug testing on August 6, 2015, which was reported by LabCorp as a negative result. Respondent also presented character evidence through testimony and letters.

The Coast Guard initially objected to the introduction of the subsequent hair chemical test by Respondent and, at the hearing, the Court deferred ruling on whether the evidence would be admitted pending further briefing and argument by the parties. The Coast Guard later withdrew its objection and both parties submitted post-hearing briefs in regard into the evidence of the subsequent hair test and how it should be considered in this matter. As noted above, after review of the record and the arguments for admission presented by the parties, the evidence of the hair test is admitted into evidence.

During the hearing, Respondent offered Exhibit I, a document from LabCorp, showing a negative result from Respondent's hair specimen collected on August 6, 2015. Respondent also presented Exhibit J, a print out from LabCorp website, to demonstrate

the procedures for hair drug testing analysis. Respondent also relied on the decision in U.S.C.G. v McPherson, Docket No. 2013-0434 (January 7, 2015), issued by Judge Jordan finding hair testing and analysis to be a reliable and scientifically valid method of testing for cocaine use. Although only CDOAs are binding authority[13] for this Court, I find Judge Jordan's thorough analysis on this issue to be strongly persuasive authority and, based on the matters presented by the parties including the testimony of Dr. Thomas Cairns, I also find that hair testing is a reliable and scientifically valid method of testing for dangerous drugs including cocaine.

At the conclusion of Respondent's presentation of evidence, the Coast Guard called Dr. Thomas Cairns,[14] a forensic toxicologist for Psychemedics Corporation in California, as a rebuttal witness to testify regarding Respondent's hair test. Dr. Cairns testified regarding his background, credentials, and the certification and testing procedures for Psychemedics Corporation. He also testified that his company had an agreement with LabCorp to conduct hair testing for them and that Psychemedics conducted the test for Respondent's August 6, 2015 hair specimen. TR Vol. II at 130, 143-144. Dr. Cairns testified that Respondent's specimen submitted to Psychemedics indicated a presence of cocaine metabolites that was below the cut-off level for an initial drug test. TR Vol. II at 132-135; 145-148, 152. Further testimony by Dr. Cairns provided a substantial amount of information regarding the testing process for hair specimens including the amount of time for a look-back period as discussed in Respondent's Exhibit J. Dr. Cairns reviewed the documentation regarding Respondent's specimen and Dr. Cairns stated that if the specimen had been submitted as a confirmatory

[13] See 46 C.F.R. § 5.65.

test it would have been reported as positive for cocaine. TR Vol. II at 160-163; CG-23 and 25. Dr. Cairns also testified that Respondent's hair test results were inconsistent with incidental or one-time use. Dr. Cairns testified that the level of metabolites indicated a long period of abstinence, but preceded by use of cocaine.

As noted above, Respondent cites Judge Jordan's decision in U.S.C.G. v. McPherson, supra to support the argument that hair testing is a reliable drug test and that the Court should consider Respondent's hair test results in reaching a decision in this matter. However, once the matter was presented by Respondent, the process of the hearing permits exploration of such evidence in rebuttal. The record shows that LabCorp used Psychemedics to conduct the hair testing of Respondent's specimen. In contesting the rebuttal evidence testimony from Dr. Cairns, Respondent argues Dr. Cairns relied on "junk science" when he concluded Respondent's hair test corroborated the initial May 2015 positive test results. I find this argument inconsistent and unconvincing and it is rejected. I find Dr. Cairns testimony to be substantial, persuasive evidence showing an indication of cocaine use. The voluntary hair test presented by Respondent when considered in the light of Dr. Cairn's testimony corroborates the evidence of a positive result from the urinalysis test from the May 28, 2015, collection on the USNS MERCY.

In conclusion, I find the evidence Respondent presented on his own behalf is not sufficient to rebut the evidence of the positive test results from the May 2015 test as corroborated by the hair test. Respondent's final brief and argument also noted Respondent had not failed previous drug tests. However, evidence of past negative drug tests from a different time period are not relevant to the present case. While the

[14] Throughout the transcript Dr. Cairns name is misspelled as Dr. "Karins." Dr. Cairns C.V. was admitted as CG-21.

voluntary hair test in this matter is relevant and admitted based on the testimony in the record regarding the timeframe and type of test, subsequent negative tests may be considered irrelevant. See generally Appeals Decision 2635 (SINCLAIR) (2002).

After considering the record as a whole, I find the charged violation **PROVED.** Rulings on the parties proposed findings of fact and conclusions of law are contained in **Attachment C**.

IV. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At all relevant times, Respondent was a holder of Coast Guard issued Merchant Mariner Credential No. 000284890.

2. Respondent and the subject matter of this hearing are properly within the jurisdiction vested in the Coast Guard under 46 U.S.C. § 7704(c); 46 C.F.R. Part 5; 33 C.F.R. Part 20; and the APA codified at 5 U.S.C. §§ 551-59.

3. On May 28, 2015 Respondent participated in a post-accident drug test.

4. Respondent's Custody and Control Form shows Respondent's urine sample yielded a positive result for cocaine metabolite.

5. The Coast Guard provided sufficient evidence to prove that Respondent's positive drug test was supported by reliable and probative evidence sufficient to meet the burden of proof required by 33 C.F.R. § 20.702.

6. Respondent voluntarily provided a hair specimen for a subsequent drug test in August 2015.

7. When considered as an initial drug screening test the results of the hair were reported as negative indicating that the specimen did not present test results sufficient to meet the preliminary drug test cut-off level.

8. When considered as a follow-up or confirmatory test the cut-off level for a hair drug test is not applicable for determining whether the specimen tested is positive for a dangerous drug.

9. When considered as a follow-up or confirmatory test, Respondent's hair specimen confirmed the presence of cocaine metabolites.

10. Respondent failed to present persuasive evidence sufficient to rebut the evidence presented by the Coast Guard showing that he has been a user of dangerous drugs as shown by a positive drug test.

11. Accordingly, the Coast Guard has **PROVEN** by a preponderance of reliable, probative, and credible evidence that on or about May 28, 2015, Respondent was a user of or addicted to dangerous drugs.

V. SANCTION

The authority to impose sanctions at the conclusion of a case is exclusive to the ALJ. Appeal Decision 2362 (ARNOLD) (1984). Title 46 C.F.R. § 5.569 provides the Table of Suggested Range of Appropriate Orders (Table) for various offenses. The purpose of this Table is to provide guidance to the ALJ and promote uniformity in orders rendered. Appeal Decision 2628 (VILAS) (2002), *aff'd* by NTSB Docket ME-174. However, the regulations and CDOAs provide binding authority requiring a sanction of revocation for certain violations.

When the Coast Guard proves that a mariner has used or is addicted to dangerous drugs, revocation of all Coast Guard issued licenses, documents, or other credentials is the appropriate sanction unless cure is proven. See 46 U.S.C. § 7704(c); 46 C.F.R. § 5.569; Appeal Decision 2535 (SWEENEY) (1992).

Here, the Coast Guard has proven by a preponderance of reliable, probative and credible evidence that Respondent was a user of or addicted to dangerous drugs. Therefore, the appropriate sanction is **REVOCATION**.

The Court is constrained by the regulations and binding precedent to order revocation when use of dangerous drugs is proven even if a substantial period of suspension with mandatory testing might have otherwise been considered. The evidence of outstanding performance and favorable comment from the Master and Chief Engineer and shipmates along with other materials submitted in support of Respondent and

Respondent's past work history indicates he should be considered for administrative clemency and should be eligible for credentials following proof of cure pursuant to SWEENEY and its progeny. 33 C.F.R. § 20.904; 46 C.F.R. § 5.901(d).

WHEREFORE,

VI. ORDER

IT IS HEREBY ORDERED, Respondent's Merchant Mariner Credential Number 000284890, and all other valid licenses, documents, and endorsements issued by the Coast Guard to Respondent, Daniel James Argast, are **REVOKED**.

IT IS FURTHER ORDERED, upon service of this Order, Respondent shall forthwith surrender his credentials and all other valid licenses, documents, and endorsements issued by the Coast Guard to the United States Coast Guard, Mr. James Staton, 200 Granby Street, Suite 700, Norfolk, Virginia.

PLEASE TAKE NOTICE, within three (3) years or less, Mr. Argast may file a motion to reopen this matter and seek modification of the order of revocation upon a showing that the order of revocation is no longer valid and the issuance of a new license, certificate, or document is compatible with the requirement of good discipline and safety at sea. The revocation order may be modified upon a showing that the individual:

(1) has successfully completed a bona fide drug abuse rehabilitation program;

(2) has demonstrated complete non-association with dangerous drugs for a minimum of one year following completion of the drug rehabilitation program; and

(3) is actively participating in a bona fide drug abuse monitoring program.

See generally 33 C.F.R. § 20.904; 46 C.F.R. § 5.901. The drug abuse monitoring program must incorporate random, unannounced testing during that year. Appeal Decision 2535 (SWEENEY) (1992).

PLEASE TAKE FURTHER NOTICE, service of this Decision on the parties and/or parties' representative(s) serves as notice of appeal rights set forth in 33 C.F.R. §§ 20.1001 – 20.1004. Attachment D.

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Michael J. Devine
Administrative Law Judge
U.S. Coast Guard

Date: July 07, 2016

ATTACHMENT A
WITNESS AND EXHIBIT LISTS

WITNESS LISTS

Coast Guard Witnesses

1. Eudell Walker
2. Francis Cunningham
3. Captain Thomas Giudice
4. Chief Mate John French
5. Doctor Michael Smith
6. Doctor Jerome Cooper
7. Doctor Thomas Cairns

Coast Guard Exhibits

CG-01 Signed Drug Free Workplace Agreement

CG-02 Memorandum of Agreement

CG-03 CIVMAR Drug Free Workplace Program

CG-04 MSC SMS Drug Testing Excerpt

CG-05 MSC Drug Free WKPL Collection Site Coordinator Training

CG-06 Collector Training Certificate of Completion

CG-07 MSC Navy Specimen Collection Checklist

CG-08 CCF

CG-09 Collection Kit

CG-10 CCF – Collectors Copy

CG-11 FedEx Forms

CG-12 MRO Lab Results Report

CG-13 E-mails

CG-14 DHS Report of Marine Casualty

CG-15 Federal Register SAMSHA Cert List

CG-16 Laboratory Litigation Package

CG-17 Photos of Specimen Bottles

CG-18 CV Dr. Jerome Cooper

CG-19 Federal CCF MRO Copy

CG-20 MSC SMS prior version

CG-21 CV Doctor Thomas Cairns

CG-22 Certification of Psychemedics

CG-23 Worklist

CG-24 Summary Results Psychemedics

Respondent Witnesses

1. Michael Hussey
2. Lisa Wasson
3. Brendan Marron
4. Barron Von Garvey
5. Judge Robert Holdman
6. Daniel Argast

Respondent Exhibits

Exhibit A Department of Health and Human Services Handbook

Exhibit B Captain Giudice Character Reference

Exhibit C Resume Michael Hussey

Exhibit D Michael Hussey Merchant Mariner Credential

Exhibit E Character Reference From Brendan Marron

Exhibit F Resume/Bio Judge Holdman

Exhibit G Performance Evaluations

Exhibit H Character Reference Chief Engineer Brian Muir

Exhibit I D.R.S. Negative Results (Hair Follicle Test Report)

Exhibit J LabCorp Website Info. Hair Drug Testing

ATTACHMENT B

STIPULATION AND OFFICIAL NOTICE

Stipulation

Stipulation – On Day 2 of the hearing the parties stipulated that the Safety Management Procedures (for Post-Accident Testing) for both CG-04 and CG-20 were the same. TR Vol. 2 at 4-7.

Official Notice (33 C.F.R. § 20.806) is taken of:

(1) Memorandum of Agreement Between Commander Military Sealift Command and U.S. Coast Guard dated July 30, 2013 (Admitted as CG-02) TR Vol. 1 at 23-26.
(2) 46 U.S.C. 7704. TR Vol. 1 at 287.

ATTACHMENT C

Rulings on Proposed Findings of Fact and conclusions of law

RULINGS ON USCG PROPOSED FINDINGS OF FACT

1. Respondent's current license, No. 000284890, was issued on February 3, 2015 and expires on February 3, 2020. At all times relevant to this proceeding, the Respondent was the holder of a Coast Guard-issued credential. (Transcript of Record ("TR") Vol. I at 6; TR Vol. II at 165)

   ACCEPTED as provided in the Decision and Order.

2. Respondent admitted to the jurisdictional allegations of the Amended Complaint. (TR Vol. I at 9; Answer to the Amended Complaint, para. 1, dtd 21 Oct 2015)

   ACCEPTED as provided in the Decision and Order.

3. Respondent admitted to Factual Allegations 3 and 8 of the Amended Complaint; in that: "3) The Respondent signed a Drug Testing Custody and Control Form for providing specimen ID# 1339504" and "8) Use of a dangerous drug is a violation of 46 U.S.C § 7704 as further defined by 46 C.F.R. 5.35." (TR Vol. I at 9; Answer to the Amended Complaint, para. 2, dtd 21 Oct 2015)

   ACCEPTED as provided in the Decision and Order.

4. The steamship, USNS MERCY, is a hospital ship operated by MSC. (TR Vol. I at 125)

   ACCEPTED as provided in the Decision and Order.

5. On May 27, 2015, Respondent was serving aboard the USNS MERCY as the Second Engineer and throttleman. (TR Vol. I at 135; Vol. II at 80-81)

   ACCEPTED as provided in the Decision and Order.

6. On May 27, 2015, the USNS MERCY departed Pearl Harbor, HI, with the Respondent as the throttleman. During its departure evolution, the vessel was involved in a marine casualty when it allided with the boat landing platform of the USS ARIZONA Memorial. (CG-14; TR Vol. I at 126)

   ACCEPTED as provided in the Decision and Order.

7. The USNS MERCY's rudder made contact with and rubbed the dock, causing damage to the boat landing platform of the USS ARIZONA Memorial. (TR Vol. I at 129, 137)

ACCEPTED as provided in the Decision and Order.

8. On the day of the allision, as well as on May 28, 2015, the Master of the USNS MERCY, Captain Thomas Giudice, was unsure of the exact amount of damage to both the platform and his vessel, but determined that the potential for $10,000 or more in damage existed. (TR Vol. I at 137; CG-13)

ACCEPTED as provided in the Decision and Order.

9. Mr. Jack Taylor, the Director of MSC and Commander, Military Sealift Fleet Support Command ("MSFSC"), discussed the allision with Captain Giudice and provided his concurrence and direction that post-accident drug testing should be conducted for all involved personnel and crewmembers. (TR Vol. I at 94-99, 130, 138-139 and 149; *and* CG-13)

ACCEPTED as provided in the Decision and Order.

10. As the throttleman, Respondent was determined by Captain Giudice, as well as MSC, to be one of nine involved persons who were in positions that warranted drug testing. (TR Vol. I at 96-97 and 130-132)

ACCEPTED as provided in the Decision and Order.

11. At the time when the drug test was ordered, Respondent knew that he was subject to MSC's drug testing policy and that he may be subject to testing as a result of a safety mishap. (TR Vol. I at 18; TR Vol. II at 113-115; *and* CG-01)

ACCEPTED as provided in the Decision and Order.

12. On May 28, 2015, Respondent reported to Chief Mate John French's office/stateroom to provide a urine sample as directed. (TR Vol. I at 183)

ACCEPTED as provided in the Decision and Order.

13. Respondent's sample, under chain of custody number 1339504, tested positive for cocaine. (TR Vol. I at 222, 275; CG-12)

ACCEPTED as provided in the Decision and Order.

14. From August 3, 2012 to the present, which includes the date of the urinalysis on May 28, 2015, Respondent was a Civilian Mariner ("CIVMAR") employee of MSC. (TR Vol. II at 70)

ACCEPTED as provided in the Decision and Order.

15. CIVMARS are federal employees holding Coast Guard-issued credentials, employed by MSC, and are subject to the Navy's Drug Free Workplace Program ("DFWP"). (TR Vol. I at 22-25; CG-04)

ACCEPTED as provided in the Decision and Order.

16. MSC employees are not subject to Department of Transportation ("DOT") drug testing protocols. (See Note on page 1 of CG-04)

ACCEPTED IN PART AND REJECTED IN PART. MSC employees are not subject to DOT testing protocols as they concern post-casualty drug testing.

17. The Coast Guard and MSC have entered into a Memorandum of Agreement whereby the Coast Guard recognizes that CIVMARs are subject to the Navy's DFWP to avoid subjecting them to multiple and redundant federal drug testing standards. (TR Vol. I at 22-25; CG-02; See Note on page 1 of CG-04)

ACCEPTED as provided in the Decision and Order.

18. Instead of the DOT drug testing procedures identified in 49 C.F.R. Part 40, the Navy's DFWP adopts the Department of Health and Human Services ("HHS") Mandatory Guidelines for Federal Drug Testing Programs. (CG-03 at 2-1(b))

ACCEPTED as provided in the Decision and Order.

19. The DOT drug testing procedures in 49 C.F.R. Part 40 essentially mimic the guidelines established by HHS. The analysis of the specimen is the same, the review process is the same, and the same Federal Drug Testing Custody and Control Form is used. (TR Vol. I at 255, 270-271)

NEITHER ACCEPTED NOR REJECTED. The regulations speak for themselves and questions of law are for the court.

20. DOT and HHS drug tests only differ in that the DOT spells out who may collect a sample and how the sample is to be collected. Additional differences include how the two agencies treat invalid tests. The testing itself, however, is the same. (*Id*.)

NEITHER ACCEPTED NOR REJECTED. The regulations speak for themselves and questions of law are for the court.

21. MSC implements the Navy's DFWP by way of its company policy, specifically the Civilian Marine Personnel Instruction ("CMPI") No. 792. (CG-03, para. 1-1)

ACCEPTED as provided in the Decision and Order.

22. CMPI No. 792 authorizes the MSFSC (MSC Director) to tailor the drug testing and collection procedures to the CIVMAR workforce and the shipboard environment. (CG-03 at 2-1(b))

ACCEPTED as provided in the Decision and Order.

23. MSC tailored and refined its drug testing and collection procedures by way of its MSC Government Operations Safety Management System ("SMS"). Specifically, the "Post-Accident/Incident or Unsafe Practice Drug and Alcohol Testing" document is the portion of the SMS that guides MSC's Masters on how to conduct drug testing operations in certain situations, including post-accident. (TR Vol. I at 31-32; CG-04 at 1-3)

ACCEPTED as provided in the Decision and Order.

24. The SMS directs that urine drug testing shall be performed with the concurrence of the MSFSC Director, or his delegate, when a mishap or unsafe practice occurs which results in . . . damage equal to or above $10,000.00. (CG-04, at 2, para. 3.3)

ACCEPTED as provided in the Decision and Order.

25. The SMS directs the Master to use the flow chart on page three of the document to assist in identifying when drug testing is authorized. Captain Giudice consulted the flow chart to aid in his decision making. Additionally, Section 3.3.2 of the same document directed him to arrange drug testing (urine) of all involved persons immediately after approval from MSC is received. (TR Vol. I at 137; CG-04 at 2, para. 3.3.2)

ACCEPTED as provided in the Decision and Order.

26. The decision whether to test individuals must be made and completed within 32 hours of the incident. (CG-04 at 3)

ACCEPTED as provided in the Decision and Order.

27. Section 4-4 of CMPI 792 directs that persons reasonably suspected of having caused or contributed to an accident with more than $10,000 in damage may be subject to drug testing. (CG-03 at 20)

ACCEPTED as provided in the Decision and Order.

28. Captain Giudice, in consultation and with concurrence with Mr. Taylor and Mr. Cunningham (Mr. Taylor's delegate), decided to expand the initial drug testing collection pool to include individuals filling positions that were reasonably suspected to have contributed to the accident. As such, they chose individuals that filled positions in the Engine Room Control ("identified on the transcript as "ERC"), after steering (or "aft steering"), and those on the bridge. (TR Vol. I at 157; CG-13)

ACCEPTED as provided in the Decision and Order.

29. The Respondent was serving as the throttleman in the ERC at the time of the allision and that position is an integral part of the movement of a vessel such as the USNS MERCY. The throttleman executes the Captain's commands, ultimately controlling the movement of the vessel. (TR Vol. I at 132-135; CG-13)

ACCEPTED as provided in the Decision and Order.

30. Captain Giudice selected Chief Mate John French to conduct the urine collection for the drug testing. Drug test collections were the collateral duty of the Chief Mate, the Captain's most senior and experienced crewmember at the time. (TR Vol. I at 36-37, 125-126, 161-162)

ACCEPTED as provided in the Decision and Order.

31. MSC guidelines direct medical service officers ("MSO's") to serve as drug test collectors on the majority of their ships. However, on the USNS MERCY, as well as other vessels where there is no MSO assigned on board, the collection duties are assigned to the Chief Mate. (TR Vol. I at 36-37)

ACCEPTED as provided in the Decision and Order.

32. Chief Mate French was trained and certified as a Collection Site Coordinator (CSC) in May 2010. (TR Vol. I at 69-70)

ACCEPTED in PART. Chief Mate French had received training and certification as a collection site coordinator before May 2010.

33. MSC relies on the authority of CMPI 792 section 2-1(b) to tailor the CIVMAR drug testing program to fit the unique shipboard operating environment. (TR Vol. I at 29-30, 69, 85, 101-102; CG-03 at paragraph 2.1B)

ACCEPTED as provided in the Decision and Order.

34. MSC operates 60 ships and employs approximately 5200 CIVMAR personnel. Due to fleet operations, including the forward-deployment of vessels around the world, MSC management has granted a waiver from the standard 5-year CSC re-

certification requirements, as it is not feasible to maintain that frequency of training. (TR Vol. I at 69-70)

ACCEPTED as provided in the Decision and Order.

35. Chief Mate John French understood his job as a collector, as he had participated in the collection of approximately 20 samples prior to his collection duties on May 28 2015. (TR Vol. I at 179, 204)

ACCEPTED as provided in the Decision and Order.

36. MSC provides a Specimen Collection Checklist for the collectors and donors to follow and use for each collection. For each stage of the process, the collector and donor enter their initials indicating that the process was properly completed. (CG-07)

ACCEPTED as provided in the Decision and Order.

37. The Respondent signed his initials indicating that proper procedures were followed for each step of the collection process, from providing the sample to properly sealing the sample packaging. (CG-07)

ACCEPTED as provided in the Decision and Order.

38. The samples remained in Chief Mate French's office/state room until the vessel reached its next sufficient mailing post. From there, they were shipped via FedEx to the SAMHSA certified testing laboratory. (TR Vol. I at 60, 189, 201)

ACCEPTED as provided in the Decision and Order.

39. Any delay from the time of donation to the time of delivery, along with any time spent unrefrigerated, would have caused a more favorable result for the Respondent. (TR Vol. I at 231-232)

ACCEPTED as provided in the Decision and Order.

40. On June 18-19, the Respondent's sample was tested at the United States Army Forensic Toxicology Drug Testing Laboratory at Fort Meade, MD. The laboratory litigation package for sample number 1339504 shows that the sample was tested without complication using Gas Chromatography-Mass Spectrometry ("GCMS"). (TR Vol. I at 230-231; CG-16)

ACCEPTED as provided in the Decision and Order.

41. Analysis of Respondent's sample showed positive results for cocaine metabolites at a level of 253 ng/ml. Dr. Cooper, the Medical Review Officer (MRO), confirmed the positive laboratory results. (TR Vol. I at 274-275; CG-19)

ACCEPTED as provided in the Decision and Order.

42. On August 6, 2015, 70 days after being tested on the USNS MERCY, Respondent voluntarily submitted to a hair test. A hair test has the ability to "look back" approximately 90 days to assess levels of drug use within that timeframe. Respondent received a negative hair test result. (TR Vol. II at 103, 133; Respondent's Exhibit I)

ACCEPTED as provided in the Decision and Order.

43. Psychemedics was the testing lab for the hair sample submitted by the Respondent. The lab tests hair for three situations; 1) a first time collection, which uses cutoff values to determine the level of metabolite in a sample, 2) a confirmation screen, which uses cutoff values to verify a positive or negative result and the level of metabolite in a sample, and 3) a follow-up test which is tested without regard to cutoffs for the sole purpose of confirming the mere presence of a drug metabolite. (TR Vol. II at 130-131, 144-145, 160; CG-23_For Id and CG-24_For Id)

ACCEPTED as provided in the Decision and Order.

44. A cut off value is a standard set by the Food and Drug Administration based on a general overview of available equipment. Psychemedics abides by applicable industry standards, but the laboratory's processes and equipment are capable of detecting the presence of dangerous drugs at limits much lower than that which is set by the cut-off. (TR Vol. II at 134, 146; CG-24_For Id)

ACCEPTED as provided in the Decision and Order.

45. Respondent's hair test sample, which was collected by LabCorp and sent to Psychemedics for analysis, was treated by Psychemedics as a first time collection because Respondent did not identify the prior history of a positive urinalysis. Psychemedics, therefore, applied a cut-off value to the analysis. (TR Vol. II at 162-163)

ACCEPTED in PART as provided in the Decision and Order.

46. Although Psychemedics applied a cut-off value, the lab found that cocaine metabolites were present in Respondent's sample, and would have triggered a presumptive positive designation if the test was analyzed as a follow-up test. (TR Vol. II at 162-163)

ACCEPTED in PART as provided in the Decision and Order.

47. The data from the initial screening indicated a detectable amount of cocaine metabolites nearly equal to the lower control value inserted by Psychemedics for instrument calibration testing. (TR Vol. II at 135; CG-24_For Id)

ACCEPTED as provided in the Decision and Order.

48. If Respondent's hair test had been submitted to Psychemedics as a follow-up test, the result would have been POSITIVE for cocaine. (TR Vol. II at 160)

ACCEPTED as provided in the Decision and Order.

RULINGS ON USCG PROPOSED CONCLUSIONS OF LAW

1. Cocaine is a "dangerous drug" as contemplated by 46 U.S.C. § 7704 (c). See, e.g., See Appeal Decision 2668 (Merrill) (2007).

   ACCEPTED as provided in the Decision and Order.

2. At all times relevant, Respondent was the holder of issued U.S. Merchant Mariner Credential, No. 000284890.

   ACCEPTED as provided in the Decision and Order.

3. A positive test for dangerous drugs indicates that Respondent is a user of a dangerous drug.

   ACCEPTED in Part as provided in the Decision and Order. Final determinations on evidence are for the Court.

4. Use of a dangerous drug is a violation of 46 U.S.C § 7704 as further defined by 46 C.F.R. 5.35, for which the only appropriate sanction is Revocation.

   ACCEPTED in Part. The Regulations speak for themselves. Application of the law is stated in the Decision and Order.

5. Respondent's subsequent hair test provides further ancillary proof that Respondent was, in fact, a user of cocaine on more than one occasion.

   ACCEPTED in PART as provided in the Decision and Order.

Rulings on Respondent's Proposed Findings of Fact

1. At all relevant times, the Respondent was a holder of Merchant Mariner Document Number 00284890. (Amended Complaint, Answer to the Amended Complaint and Tr. 6:4-10; Tr. 165:11-15 & Tr. 9:12-14).

ACCEPTED as provided in the Decision and Order.

2. In May of 2015, the Respondent was employed as a Second Engineer on board the U.S.N.S. MERCY by the Military Sealift Command. (HD1 Tr., 73:21-25 & 74:1-7).

ACCEPTED as provided in the Decision and Order.

3. On May 28, 2015, Chief Mate John French collected a urine specimen from the Respondent for post accident drug testing. (HD1, TR. 194:7-11 and HD2, Tr. 87-91).

ACCEPTED as provided in the Decision and Order.

4. On May 28, 2015, Chief Mate John French was not qualified to act as a urine specimen collector for post accident drug testing. (HD1, Tr. 73:1-11 and Vol 1, Tr. 73:8-11 HD1, Tr. 191:8-11).

REJECTED as provided in the Decision and Order.

5. On May 28, 2015, Chief Mate John French was not experienced enough to be collecting urine specimens for post accident drug testing. (HD1, Tr. 179:6-10 and Tr. 192:18-20).

REJECTED as provided in the Decision and Order.

6. On May 28, 2015, Chief Mate John French did not collect the urine specimens for post accident drug testing in accordance with proper procedures. HD2, Tr.: 44:17-25 and 45:1-25 HD2, Tr. 90:3-5.

ACCEPTED in PART and REJECTED in PART as provided in the Decision and Order.

7. From May 28, 2015 until June 11, 2015, while the U.S.N.S. MERCY was at sea and sailing from Pearl Harbor to Fiji, a proper chain of custody and control was not maintained for the Respondent's urine sample and 17 other urine samples that had been collected by Chief Mate John French. (Tr. HD1, Tr. 59: 17-20, Tr. 82:7-11 and HD1, Tr. 200).

REJECTED as provided in the Decision and Order.

8. The urine sample that was allegedly provided by the Respondent was reported to have tested positive for the presence of cocaine metabolites.

ACCEPTED as provided in the Decision and Order.

9. The Respondent has denied that he has ever used cocaine. (HD2, Tr. 113).

ACCEPTED as provided in the Decision and Order.

10. On August 6, 2015, the Respondent provided a sample of his hair for drug testing to LabCorp. (Exhibit H).

ACCEPTED as provided in the Decision and Order.

11. On August 10, 2015, a reputable MRO, D., Neil Dash, certified that the Respondent's hair sample tested negative for any drugs. (Exhibit H).

ACCEPTED in Part as provided in the Decision and Order.

12. The results of the hair test indicate that it is improbable that the Respondent has used cocaine prior to submitting a urine sample. .(Exhibit H).

REJECTED as provided in the Decision and Order.

13. Numerous witnesses testified on behalf of the Respondent's good character, and the testimony of the character witnesses indicate that it is improbable that the Respondent has ever used any dangerous drugs, including cocaine. (HD2, Tr. 11-13, Tr. 24-28, Tr. 33-38, Tr. 42-48, and Tr. 58-64).

ACCEPTED in Part and Rejected in part. The weight of any evidence is a matter reserved for the Court.

RULINGS ON RESPONDENT'S PROPOSED CONCLUSIONS OF LAW

1. The Coast Guard failed to provide sufficient evidence that Respondent's positive drug test met all of the elements of a prima facie case to invoke the regulatory presumption that the Respondent is a user of dangerous drugs.

   ACCEPTED in Part. Application of law and regulation is provided in the Decision and Order.

2. The Coast Guard failed to provide sufficient evidence that Respondent's positive drug test met the elements necessary to prove a violation of 46 U.S.C. 7704 (c).

   REJECTED as provided in the Decision and Order

3. The Coast Guard has NOT PROVED by a preponderance of reliable, probative, and credible evidence that the Respondent was a user of dangerous drugs on or about May 28, 2015.

   REJECTED as provided in the Decision and Order. Findings regarding the charged violations are addressed in the Decision and order.

ATTACHMENT D

APPEAL RIGHTS

33 CFR 20.1001 General.

(a) Any party may appeal the ALJ's decision by filing a notice of appeal. The party shall file the notice with the U. S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022. The party shall file the notice 30 days or less after issuance of the decision, and shall serve a copy of it on the other party and each interested person.

(b) No party may appeal except on the following issues:

(1) Whether each finding of fact is supported by substantial evidence.

(2) Whether each conclusion of law accords with applicable law, precedent, and public policy.

(3) Whether the ALJ abused his or her discretion.

(4) The ALJ's denial of a motion for disqualification.

(c) No interested person may appeal a summary decision except on the issue that no hearing was held or that in the issuance of the decision the ALJ did not consider evidence that that person would have presented.

(d) The appeal must follow the procedural requirements of this subpart.

33 CFR 20.1002 Records on appeal.

(a) The record of the proceeding constitutes the record for decision on appeal.

(b) If the respondent requests a copy of the transcript of the hearing as part of the record of proceeding, then, --

(1) If the hearing was recorded at Federal expense, the Coast Guard will provide the transcript on payment of the fees prescribed in 49 CFR 7.45; but,

(2) If the hearing was recorded by a Federal contractor, the contractor will provide the transcript on the terms prescribed in 49 CFR 7.45.

33 CFR 20.1003 Procedures for appeal.

(a) Each party appealing the ALJ's decision or ruling shall file an appellate brief with the Commandant at the following address: U.S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022, and shall serve a copy of the brief on every other party.

(1) The appellate brief must set forth the appellant's specific objections to the decision or ruling. The brief must set forth, in detail, the --

(i) Basis for the appeal;

(ii) Reasons supporting the appeal; and

(iii) Relief requested in the appeal.

(2) When the appellant relies on material contained in the record, the appellate brief must specifically refer to the pertinent parts of the record.
(3) The appellate brief must reach the Docketing Center 60 days or less after service of the ALJ's decision. Unless filed within this time, or within another time period authorized in writing by the Docketing Center, the brief will be untimely.

(b) Any party may file a reply brief with the Docketing Center 35 days or less after service of the appellate brief. Each such party shall serve a copy on every other party. If the party filing the reply brief relies on evidence contained in the record for the appeal, that brief must specifically refer to the pertinent parts of the record.

(c) No party may file more than one appellate brief or reply brief, unless --

(1) The party has petitioned the Commandant in writing; and
(2) The Commandant has granted leave to file an added brief, in which event the Commandant will allow a reasonable time for the party to file that brief.

(d) The Commandant may accept an amicus curiae brief from any person in an appeal of an ALJ's decision.

33 CFR 20.1004 Decisions on appeal.

(a) The Commandant shall review the record on appeal to determine whether the ALJ committed error in the proceedings, and whether the Commandant should affirm, modify, or reverse the ALJ's decision or should remand the case for further proceedings.

(b) The Commandant shall issue a decision on every appeal in writing and shall serve a copy of the decision on each party and interested person.