

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

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UNITED STATES COAST GUARD

Complainant

vs.

PAUL V. UCCELLO

Respondent.

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Docket Number: CG S&R 020208  
CG Case No. 747487

**DECISION AND ORDER**

**Issued: July 20, 2004**

**Issued by: Peter A. Fitzpatrick, Administrative Law Judge**

**Appearances:**

LCDR Dawn M. Kallen  
LT Timothy Dickerson  
U.S. Coast Guard  
Marine Safety Office Long Island Sound  
120 Woodward Avenue  
New Haven, CT 06512

**For the Coast Guard**

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**For the Respondent**

## PRELIMINARY STATEMENT

The United States Coast Guard (henceforth “Coast Guard” or “USCG”) seeks revocation of United States Coast Guard Merchant Mariner’s License Number 996548, issued to Paul V. Uccello (henceforth “Respondent”), for alleged failure to comply with the terms of a Settlement Agreement entered into with the Coast Guard in October 2002. This Settlement Agreement constituted complete adjudication of Coast Guard charges against Respondent, following Uccello’s involvement in a serious marine incident on the Connecticut River. The facts of the incident itself are not in dispute. The Coast Guard filed its complaint<sup>1</sup> on April 11, 2002, and the Respondent answered on June 4, 2002. The parties filed a motion for approval of a settlement agreement on October 4, 2002, and I approved the Settlement in full on October 7, 2002.

In the Settlement Agreement, Respondent admitted that he wrongfully refused to submit to a chemical drug test, following a serious marine incident, by providing an adulterated urine specimen.<sup>2</sup> The Agreement sets forth a number of conditions Respondent must meet to prevent the revocation of his license. These conditions included requirements that Respondent:

1. Participate in a random, unannounced drug-testing program, during which Respondent must take at least eight (8) random drug tests under direct observation;
2. Complete and provide documentation of completion of the return-to-duty process;
3. Refrain from performing any function requiring a Coast Guard issued credential.

During the one-year period allotted for Respondent to comply, the Coast Guard suspended his Merchant Mariner’s License. If, by October 4, 2003, Respondent complied with the terms of the

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<sup>1</sup> The Coast Guard filed charges of misconduct, violation of a law or regulation, and negligence, pursuant to 46 CFR 5.27, 46 CFR 5.33, and 46 CFR 5.29, respectively.

<sup>2</sup> 46 CFR 16.240 states that “[t]he marine employer shall ensure that all persons directly involved in a serious marine incident are chemically tested for evidence of dangerous drugs and alcohol....”

Agreement, the Coast Guard would restore Respondent's license, and the suspension would thus merely have been for the period of deposit. If, however, Respondent did not satisfactorily complete the Settlement Agreement conditions by this date, the Coast Guard would revoke Respondent's license pursuant to the terms of the Agreement.

On October 17, 2003 – over a year following the Settlement Agreement's approval – the Coast Guard moved to revoke Uccello's license, pursuant to the legal authority contained in 46 U.S.C. 7704(c), for failure to comply with the terms of the Agreement.<sup>3</sup> Subsequent to this, Respondent requested a hearing on the Coast Guard's rejection of Respondent's evidence allegedly demonstrating compliance with the terms of the Settlement Agreement. The Settlement Agreement set forth a number of conditions that Respondent was required to meet by October 4, 2003, in order to prevent the revocation of his license. (Tr. 7). Essentially, the present dispute centers on whether Respondent met the terms of the Agreement within the specified period of time. The Coast Guard alleges that Respondent failed to meet the terms of the Agreement, while Respondent maintains he demonstrated substantial compliance.

The heart of the dispute involves how to properly define "random" for the purpose of random drug testing; while the Coast Guard maintains that random means unannounced, Respondent argues that the Settlement Agreement's references to: 1. random, 2. unannounced, and 3. random and unannounced tests, indicate that random is not synonymous with unannounced. Respondent reasons that if every word of the Agreement is to be given meaning, then, logically, "unannounced" must not be subsumed within "random." (Respondent's Brief Supporting Proposed Findings). Additionally, Respondent maintains that, as the Coast Guard

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<sup>3</sup> 46 U.S.C. 7704(c) states that "[i]f it is shown that a holder has been a user of, or addicted to, a dangerous drug, the license, certificate of registry, or merchant mariner's document shall be revoked unless the holder provides satisfactory proof that the holder is cured."

drafted the Settlement Agreement, any textual ambiguities detected therein should be interpreted in Respondent's favor. (Tr. 10-11).

On December 16, 2003, a hearing was held before the undersigned, at the Marine Safety Office in New Haven, Connecticut. At the hearing, the Coast Guard introduced two witnesses and entered three exhibits into evidence. (Tr. 24, 105-106; IO Exhibits 1-3). Subsequent to this, Respondent called one witness to testify. (Tr. 150). Additionally, the parties submitted a joint stipulation, identified as IO Respondent 1A, establishing that Respondent submitted to eight tests under observation. (Tr. 42). The witness and exhibit lists are contained in Attachment A. Following the hearing, the parties submitted post-hearing briefs, which included proposed findings of fact and conclusions of law. The rulings on the proposed findings of fact and conclusions of law are contained in Attachment B. This case is now ripe for decision.

### **FINDINGS OF FACT**

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

1. Respondent, Paul V. Uccello, is the holder of United States Coast Guard Merchant Mariner's license number 996548. (Tr. 11).
2. On April 11, 2002, the Coast Guard filed a complaint alleging that on April 7, 2001, Respondent engaged in conduct that obstructed the drug testing process by providing a urine sample, later determined to be adulterated. (Tr. 4-5).
3. The Coast Guard and Respondent filed a joint Motion for Approval of a Settlement Agreement and Entry of a Proposed Consent Order on October 4, 2002. (Tr. 6).

4. On October 7, 2002, this Judge issued a Consent Order Approving Settlement Agreement. (Tr. 8).
5. On October 16, 2002, Respondent deposited his Coast Guard license, pursuant to the Agreement. (Tr. 19).
6. The Settlement Agreement set forth a number of conditions that Respondent was required to satisfactorily complete by October 4, 2003, in order to prevent the revocation of his license. (Tr. 7). These conditions include requirements that:
  - a. Respondent participate in a random, unannounced drug-testing program for the twelve (12) month suspension period. During the course of this program, Respondent must submit to eight (8) random drug tests under direct observation conducted in accordance with Department of Transportation procedures found in 49 CFR Part 40. (Settlement Agreement, Paragraph 1C).
  - b. Respondent provide the Coast Guard with the name and address of the service agent/consortium administering the drug testing program for the duration of the suspension. (Settlement Agreement, Paragraph 1D).
  - c. Respondent complete and provide documentation of completion of the return to duty process, pursuant to 49 CFR Part 40, including the completion of a Substance Abuse Professional (SAP) evaluation, referral, and education/treatment process. (Settlement Agreement, Paragraph 1E).
7. Respondent submitted to eight (8) drug tests at Pequot Occupational Health Center, henceforth "POHC." The tests occurred on the following dates: May 29, 2003; June 12, 2003; July 1, 2003; July 31, 2003; August 14, 2003; September 16, 2003; October 3, 2003; and October 9, 2003. (Tr. 45-46, 48-49, 52, 163; Exhibit 5).

8. Respondent himself scheduled all of the drug tests that were conducted at PHOC. (Tr. 45-46, 48-49, 52, 163; Exhibit 3).
  9. Respondent's consortium, the Newport Alliance, did not select Respondent to submit to random drug tests. (Tr. 109-110).
  10. The Newport Alliance did not direct Respondent to submit to any other tests in addition to the eight (8) tests Respondent scheduled. (Tr. 117, 122-24).
  11. Respondent did not request that the Newport Alliance conduct any additional random testing. (Tr. 110, 117; Exhibits 4, 14).
  12. Respondent failed to provide the Coast Guard with the name and address of the service agent/consortium who would be administering the random drug testing program for the period of suspension. (Tr. 20-21).
  13. Respondent failed to complete and provide documentation of completion of the return to duty process of 49 CFR Part 40, Subpart O – which included the completion of a Substance Abuse Professional (SAP) evaluation, referral and education/treatment process. (Tr. 20, 192).
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#### **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. 7704(c) and 33 CFR Part 20.
2. The Settlement Agreement between the Coast Guard and Respondent was a contract, and, as such, was legally binding on both parties.
3. Under the terms of the Settlement Agreement, Respondent's non-compliance with the Agreement's requirements would necessitate a sanction of revocation. (Tr. 21).

4. To be considered random, a drug test must be non-scheduled by Respondent, and must be unannounced. (Tr. 39).
  5. The eight (8) drug tests Respondent underwent at PHOC were not random. (Tr. 71, 112; Exhibit 3).
  6. Respondent understood that he was not submitting to eight (8) random drug tests, as were required in order to comply with the terms of the Settlement Agreement. (Tr. 71, 93).
  7. Respondent failed to comply with paragraph 1C of his Settlement Agreement. (Tr. 71, 112).
  8. Respondent failed to comply with paragraph 1D of his Settlement Agreement. (Tr. 20-21).
  9. Respondent failed to comply with paragraph 1E of his Settlement Agreement. (Tr. 20, 192).
  10. Respondent did not meet the terms of his Settlement Agreement with the Coast Guard. (Tr. 71, 112).
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11. As such, Coast Guard's allegation that Respondent failed to comply with the terms of the Settlement Agreement is PROVED.

### **DISCUSSION**

The central issue in this case involves the Settlement Agreement entered into by the parties, Paul V. Uccello and the United States Coast Guard, on October 7, 2002. It is well settled that settlements reached in adversarial proceedings may be viewed as contracts, and thus "once entered into [are] binding and conclusive." Janneh v. GAF Corporation, 887 F.2d 432, 436 (2<sup>nd</sup> Cir. 1989), *cert. denied*, 498 U.S. 865 (1990), *overruled on other grounds by Digital Equipment*

*Corp. v. Desktop Direct, Inc.*, 511 U.S. 863 (1990).<sup>4</sup> As such, the Settlement Agreement that Respondent and the Coast Guard entered into on October 7, 2002, was indeed a contract and, thus, is legally binding upon the parties.

When interpreting a contract, the general rule directs inquiry to the four corners of the document, to what is required by the document's plain text. (Tr. 211). *See* Restatement (Second) of Contracts ch. 9, introductory note (1981)(stating that "[w]here the parties have adopted a writing as the final expression of all or part of their agreement, interpretation focuses on the writing, and its terms may supercede other manifestations of intention"). Under paragraph 1C of the Settlement Agreement, Respondent was required to "[p]articipate in a random, unannounced drug testing program for the twelve month suspension period" and to "take at least eight random tests consistent with [DOT] regulations." (Tr. 222). Respondent contends that he substantially met the terms of the Settlement Agreement, irrespective of substantial evidence indicating that he scheduled his own drug tests. (Tr. 45-46, 48-49, 52, 163; Exhibit 3).

Respondent insists that the term "random" is ambiguous. (Tr. 169-173). In Respondent's opinion, a test need not necessarily be unannounced in order to be considered random.<sup>5</sup> (Tr. 169-170). As Respondent believes he complied with both the letter and the spirit of the Agreement, he argues that he should be found to be in compliance with the Agreement, or, in the alternative, that he should be allowed further time to comply with the Coast Guard's requirements, as ultimately interpreted by the Court. (Tr. 166).

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<sup>4</sup> *See also Fustok v. Conticommodity Services, Inc.*, 577 F.Supp. 852, 858 (S.D.N.Y. 1984)(stating that "an agreement to compromise and settle a claim, oral or written, may be enforced as any other contract"); *Interspace Incorporated v. Morris*; 650 F.Supp. 107, 109 (acknowledging that "[a]n agreement to compromise and settle a claim may be enforced as a contract").

<sup>5</sup> When asked about the meaning of "random," Respondent stated that "[r]andom means what the definition of random to a layperson means. Here and there and random in space." (Tr. 169).



Yet, clearly Respondent did not meet the four corners of the Settlement Agreement. Even if, *arguendo*, one were to concede that Respondent participated in a random drug testing program, Respondent still would fail to meet the Agreement's requirement of a "random, *unannounced* drug testing program." (Tr. 209; Exhibit 3)(emphasis added). Respondent does not deny that the four corners of the Agreement required participation in a random unannounced drug testing program, but insists that the availability of male observers at the Pequot Center testing site limited Respondent's ability to comply with this Settlement Agreement condition. (Tr. 218-219, 222-223). Pursuant to 49 CFR 40.67(g), an observer, for the purposes of drug testing, must be of "the same gender as the employee" being tested.

Whether or not there was a limited availability of appropriately gendered observers is itself subject to debate. (Tr. 70, 83, 219). Pequot Occupational Health Center clinical coordinator Elaine Glater testified that, as the POHC had a male medical director during the period of time in which Respondent submitted for his first six drug tests, the availability of a male observer was not even possibly a scheduling constraint for these first six tests; nevertheless, Respondent scheduled all of his drug tests, even when unscheduled tests were possible. (Tr. 70). While I find Ms. Glater's testimony highly convincing, Respondent insists that POHC selected his test dates based on the availability of male observers, and that as such, the unannounced nature of these tests ought not be attributed to Respondent. (Tr. 176-177). I find Ms. Glater's testimony regarding this matter to be more credible than Respondent's.

Yet irrespective of conditions at the Pequot Occupational Health Center and their effects on drug test scheduling, the fact remains that Respondent did not participate in a random unannounced drug testing program, and consequently did not meet the terms of his Settlement Agreement with the Coast Guard. (Tr. 221). Respondent – not POHC – entered into this

Settlement Agreement, and, as such, Respondent – not POHC – bore the burden of ensuring compliance with its terms. Moreover, the Coast Guard presented credible testimony from Ms. Glater indicating Respondent understood that his drug tests were not random, thus diminishing any sympathies I might have for Respondent if it were conceivable that he manifested a good faith effort to comply with the terms of the Agreement. (Tr. 93).

Respondent’s argument, regarding the allegedly ambiguous term “random,” is tenuous at best. While the Coast Guard maintains that random means unannounced, Respondent argues that the Settlement Agreement’s references to: 1. random, 2. unannounced, and 3. random and unannounced tests, indicate that random is not synonymous with unannounced. Respondent reasons that if every word of the Agreement is to be given meaning, then, logically, “unannounced” must not be subsumed within “random.”<sup>6</sup> (Respondent’s Brief Supporting Proposed Findings). Additionally, Respondent asserts that, as the Coast Guard drafted the Settlement Agreement, any textual ambiguities detected therein should be interpreted in Respondent’s favor. (Tr. 10-11). While certainly this is the general rule for interpreting ambiguous contractual agreements, the fact remains that the Settlement Agreement in question is simply not ambiguous. Both parties expressly agreed to the Settlement terms, and submitted the Agreement to the court as a joint motion. (Exhibit 3).

In my opinion, random is – as Pequot Occupational Health Center clinical coordinator Elaine Glater testified – “a non-scheduled test.” (Tr. 26, 39). A random test – a non-scheduled test – prevents the person in question from engaging in any preparation for the test, and, as such, seeks to ensure compliance with Coast Guard policies on the use of dangerous drugs, pursuant to

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<sup>6</sup> See generally Harris v. The Epoch Group, L.C., 357 F.3d 822, 825 (8<sup>th</sup> Cir. 2004)(interpreting federal law to require a contract to be interpreted so as to give meaning to each of the terms of a contract); Transitional Learning Community at Galveston, Inc. v. United States Office of Personnel Management, 220 F.3d 426, 431 (C.A.5 (Tex.) 2000)(stating that “a contract should be interpreted as to give meaning to all of its terms”).

46 U.S.C. 7704. (Tr. 196). To me, it is quite clear that Respondent did not participate in a random unannounced drug testing program, as required by the terms of the Settlement Agreement. Moreover, Respondent understood this fact and yet did nothing to seek amendment of the terms of the Agreement, or to otherwise obtain compliance with the conditions of the Agreement. (Tr. 201-202). This calls into question Respondent's asserted good faith effort at compliance. (Tr. 204).

Respondent failed to meet the terms of his Settlement Agreement with the Coast Guard on a number of grounds. Even if one were to ignore the requirement to participate in a random, unannounced drug testing program of paragraph 1C of the Agreement – and thus to disregard consideration of the alleged ambiguities of the text of this paragraph – the Coast Guard would still have a case for revocation, predicated on Respondent's failure to meet the requirements of paragraphs 1D and 1E. Paragraph 1D of the Agreement required Respondent to “[p]rovide the name and address of the service agent/consortium who [would] be administering the random drug testing program for the period of suspension.” (Tr. 20). The Coast Guard stated that it was not notified of who would be administering Respondent's program, nor did Respondent offer any evidence of compliance with this Settlement condition. (Tr. 192). This failure, in and of itself, may be sufficient for a sanction of revocation.<sup>7</sup>

Additionally, paragraph 1E of the Settlement Agreement directs Respondent to “[c]omplete, and provide documentation of completion of, the return-to-duty process of Title 49 CFR Subpart O; including, but not limited to, completion of a Substance Abuse Professional (SAP) evaluation, referral, and education/treatment process.” By Respondent's deadline for

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<sup>7</sup> Recall that paragraph 5 of the Settlement Agreement states that “[i]f the (sic) Respondent fails to provide evidence and documentation demonstrating completion of the conditions of this agreement by [October 4, 2003], then the Coast Guard will notify the Respondent and Docketing Center of the failure to complete and that an order of REVOCATION has been automatically invoked in accordance with paragraph 4 of this Agreement.”

compliance with the terms of the Agreement, the Coast Guard had not received notification of Respondent's completion of this return to duty process. (Tr. 20, 192). Respondent has not introduced any evidence to show he met this Settlement condition, or even that he attempted to do so.

I find that Respondent failed to meet the terms of his Settlement Agreement with the Coast Guard. Consequently, pursuant to paragraph 5 of the Agreement, Respondent's United States Coast Guard Merchant Mariner's License Number 996548 must be revoked.

### **SANCTION**

The terms of the Settlement Agreement, jointly filed by the Coast Guard and Respondent, clearly supports an order of revocation because of Respondent's non-compliance with the Agreement's terms by the October 4, 2003 deadline. (Settlement Agreement, Paragraphs 4-5). Under the facts of this case, there are no mitigating or aggravating factors such that would render a sanction of revocation inappropriate.

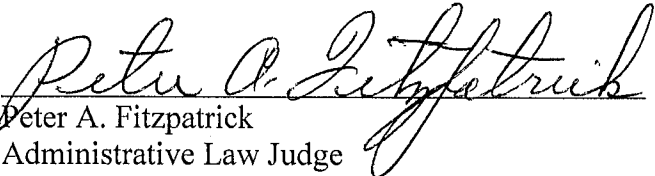
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**ORDER**

IT IS HEREBY ORDERED that Merchant Mariner's License Number 996548 be REVOKED.

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

Done and dated July 20, 2004  
Norfolk, Virginia

  
Peter A. Fitzpatrick  
Administrative Law Judge