

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

UNITED STATES COAST GUARD
Complainant

vs.

MICHAEL STEPHEN MOORE
Respondent

Docket Number CG S&R 02-0626
CG Case No. 1683144

DECISION AND ORDER

Issued: April 25, 2007

Issued by: Honorable Archie R. Boggs, Administrative Law Judge

APPEARANCES:

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Senior Investigating Officer
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For the Coast Guard

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For the Respondent

PRELIMINARY STATEMENT

The United States Coast Guard (Coast Guard) initiated this administrative action seeking revocation of Merchant Mariner's License Number 1013275 issued to Michael Stephen Moore (Respondent). This administrative action was brought pursuant to the legal authority contained in 46 U.S.C. 7703(1)(A) and its underlying regulations codified at 46 CFR Part 5.

On October 2, 2002, the Coast Guard issued a Complaint charging Respondent with one count of failing to obey law or regulation by refusing to submit to a random drug test. In support of the Complaint, the Coast Guard alleged that on September 12, 2002, the Mississippi Drug Compliance notified Respondent that he was selected for a random drug test; however he refused to test by failing to appear at the drug screen. Respondent was contacted two additional times, September 20 and 28, for random drug testing; and again refused to test by failing to appear at either drug screen. Respondent filed an Answer, dated October 2, 2002, denying all the factual allegations in the Complaint and requested a hearing before an administrative law judge.

On October 18, 2002, Grover Asmus, III, entered his appearance as counsel for Respondent and filed another Answer to the Complaint. This second Answer mirrored Respondent's previously filed Answer dated October 2, 2002, except five affirmative defenses were asserted as follows: 1) the Complaint failed to state a claim upon which relief could be granted; 2) Respondent did not refuse to submit to a random drug screen; 3) Respondent was not provided with notice for all incidents alleged in the Complaint; 4) Respondent lacked adequate funds to pay for the drug test; and 5) exigent circumstances

[tropical storms] prevented Respondent from complying with any notices he allegedly received to submit to a random drug screen.

On November 13, 2002, a Notice of Hearing was issued and the matter was initially scheduled for a hearing on December 6, 2002, in Daphne, Alabama. On December 5, 2002, the Coast Guard informed the undersigned Administrative Law Judge (ALJ) of a date conflict experienced by a witness and requested a new hearing date. Respondent was amendable to the request; therefore the hearing was rescheduled for January 17, 2003.

On January 17, 2003, the hearing commenced at the Daphne Municipal Courtroom whereupon the Coast Guard immediately moved to amend the dates of contact made by the Mississippi Drug Compliance (MDC) to Respondent. The original Complaint alleged MDC called Respondent on September 12, 20, and 28, 2002. However, the telephone calls were actually made to Respondent on September 10, 11, and 12, 2002. The Coast Guard explained that the three referenced dates were incorrect. Respondent objected to the amendment and moved for dismissal of the charges. The undersigned ALJ denied Respondent's motion to dismiss and offered additional time, if necessary, to prepare an adequate response. Respondent declined the ALJ's offer of additional time. The Coast Guard's motion was granted and the Complaint was amended to reflect telephone calls made to Respondent for notification of random drug screening as September 10, 11, and 12, 2002.¹

¹ The purpose of factual specifications in a complaint is intended to put a respondent on notice of the alleged administrative violation and provide respondent with an opportunity to prepare a defense. Here, it is clear from the record that Respondent was aware of the charges brought by the Coast Guard and there was no prejudice by virtue of the amendment. See Appeal Decision 2309 (CONEN), 6.

The hearing was conducted in accordance with the Administrative Procedures Act as amended and codified at 5 U.S.C. 551-559, and Coast Guard procedural regulations set forth at 33 CFR Part 20. The Investigating Officers (IO) presenting the case on behalf of the Coast Guard moved for admission of six exhibits and presented testimony of two witnesses. Respondent's attorney admitted four exhibits and introduced two witnesses. The list of witnesses and exhibits is contained in Attachment A. Post-hearing briefs with proposed findings of fact and conclusion of law were ordered and due by February 18, 2003. Both parties filed post-hearing briefs and rulings on the proposed findings of fact and conclusions of law are contained in Attachment B.

After careful review of the facts and applicable law in this case, I find that the Coast Guard has established by a preponderance of reliable and credible evidence that Respondent, Michael Stephen Moore, refused to submit to a random drug test in violation 46 U.S.C. 7703(1)(A) and 46 CFR 5.33.²

FINDINGS OF FACT

The Findings of Fact are based on a thorough and careful analysis of the documentary evidence, testimony of witnesses, and the entire record.

1. At all relevant times mentioned herein and specifically on or about September 10, 2002, through January 17, 2003, the above-captioned Respondent was the holder

² During the pendency of this case, the United States Coast Guard transferred from the Department of Transportation to the Department of Homeland Security. Pursuant to the Savings Provision of HR 5005 §1512 (PL 107-296), pending proceedings are continued notwithstanding the transfer of the Agency.

- of Merchant Mariners License Number 1013275 issued by the United States Coast Guard. (Tr. 5).³
2. In September 2002, Tammy Taylor, owner of Mississippi Drug Compliance, performed a random drug screen selection by utilizing Microsoft Excel data analyst program. (Tr. 23, 31).
 3. The MDC is the third party administrator for the Mississippi Charter Boat Captains Association (the Consortium).⁴ (Tr. 23). As the third party administrator, MDC functions similarly to an employer who coordinates drug testing service for its employees. In this case, the MDC performs drug screening and random drug testing of the Consortium members. Further, MDC performs administrative tasks, documents the operation of the Consortium's drug and alcohol testing programs, and maintains a roster of member names, social security numbers, addresses and telephone numbers. (Tr. 23, 33; Gov't. Ex. 1, 2).
 4. In September 2002, thirty-five Consortium members were randomly selected for drug testing. (Tr. 31, 33, 38). Thirty members provided urine samples for drug screening and four mariners did not participate because they were no longer members of the Consortium. (Tr. 33, 36).
 5. Respondent was the only member who did not participate in the random drug test. (Tr. 43).

³ The citations in this Initial Decision and Order are as follows: Transcript followed by the page number, (Tr. ____); Agency Exhibit followed by number (Gov't Ex. ____); and Respondent Exhibit followed by a letter (Resp Ex. ____).

⁴ The Consortium is an entity comprised of self-employed charter boat captains who have joined together and are subject to DOT drug and alcohol testing. (Tr. 59).

6. Written notification explaining MDC's drug testing policies and random drug testing was provided to members of the Consortium at meetings, by mail, and copies were available at MDC's office. (Tr. 29, 24; Gov't Ex. 1 and 2).
7. Pamphlets entitled "Random Drug Testing" and "Policy" were distributed by MDC to Consortium members summarizing 46 CFR Part 16 governing random drug testing requirements. (Tr. 26-30; Gov't Ex. 1, 2).
8. Judy Shaw, a clerk and specimen collector for MDC, is responsible for contacting mariners selected for random drug testing. (Tr. 91).
9. On September 10, 2002, Ms. Shaw received a copy of the Consortium's Member Roster from Ms. Taylor, and was instructed to contact the thirty-five mariners randomly selected for drug testing. (Tr. 47, 91; Gov't Ex. 3).
10. Members who are selected for random drug testing are contacted by telephone, instructed to provide a sample that day or within twenty-four hours, and they are responsible for the \$47.00 fee. (Tr. 60; Gov't Ex. 1).
11. On September 10, 2003, Ms. Shaw contacted Respondent by telephone at 11:30 a.m. (Tr. 97; Gov't Ex. 3). The purpose of the telephone call was to inform Respondent that he had been randomly selected for a drug test. (Tr. 97; Gov't Ex. 5).
12. Since an answering machine received the telephone call, Ms. Shaw left a message explaining that she was calling on behalf of MDC. Ms. Shaw instructed Respondent to report within the next twenty-four hours for a random drug test and informed Respondent that he would be responsible for the \$47.00 fee. (Tr. 97-98; Gov't Ex. 5).

13. The Respondent failed to appear for the drug screen.
14. Ms. Shaw placed a second telephone call to Respondent on September 11 and a third call on September 12, 2002. On both occasions, Ms. Shaw left messages on the answering machine. Ms. Shaw's fourth attempt to contact Respondent was September 20, 2002. Once again, she left a message on the answering machine instructing Respondent to report for a random drug screen. (Tr. 97; Gov't Ex. 5).
15. The Respondent failed to appear for any of the three subsequent drug screens.
16. After four unanswered telephone calls, Ms. Shaw solicited assistance from Tom Becker, President of the Consortium, in an effort to contact Respondent for the random drug test. (Tr. 82-83,101).
17. On September 27, 2002, Mr. Becker left a message on Respondent's cellular telephone instructing him to report to MDC by Monday, September 30, 2002 for the random drug test or the matter would be turned over to the Coast Guard. (Gov't Ex. 5).
18. On September 28, 2002, Respondent's mother, Dolores Moore, informed Respondent about a telephone call received from MDC regarding a drug test. Respondent called MDC that day and left a message on Ms. Taylor's voicemail. Respondent explained that his boat had been inoperable for about twenty-one days and that he was "broke" and unable to pay for the drug test. (Tr. 48). Respondent suggested that perhaps the Consortium could pay for the drug test and asked MDC to return his call. (Tr. 49-51; Gov't Ex. 4).
19. MDC received and reviewed Respondent's message on Monday, September 30, 2002. (Tr. 48).

20. Ms. Shaw memorialized all of her telephone conversations with, and attempts to contact, mariners selected for random drug screening in a logbook. (Tr. 91, 104; Gov't Ex. 5).
21. The telephone number used by Ms. Shaw for each attempt to contact Respondent was the telephone number provided to the Consortium by Respondent. (Tr. 47-48, 83, 97; Gov't Ex. 3).
22. On October 2, 2002, two Coast Guard Officials arrived at the home of Respondent's parents, which is also Respondent's current residence. (Tr. 108, 136). Respondent's mother greeted the officials and called Respondent on his cellular telephone. Mrs. Moore asked her son to return home and discuss the status of his captain's license with the Coast Guard officials. (Tr. 111, 136).
23. The Coast Guard officials explained to Respondent that they were present to discuss his failure to appear for random drug testing. (Tr. 136).
24. Respondent offered to report immediately to MDC for a drug test. However, the Coast Guard explained that 72 hours had passed since the latest notification for random drug testing by MDC; therefore it was too late for Respondent to complete the drug test. (Tr. 137).
25. On October 8, 2002, Respondent submitted to a drug test, which yielded a negative result. (Tr. 84, 139; Resp. Ex. A).

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent and the subject matter of the hearing are properly within the jurisdiction vested in the United States Coast Guard under 46 U.S.C. 7703.

2. At all relevant times, Respondent was the holder of United States Coast Guard License Number: 1013275.
3. Respondent is the holder of a license subject to random drug testing under 46 U.S.C. 7702(c)(2) and 46 CFR 16.230.
4. The Coast Guard has **PROVED** by a preponderance of reliable and credible evidence that on September 10, 11, and 12, 2002, the MDC left telephone messages notifying Respondent that he was selected for a random drug test.
5. Respondent failed to appear for a drug screening which constituted a refusal to test.

IV. OPINION

The purpose of Coast Guard suspension and revocation proceedings is to promote safety at sea. See 46 U.S.C. 7701. Under 46 CFR 5.19, the Commandant delegated to the Administrative Law Judges, the authority to suspend or revoke a license or certificate in a hearing for violations arising under 46 U.S.C. 7703. In this case, the Coast Guard has charged Respondent with the failure to obey law or regulation under 46 U.S.C. 7703(1)(A). The Coast Guard claims Respondent refused to submit to a random drug test as required under 46 CFR 16.230. See also 46 U.S.C. 7702(c)(2).

The issue is whether Respondent's failure to appear for a random drug test within a reasonable amount of time constitutes a refusal to submit to drug testing under applicable Department of Transportation and Coast Guard Drug Testing regulations. The parties presented conflicting testimony regarding MDC's effort to notify Respondent of the random drug test selection. According to the Coast Guard, five telephone calls were made to Respondent between September 10, 2002 and September 27, 2002. Respondent

claims he only received the telephone message on September 27, 2002. Before the ultimate issue can be discussed, it is necessary for the undersigned ALJ to assess the witness' conflicting testimony and determine credibility.

A. Witness Credibility Determination

It is well established that an ALJ is the finder of fact; therefore witness credibility and assessment of evidence is determined by the presiding ALJ. Appeal Decision 2633 (MERRILL), 5; Appeal Decision 2632 (WHITE), 6. "The ALJ is not bound by the witnesses' opinion, but must make his own determination based on the facts and the law." WHITE, at 6. When conflicting or inconsistent testimony is presented during an administrative law hearing, the ALJ is afforded broad discretion to determine the credibility of witnesses. Appeal Decision 2616 (BYRNES), 4.

Here, Ms. Shaw testified that she called Respondent on September 10, 11, 12, and 20, 2002, to notify him that he had been selected for a random drug screen. (Tr. 96-98). On each occasion, Ms. Shaw left a message on Respondent's answering machine and documented each telephone call. (Gov't. Ex. 5). Further, Mr. Becker left a message on Respondent's cellular telephone which was also documented on the call log. Mr. Becker instructed Respondent to report on September 30, 2002 for a drug test. (Tr. 102-104).

In contrast, Dolores Moore testified that she only received one telephone message for Respondent on September 27, 2002. (Tr. 109). Mrs. Moore explained that her answering machine was sensitive and that she may have lost the telephone messages as a result of the tropical storms severing the electricity in the area. (Tr. 117-118).

I conclude credible evidence exists that Ms. Shaw and Mr. Becker did call Respondent on five occasions and left messages to report for a random drug test as

documented on the call log. (Gov't. Ex. 5). Compared to MDC's efforts, Mrs. Moore's testimony surmising what could have happened to the answering machine messages is speculative, and lacks supporting documentation or corroboration. In this regard her testimony was not credible but self-serving to Respondent.

B. Refusal To Test

Required chemical testing for merchant marine personnel is governed by 46 CFR Part 16. The regulations are preventative in nature for the purpose of reducing the use of intoxicants and provide a drug-free, safe work environment for mariners. 46 CFR 16.101(a). See Appeal Decision 2542 (DEFORGE), 5.

The issue to be decided is whether Respondent's failure to appear for a random drug test within a reasonable amount of time can be construed as a refusal to submit to a drug test. Refusal to submit to a drug test has been defined in Part 16 quite simply as, "you refused to take a drug test as set out in 49 CFR 40.191." See 46 CFR 16.105. Examination of 49 CFR 40.191 provides that a mariner refuses to take a drug test when they fail to appear for test within a reasonable amount of time.

An employer is vested with the authority to determine the amount of time which is reasonable for a mariner to appear for a random drug test. 40 CFR 40.191(a)(1). An employer's determination of "reasonable time" must be consistent with applicable DOT regulations. Id. According to the Random Drug Testing leaflet provided to Consortium members, a mariner will be notified by MDC and instructed to report that day for a random drug test, or within the next twenty-four (24) hours. (Gov't Ex. 1).

Respondent argued that the Coast Guard failed to establish the offense "refusal to submit" because the Consortium did not notify Respondent that his failure to appear for

the drug test was considered as a “refusal to submit” offense under 49 CFR 40.61(a). I do not agree with Respondent’s argument that the notice requirement referenced in 49 CFR 40.61 is an element of the offense of “refusal to submit.” Part 40 Section 61 explains the steps to be taken by the urine collector. In contrast, 49 CFR 40.191(a)(1) provides the definition of refuse to test, “[F]ail to appear for any test within a reasonable time... This includes the failure of an employee to appear for a test when called by a C/TPA.”⁵

Next, Respondent claimed that the Coast Guard did not prove he failed to appear for random drug testing within a reasonable amount of time. Respondent, without citation to authority, urges the undersigned to adopt a totality of the circumstance test to determine what constitutes a “reasonable amount of time.” Title 49 of the Code of Federal Regulations Part 40 Section 191 allows the employer to determine what constitutes a “reasonable amount of time.” Here, the Consortium established that the mariner must report to MDC on the day of notification for random testing or within twenty-four (24) hours. (Gov’t Ex. 1). Respondent did not report for testing until six days after meeting with Coast Guard Officials and being served a Complaint. (Resp. Ex. A). I conclude Respondent’s drug test was not within a reasonable amount of time and his delay to take the drug test undermined the purpose of unannounced random drug testing.

V. SANCTION

When an employee refuses to test, they incur consequences specified under the respective DOT agency. 49 CFR 40.191(c). Title 46 Part 5 Section 569 provides the Table of Suggested Range of Appropriate Orders (Table) for various offenses. The

⁵ Consortium/Third-Party Administrator (C/TPA). See 49 CFR 40.3

authority to impose these sanctions at the conclusion of a case is exclusive to the ALJ. Appeal Decision 2362 (ARNOLD), 4. The purpose of the Table is to provide guidance to the ALJ and promote uniformity in orders rendered. Appeal Decision 2628 (VILAS), 13. However, the ALJ is not bound by the Table and may exceed the suggested range or impose a sanction less severe when aggravating or mitigating factors are present. Id.

Here, the suggested range of an appropriate order for refusal to submit to a drug test is 12-24 month suspension. See 46 CFR Table- 5.569. The Coast Guard is seeking revocation of Respondent's Merchant Mariners License No. 1013275. In support of revocation, the Coast Guard has requested the undersigned to take judicial notice of Appeal Decision 2624 (DOWNS). In DOWNS, the Commandant affirmed the ALJ's sanction revoking respondent's license for refusal to take a reasonable cause drug test. Id. at 19. See also Appeal Decision 2578 (CALLAHAN) (ALJ's decision to revoke license for refusal to test held not excessive or abuse of discretion). The Commandant has recognized an ALJ's discretion to formulate an appropriate order in an effort to deter appellant from repeating a violation. Id. at 18 (quoting (CALLAHAN), 5).

Based upon my review of all facts presented at the hearing, I conclude a sanction of revocation is appropriate. The Coast Guard proved it contacted Respondent for a random drug test on September 10, 11, 12, and 20, 2003. Further, Respondent admits to receiving a telephone message from the Consortium on September 27, 2003, but he still waited six days to submit to a "random" drug test. I do not consider Respondent's drug test on October 8, 2003 as complying with 46 CFR 16.230. Respondent has undermined the purpose of random drug testing by failing to comply with federal regulations and Consortium policies within 24 hours.

Respondent has provided several explanations for his failure to test. Respondent cites his inability to pay the \$47.00 fee, severe weather consisting of tropical storms and a hurricane. Finally, Respondent claims maintenance on his boats rendered them inoperable. All of these explanations do not excuse Respondent of his responsibility as a member of the Consortium and licensed mariner, to participate in random drug testing. I conclude revocation of Respondent's Coast Guard License an appropriate sanction

VI. ORDER

IT IS HEREBY ORDERED that Merchant Mariner's License No. 1013275, and all other valid licenses, documents, and endorsements, issued by the Coast Guard to Michael Stephen Moore is REVOKED.

IT IS HEREBY FURTHER ORDERED that Respondent shall immediately surrender Merchant Mariner's License No. 1013275, and all other valid licenses, documents, and endorsements, issued by the Coast Guard to the Investigating Officer at United States Coast Guard, Marine Safety Office Mobile, Alabama.

PLEASE BE ADVISED any party has the right to appeal this Decision and Order by filing a notice of appeal with the U.S. Coast Guard ALJ Docketing Center within 30 days of the issuance date of this decision and in accordance with the procedures set forth in 33 CFR 20.1001-20.1003. See Attachment C.

ARCHIE R. BOGGS
Administrative Law Judge
U.S. Coast Guard

Dated this 1st day of August, 2003
New Orleans, Louisiana

ATTACHMENT A

LIST OF WITNESSES AND EXHIBITS

INVESTIGATING OFFICER'S EXHIBITS

1. Mississippi Charter Boat Association Random Drug Testing Pamphlet
2. Mississippi Charter Boat Association Policy for Chemical Testing
3. Mississippi Charter Boat Association Membership
4. Transcript of Call From Michaels Moore to Mississippi Drug Compliance
5. Mississippi Drug Compliance Call Log
6. History of Biloxi, Mississippi, Weather

INVESTIGATING OFFICER'S WITNESSES

1. Tammy Taylor
2. Judy Shaw

RESPONDENT'S EXHIBITS

1. Medical Review Officer Report
2. Quest Diagnostics Incorporated- Hair Analysis
3. The Sun General Newspaper
4. Character Letters.

RESPONDENT'S WITNESS

1. Dolores Moore
2. Michael Moore

ATTACHMENT B

**RULINGS ON PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

PROPOSED FINDINGS OF FACT

After careful review of the entire record of this proceeding, including the testimony of witnesses and exhibits, the ruling on the Agency's Proposed Findings of Facts⁶ are as follows:

1. Michael Moore, whose Coast Guard license was issued to him on April 24, 2002, did not provide a urine specimen, as required by law for a random drug screen on September 10, 2002.

RULING: ACCEPTED AND INCORPORATED

2. Michael Moore is self-employed, and elected the Mississippi Charter Boat Captains Association (MCBCA) to act as his Marine Employer.

RULING: ACCEPTED AND INCORPORATED

3. Mississippi Drug Compliance (MDC) was acting as a Collector/Third Party Administrator (C/TPA).

RULING: ACCEPTED AND INCORPORATED

4. Michael Moore was contacted by MDC on September 10, 11, 12, and 20, 2002 and advised he had been selected to provide a urine sample for compliance with the random drug screening program.

RULING: ACCEPTED AND INCORPORATED

5. Michael Moore contacted MDC on or about September 27, 2002, and left a telephone message explaining that he was too busy to come in for the purpose of providing a urine sample. He also stated he could not afford to pay \$47.00 for the test.

RULING: ACCEPTED AND INCORPORATED

6. During cross-examination, Mr. Moore stated, under oath, when asked why he did not come in for the random drug test, that "It slipped my mind"; not that the

⁶ Only the Coast Guard provided enumerated findings of fact. Respondent did file Proposed Findings of Fact and Conclusions of Law however the lack of enumeration prevented the undersigned from making specific findings of facts or conclusions of law.

weather was bad; not that he did not have the money; and, not that he wasn't notified; just, "It slipped my mind."

RULING: ACCEPTED AND INCORPORATED

7. Michael Moore did not provide a urine specimen in a reasonable amount of time, as required by regulation.

RULING: ACCEPTED AND INCORPORATED

8. MDC generated thirty-five names for this random drug screen. Of the thirty-five selected, thirty provided urine samples, four were no longer employed or associated with MCBCA, and one refused to submit (Michael Moore).

RULING: ACCEPTED AND INCORPORATED

CONCLUSIONS OF LAW

1. 46 U.S.C. 7702(c)(2): The Secretary shall require the testing of the holder of a license, certificate of registry, or merchant mariner's document for use of alcohol and dangerous drugs in violation of law of law or regulation. The testing may include preemployment (with respect to dangerous drugs only), periodic, random, and reasonable cause testing, and shall include post-accident testing.

RULING: ACCEPTED AND INCORPORATED

2. 46 U.S.C. 7703(1)(A): A license, certificate of registry, or merchant mariner's document issued by the secretary may be suspended or revoked if the holder-
 - (1) when acting under the authority of that license, certificate, or document-
 - (A) has violated or failed to comply with this subtitle, a regulation prescribed under this subtitle, or any other law or regulation intended to promote marine safety or to protect navigable waters;

RULING: ACCEPTED AND INCORPORATED

3. 46 CFR 16.203(b)(1): Marine employers shall establish programs for the chemical testing for dangerous drugs on a random basis of crewmember on uninspected vessels who:
 - (1) Are required by law or regulation to hold a license issued by the Coast Guard in order to perform their duties on the vessel;

RULING: ACCEPTED AND INCORPORATED

4. 46 CFR 16.230(d): Marine employers may form or otherwise use sponsoring organizations, or may use contractors, to conduct the random chemical testing programs required by this part.

RULING: ACCEPTED AND INCORPORATED

5. 49 CFR 40.191(a)(1): As an employee, you have refused to take a drug test if you:
 - (1) fail to appear for any test (except a pre-employment test) within a reasonable time, as determined by the employer, consistent with applicable DOT agency regulations, after being directed to do so by the employer. This includes the failure of an employee (including an owner-operator) to appear for a test when called by a C/TPA.

RULING: ACCEPTED AND INCORPORATED

[REDACTED]