UNITED STATES OF AMERICA

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

UNITED STATES COAST GUARD

Complainant

vs.

HOWARD C. MILLS

Respondent.

Docket Number: CG S&R 04-0251

CG Case No. 2023443

DECISION AND ORDER

Issued: October 27, 2004

Issued by: Jeffie J. Massey, Administrative Law Judge

Appearances:

Lt Katherine Kulaga
CWO Jason Boyer
U.S. Coast Guard
800 David Drive
Morgan City, LA

For the Coast Guard

Howard C. Mills

For the Respondent

PRELIMINARY STATEMENT

On May 13, 2004, the United States Coast Guard ("USCG" herein) initiated an administrative proceeding against credentials issued to Howard C. Mills by the USCG. On June 7, 2004, an Amended Complaint was filed with the ALJ Docketing Center. On that same date, Respondent's Answer was received by the Docketing Center. In his Answer, Respondent Howard C. Mills ("Respondent" or "Mr. Mills" herein) denied the factual allegations and requested an opportunity to be heard on the remedy proposed by the USCG. He also wrote in the body of the Answer:

> . . . Was not allowed to take Drug Screen after taking alcohol test was told there was nothing more I could do I had to leave the vessel. Went to my room to pack and did not see David Fournier of SECON again.

The Amended Complaint was the subject of the hearing held in Morgan City, Louisiana on September 30, 2004. The USCG presented two witnesses: Mark Dawson, Sr., a Safety Captain for Tidewater Marine (Respondent's former employer) and Dave Fournier, an employee of SECON, a contract testing company. Respondent was the only witness to testify on his behalf.

At the end of the testimony the evidentiary record was closed. The undersigned instructed the USCG that they had ten (10) days to submit a clarification of the regulations they were using to charge the Respondent. This submission was received by the undersigned on October 15, 2004.

FINDINGS OF FACT

THE FIRST ALLEGATION IN THE AMENDED COMPLAINT:

1. On February 16, 2004, Respondent was acting under the authority of his Merchant Mariner's credentials when he reported for duty aboard the Vessel "Carl F. Thorne."
2. The Vessel "Carl F. Thorne" is a vessel subject to inspection by the USCG.
3. On February 16, 2004, David Fournier was an employee of SECON who had, in September 2003, completed training as a breath alcohol technician, an operator of the ALCO Sensor IV/RBT IV, and in specimen collection procedures.
4. On this same date, Mr. Fournier collected a urine specimen from the Respondent, but that sample was insufficient in quantity to be considered a valid sample.
5. On this same date, Mr. Fournier administered a breath test to Respondent, and the breath testing machine indicated the results were .175.
6. On this same date, Mr. Fournier administered a second breath test to Respondent, fifteen minutes after the first one, and the breath testing machine indicated the results were .158.[1]
7. After the Respondent was informed of the test results from the first breath test, he told Mr. Fournier that he had rinsed his mouth with mouthwash right before the breath test.

[1] While the case presented by the USCG did not include a complete explanation of the breath testing process, and how said machines work, the regulations contemplate that when tested by taking a breath sample, the results will be expressed in terms of grams of alcohol per 210 liters of breath. This is a standard unit of measurement. 33 CFR §95.010.

8. The USCG presented no evidence as to how the presence of mouthwash in a person's mouth could affect the outcome of a breath test.

9. The USCG presented no evidence to establish that the breath testing machine was properly calibrated before the first breath test was administered to Respondent on February 16, 2004.

10. The Respondent had not consumed any alcoholic beverages since approximately 3:00 a.m. on February 16, 2004, or approximately thirteen hours before the first breath test was administered to Respondent.

11. No person observed any signs of intoxication with respect to the Respondent on February 16, 2004.

12. No evidence was presented that indicated the Respondent's manner, disposition, speech, muscular movement, general appearance, or behavior was affected from being under the influence of alcohol on February 16, 2004.

13. At the time Mr. Fournier conducted the tests of Respondent's breath on February 16, 2004, he had been certified to do so for less than five months.

WITH RESPECT TO THE SECOND ALLEGATION IN THE COMPLAINT:

1. 1. On February 16, 2004, Respondent was acting under the authority of his Merchant Mariner's credentials when he reported for duty aboard the Vessel "Carl F. Thorne."

2. The Vessel "Carl F. Thorne" is a vessel subject to inspection by the USCG.

3. On February 16, 2004, David Fournier was an employee of SECON who had, in September 2003, completed training as a breath alcohol technician, an operator of the ALCO Sensor IV/RBT IV, and in specimen collection procedures.

4. On this same date, Mr. Fournier collected a urine specimen from the Respondent, but that sample was insufficient in quantity to be considered a valid sample.

5. After the Respondent was informed the urine sample was insufficient, he was not informed that he could drink up to forty ounces of water nor was he informed that he had up to three hours to give another sample.6. At no time on February 16, 2004, did any person inform the Respondent that he had five days to obtain, from an acceptable licensed physician, an opinion as to whether or not the Respondent could have a medical condition that precludes him from providing a sufficient urine sample.

7. The insufficient urine sample that the Respondent provided was obtained before his breath was tested on the breath alcohol testing machine.

8. The Coast Guard failed to prove that the Respondent was intoxicated on February 16, 2004, when he reported for duty to the Vessel "Carl F. Thorne."

9. The Coast Guard failed to prove that the breath alcohol tests administered to the Respondent on February 16 2004, were reliable, in the face of conflicting evidence as to the question of intoxication.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. On February 16, 2004, Respondent was a holder of a Coast Guard issued license and other documents issued by the USCG, and he was acting under the authority of said documents when he reported for duty to the Vessel "Carl F. Thorne."

2. The Coast Guard failed to prove by a preponderance of the evidence that sanctions are warranted against Respondent's license under 46 U.S.C. 7703, because the evidence failed to prove a violation of law or regulation, or an act of misconduct by the Respondent on February 16, 2004

3. The Coast Guard failed to prove that the Respondent "refused" to submit a urine sample for a drug test, pursuant to the provisions of 46 CFR Part 16 and 49 CFR Part 40.

4. The Coast Guard failed to prove that the Respondent "refused" to submit a urine sample for a drug test, pursuant to the requirements of Tidewater Marine (Respondent's employer).

5. The Coast Guard failed to prove that the Respondent was intoxicated on February 16, 2004, when he reported for duty to the Vessel "Carl F. Thorne."

6. The Coast Guard failed to prove that the breath alcohol tests administered to the Respondent on February 16 2004, were reliable, in the face of conflicting evidence as to the question of intoxication.

DISCUSSION

The Administrative Procedure Act (APA), 5 U.S.C. 551-59, governs Coast Guard suspension and revocation hearings. 46 U.S.C. 7702(a). The APA only authorizes sanctions to be imposed if, upon consideration of the record as a whole, the charges are supported by reliable, probative, and substantial evidence. 5 U.S.C. 556(d). "The term substantial evidence is synonymous with preponderance of the evidence as defined by the Supreme Court." Appeal Decision 2477 (TOMBARI) (1998). The burden of proving a claim by a preponderance of the evidence "simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence.'" Concrete Pipe and Products of California, Inc. v.

Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 622 (1993)(citing In re Winship, 397 U.S. 358, 371-72 (1970)(Harlan, J., concurring)(brackets in original)). Under Coast Guard procedural regulations, the Coast Guard bears the burden of proving the charges by a preponderance of the evidence. 33 CFR 20.701, 20.702(a). Therefore, the Coast Guard must prove with reliable and probative evidence that Respondent more likely than not committed the violations charged.

In these proceedings, the Administrative Law Judge is vested with broad discretion to determine witness credibility and resolve inconsistencies in the evidence, and the findings of the Administrative Law Judge are not required to be consistent with all the evidence in the record as long as there is sufficient evidence to justify the finding. Appeal Decision 2639 (HAUCK) (2003). In this case, I find Respondent is credible, and the record as a whole supports his testimony. There are significant conflicts in the evidence of record, and there are significant deficiencies in the evidence presented by the USCG, both of which have resulted in my conclusion that the allegations against the Respondent have not been proven by the required level of evidence so that I am convinced it is more likely than not that the Respondent committed the charged violations. To best understand the inconsistencies and deficiencies in the record, a general discussion of the evidence of record is necessary.

The first witness for the USCG was Mark Dawson, Sr. Mr. Dawson was employed by Tidewater Marine ("Tidewater" herein)as a Safety Captain on February 16, 2004, a position he had held for six years. On February 16, 2004, he was serving as a Designated Employee Representative for Tidewater and in that capacity he was dispatched to the vessel "Carl F. Thorne" ("vessel" herein) to oversee a pre-employment drug screen for the crew members of the vessel. He further explained that the pre-employment drug screen was necessitated by the fact

that the vessel had been tasked to perform a job for Exxon Corporation. These types of drug screens were a requirement of Exxon Corporation, but Tidewater Marine did not have a written policy about such testing (as a condition of employment). Mr. Dawson further testified that the Respondent was the Chief Engineer on the crew that day, and that the position of Chief Engineer is one required to be staffed by applicable regulations.

When Mr. Dawson arrived on board, he told the Captain why he was there and the Captain rousted the crew; everyone was summoned to the galley. He corroborated the Respondent's testimony that when rousted to report to the galley, he had been asleep in his room. Mr. Dawson testified that he was present for the administration of the first breathalyzer test to Respondent, but on cross-examination he claimed to not have known the Respondent gave a urine sample before the breathalyzer testing began. Mr. Dawson, in response to specific questions about his knowledge of drug testing procedures claimed only to know "what David told me" and repeatedly stated that he had no training about drug training procedures. He also testified that he was not aware of all of the regulations applicable to collecting a urine sample.

After the positive result was received on the breathalyzer, Respondent knew that he had lost his job because Tidewater had a zero tolerance policy (with respect to intoxication). Mr. Dawson claimed that *after the breathalyzer* Respondent disappeared from the galley and he didn't know where he went. Later, however, he went to Respondent's stateroom to tell him another urine sample was needed, and the Respondent was there. Mr. Dawson claimed that he had called another employee (Mr. Prafait) of Tidewater who told him that they had to wait three hours before they could consider Respondent's failure to give a urine sample as a "refusal."

When the witness told Respondent that another urine sample was needed, the Respondent stated that he wished he had known that, because he had just gone to the bathroom. After that, the witness returned to the galley and spoke with Mr. Fournier.

In response to questioning from the undersigned, the witness explained that the galley was a large room—large enough so that several crew members could be in one area at the same time the breath tests were being administered in another part of the galley. He further testified that he had not informed Mr. Mills of his rights under the regulations that provided him an opportunity to see a medical doctor to establish a medical reason why he could not give a sufficient urine sample. (Known as the "shy bladder" procedures in the regulations. See 49 CFR §§40.65(a), 40.191, 40.193(b).)

The next witness called by the USCG was David Fournier, the SECON employee who administered breath tests to and collected urine specimens from the crew on February 16, 2004. Mr. Fournier authenticated copies of his training certificates (Exhibit IO-06) which indicated he had completed training in September 2003 as a breath test technician certified to use the "ALCO Sensor IV/RBT IV" machine and, further, that he had completed training in (urine) specimen collection procedures.

With respect to the breath test machine he was trained to use, Mr. Fournier testified that the machine was calibrated weekly, usually on a Monday morning, and back at the office, after a positive test. He also testified that there was a "complete" calibration done every six months by the safety officer for the company. Even though the witness stated that he had the weekly calibration tests with him, the USCG did not seek to have those admitted into evidence. (Likewise, no testimony about the calibration supposedly done at the office after the positive test on the Respondent was sought by the USCG.)

Mr. Fournier claimed to recognize Mr. Mills, and testified as to the procedures he followed on February 16, 2004, including the procedures he followed for administering the breath tests to the crew members. He then stated that the next step he would have followed was to collect a urine specimen. He testified that the Collection Roster (admitted as Exhibit IO-07) indicated that the Respondent was the last crew member that he attended to that day. (This testimony about general procedures was, however, contradicted by his testimony that with respect to Respondent, he took a urine sample *before* administering the breath tests.)

He testified that when the Respondent gave him his urine sample, he tested the temperature and then determined that the urine sample was of an insufficient quantity to be considered a valid specimen (per the provisions of 49 CFR §40.65(a)). He claimed that at that point, he told the Respondent that he could drink up to forty ounces of water, and that he had up to three hours to provide a sufficient sample. After this, the witness said he discarded the insufficient urine sample, per required procedures. On direct examination, the witness claimed to have been the person to tell Mr. Dawson that the three hour wait period was up, and at that point Mr. Dawson went in search of the Respondent. When Mr. Dawson returned to the galley, the witness testified that Mr. Dawson said the Respondent had said he could not provide another urine sample.

As to the breath tests, the witness explained the Breath Alcohol Test Form admitted into evidence as Exhibit IO-08. He explained how the machine printed the test results right on the form. The first test yielded a breath alcohol content of .175; the second test result (received after the mandatory fifteen minute waiting period) was .158.

During questioning by the undersigned, the witness said that he collected the urine sample from Respondent before the breath test was administered. He also testified that Mr.

Dawson was in the galley area as the breath tests were being administered to the crew members, and that as each crew member completed the process, Mr. Dawson would call for the "next" person. The witness testified that he was administering the breath tests about ten feet away from where the other crew members were congregated.

After being advised of his right to testify in his own behalf, if he chose to do so, the Respondent was sworn and took the stand. During his narrative, guided by questions from the undersigned, the Respondent testified that he gave the urine sample first, then went straight to the breath tests. He denied that Mr. Fournier told him—after he gave the insufficient urine sample—that he could drink up to forty ounces of water and that he had up to three hours to give another sample. He testified that after the breath tests were completed—the results of which surprised him—he went to his stateroom and called his employer (Mr. Prafait) on his cellular phone.

He further testified that after the positive breath test results, he asked Mr. Fournier what he could do, as he just couldn't believe the test results. He stated that the only thing Mr. Fournier told him was that he couldn't stay there (in the galley). Mr. Prafait told him to pack his belongings and prepare to leave the vessel. He packed his belongings and laid down to watch TV. Because no one had told him he would have another opportunity to give a urine sample, when Mr. Dawson came to his room to see if he wanted to give another sample, all he could do was say I wish I had known that, because I just used the bathroom.

The Respondent further testified that prior to being rousted by the Captain (and being told to report to the Galley), he had been in his stateroom (since his arrival on the vessel.) He testified that he had taken a nap, waking just shortly before the Captain knocked on his door.

When he woke up, he used the bathroom and rinsed his mouth out, using "Minty Scope" mouthwash.

As to his activities before reporting for duty earlier that day, the Respondent testified that he had been out the night before with friends. When he went out, he did not know that he had to report for work the next day. He testified that over the course of the evening and on into the morning hours (he got home about 3:00 a.m.) he drank approximately four margaritas and three or four beers. He further testified that he had eaten lunch on the 15th, but did not eat dinner on the 15th, did not have a snack when he arrived home in the early morning hours of the 16th, and did not have lunch on the 16th before he reported for duty.

Respondent repeatedly denied that he had been told about the three hour wait, and the opportunity to give another urine sample after drinking up to forty ounces of water. I find that this testimony is corroborated by the tenuous nature of the testimony from the USCG witnesses. I further find that Respondent's testimony on this part is supported by the overall procedures utilized by Mr. Fournier while testing the Respondent and other crew members. Specifically, I find that Mr. Fournier's techniques and procedures were of such a nature that his competence to properly perform the duties he was tasked to perform on February 16 are called into question.

Specifically I note that the overall demeanor of Mr. Fournier while testifying was tenuous in nature. Although he claimed to recognize the Respondent as one of the persons he tested on February 16, 2004, the Respondent had previously been identified as Mr. Mills in the presence of Mr. Fournier in the hearing room, prior to Mr. Fournier's testimony. I find it unlikely that Mr. Fournier would have an independent recollection of the Respondent's appearance, when Mr. Fournier was not able to recall the specifics of other procedures or conversation that occurred that day (In fact, he responded that he "did not know" the answer to questions along those lines

on at least twenty-three occasions.) . On the whole, where there are inconsistencies between the testimony of the Respondent and the testimony of Mr. Fournier, I find the Respondent's testimony to be the credible version of events that took place during the testing procedures performed by Mr. Fournier on February 16, 2002.

On one crucial point—whether or not Mr. Fournier told the Respondent about the three hour wait period and the forty ounces of water, I find it more likely than not that Mr. Fournier did not so advise the Respondent. This fact is more likely than not because of the un-contradicted testimony of the Respondent that he called Mr. Prafait, wanting to know what else he could do about the failed breath tests. If he had been told he would have another chance to give a urine sample that evening, he would not have been asking this question of his employer.

FIRST ALLEGATION—VIOLATION OF LAW OR REGULATION

The clarification filed by the USCG directs me to 46 USC §7703(1)(a) and 33 CFR §95.045(b), charging the Respondent with violating a law or regulation, specifically being intoxicated while on board a vessel subject to inspection. Title 46 U.S.C. §7703(1)(a) provides that a license, certificate of registry, or merchant mariner's document may be suspended or revoked if the holder when acting under the authority of his license, certificate, or document violates or fails to comply with subtitle II of Title 46 of the United States Code, a regulation prescribed under subtitle II of the Title 46 of the United States Code, or any other law or regulation intended to promote marine safety or to protect navigable waters.

A person employed in the service of a vessel is considered to be acting under the authority of his/her license, certificate, or MMD when the holding of that license, certificate, or MMD is required by law, regulation, or by the employer as a condition of employment. 46 CFR

§5.57(a). If law, regulation, or condition of his employment did not require the Respondent to have a license or MMD, then the Coast Guard does not have jurisdiction under 46 CFR §5.57(a) over the alleged violation of law. See Appeal Decision 2620 (COX) (2001). Therefore, the Coast Guard must prove Respondent was employed in the service of a vessel[2] when he committed a violation of law and Respondent's merchant mariner's credentials were either (1) required by law or regulation or (2) as a condition of his employment.

To find that a law or regulation required Respondent to hold a license or MMD, the vessel's certificate of inspection or a description of the vessel must be admitted into evidence. See Appeal Decision 2283 (FUEHR) (1982). Section 8301(b) of Title 46 of the United States Code provides that an offshore supply vessel of more than 200 gross tons as measured under 46 U.S.C. 14502 or an alternate tonnage measured under 46 U.S.C. §14104 may not be operated without a licensed engineer. Additionally, a person may not serve aboard a merchant vessel of at least 100 gross tons as measured under 46 U.S.C. §14502 or an alternate tonnage measure under 46 U.S.C. §14302 if that individual does not have a merchant mariner's document issued under 46 U.S.C. §7302. In this case, Respondent held a Coast Guard issued MMD and a license authorizing him to serve as duty engineer of motor vessels of any horsepower. (IO Ex. 05). At the time in question, Respondent was employed as an engineer aboard the offshore supply vessel CARL F THORNE, which according to the certificate of inspection is more than 200 gross tons. (IO Ex. 03). Therefore, the Coast Guard has proved Respondent was acting under the authority of his merchant mariner credentials, because he was employed as engineer aboard the CARL F. THORNE and his license and MMD were required by law for him to serve aboard that vessel.

[2] Employed in the service of a vessel does not require respondent to have boarded the vessel. Appeal Decision 2615 (DALE) (2000) (Respondent was acting under the authority of his MMD when his employer had assigned him to a vessel, but Respondent had not boarded.).

I now turn now the question of whether the Coast Guard has proven by a preponderance of the evidence that Respondent violated 33 CFR §95.045(b). On the record before me, it is undisputed that on February 16, 2004, the Respondent was a crew member of a vessel subject to inspection by the USCG. See 46 U.S.C. §3301. After the Respondent reported to the vessel, and while he was acting pursuant to the authority of documents issued to him by the Coast Guard, the Respondent was asked to do two things: first, to tender a urine sample, and second, to submit to an analysis of his breath, for purposes of detecting the presence (or absence of) alcohol.

It is well established that a crew member is prohibited from serving on a vessel when he or she is intoxicated. 33 CFR §95.045(b). See, also, Appeal Decision 2551 (LEVENE) (1993). "Intoxicant" means "any form of alcohol, drug or combination thereof"; and, "under the influence" means "impaired or intoxicated by a drug or alcohol as a matter of law." 33 CFR §95.010. Per the regulations, "acceptable evidence" of being under the influence of alcohol (or a dangerous drug), is divided into two main categories: (1) "personal observation of an individual's manner, disposition, speech, muscular movement, general appearance, or behavior; or, (2) a chemical test. 33 CFR §95.030. "Chemical test" means "a test which analyzes an individual's breath, blood, urine, saliva and/or other bodily fluids or tissues for evidence of drug or alcohol use." 33 CFR §95.010.

While tests to detect the presence of a drug other than alcohol are required to be administered by procedures that are in compliance with 49 CFR Part 40, the same is not true with respect to chemical tests which seek to measure the alcohol content in a crew member's breath. As indicated by Exhibit IO-08, the Respondent was asked to sign a non-DOT Breath Alcohol Test Form.[3] Turning first to the chemical test results in this case as an indication of whether or

[3] It is true, however, that the non-DOT form used by Mr. Fournier in this case is identical to the DOT Form found in Appendix G to Part 40 of 49 CFR.

not the Respondent was "under the influence" on February 16, 2002, the evidentiary record leads me to have grave concerns about the validity of the test results obtained by Mr. Fournier.

Should the test results in this case be deemed reliable, it is without argument that the Respondent was "under the influence" of an intoxicating element when he was tested on February 16. But I must consider the evidentiary record as a whole. I must, to the extent I can, resolve conflicts in evidence. And, when I perceive there to be an absence of information that I find should otherwise be in the record to support a finding of reliability, I must examine the impact of the missing evidence on the reliability of the test results that were admitted into the record via Exhibit IO-08.

The reliability of the breath alcohol tests in this case cannot be established solely by the fact that Mr. Fournier testified he obtained these results after the Respondent gave him two breath samples. I am compelled to look further. Did Mr. Fournier follow correct (reliable) procedures so that some confidence can be placed in the test results? Were there intervening factors that could have influenced the outcome of the breath tests? Are the test results corroborated by other evidence in the record?

The testimony of Mr. Fournier reveals that the Respondent told Mr. Fournier about rinsing his mouth with mouthwash. There is no evidence in the record that Mr. Fournier considered the impact of the fact that the Respondent had just rinsed his mouth with mouthwash before the breath tests were administered. Mr. Fournier testified only that the effects of the mouthwash should have dissipated within fifteen minutes. Likewise, there is an absence of evidence in the record as to when the breath testing device was last calibrated before it was used on February 16. If it was, in fact, calibrated only once a week, how many tests had the device performed between the last calibration and the tests on Respondent. (We know that six crew

members were tested on February 16 before the Respondent. See Exhibit IO-07 and Transcript at 72, *et seq.*) Were there other tests between the last calibration and the seven tests on February 16, 2004? What were the results of the calibration done when the machine was returned to the office? When was the last calibration done by the safety officer of SECON?[4]

I am compelled to closely examine the test results because of the blatant conflict between these test results and observations of the Respondent on February 16, 2004. If the Respondent was almost two times over the legal limit established by the State of Louisiana as a level of "intoxicated", then why didn't any person observe overt signs of intoxication? Where is the evidence that the Respondent's manner, speech, muscular movement, general appearance, or behavior was that of an intoxicated person?[5] The testimony in the record that establishes the Respondent did not appear intoxicated puts the lie to the test results. Respondent has no burden in this case to resolve these conflicts. I cannot overlook these conflicts as they go to an ultimate finding of fact and conclusion of law. Clearly, the burden is on the USCG to present evidence that overcomes these conflicts. And, the record as a whole indicates the USCG failed to resolve these conflicts in their presentation of evidence. I am not persuaded to accept these test results as evidence of intoxication when there is (1) no evidence in the record that the machine was operating properly, (2) the tester was inexperienced and did not appear to remember the events of the day; rather he appeared to base his testimony on what the procedures called for, rather than what actually took place; and, (3) abundant conflict between the test results and the eye witness testimony of Respondent's appearance on February 16, 2004.

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[4] When the Breath Alcohol Testing Form was admitted into evidence, I told the USCG representative that they needed to introduce evidence to judge the validity of the test results on the form. They did not do so.

[5] When there is a high alcohol content detected in the breath, one would expect to see overt signs of intoxication, as in Appeal Decision 2609 (DOMANGUE) (1999). While some variances between individuals is not unusual, in this case, the indication of intoxication between the chemical test results versus the testimony about Respondent's appearance and his ingestion of alcohol (which ended some 12 hours before the testing) is diametrically opposed, calling into question the chemical test results.

The greater weight of reliable evidence leads me to conclude that when the Respondent reported for work on February 16, he was not "intoxicated" as that term is defined in §95.030, regardless of the chemical test results. I find the chemical test results are unreliable. I find that the USCG has failed to prove, with reliable and probative evidence, that Respondent more likely than not committed a violation of law or regulation by being intoxicated when he was serving as a crew member upon a vessel subject to inspection, on February 16, 2004.

SECOND ALLEGATION—MISCONDUCT

The clarification filed by the USCG directs me to 46 U.S.C. §7703(1)(b) and 46 CFR §5.27. A license, certificate of registry, or merchant mariner's document may suspended or revoked if the holder when acting under the authority of that license, certificate, or document commits an act of Misconduct. 46 U.S.C. §7703(1)(B). The specific charge of Misconduct is defined as follows:

> *Misconduct* is human behavior which violates some formal, duly established rule. Such rules are found in, among other places, statutes, regulations, the common law, the general maritime law, a ship's regulation or order, or shipping articles and similar sources. It is an act which is forbidden or a failure to do that which is required. 46 CFR §5.27.

Since I have already found Respondent's merchant mariner credentials were required by law and he was therefore acting under the authority of them for the violation of law allegation, I will not repeat that discussion here.

Turning to the factual allegation portion of the Amended Complaint, the USCG alleges that the Respondent violated a requirement of Tidewater Marine by refusing to submit a sample for a DOT approved "pre-access drug screen" on February 16, 2004.

As noted above, the evidence clearly shows that on February 16, 2004, Respondent was acting as a crew member on the vessel "Carl F. Thorne," and that the boat had been tasked to work for Exxon Corporation, which required all crew members to be tested for alcohol or drug use (per the previously discussed testimony of Mr. Dawson). The evidence also clearly shows that the Respondent provided a urine sample to Mr. Fournier that was insufficient, per the requirements of 49 CFR Part 40. That leaves two disputed facts in issue: First, whether or not the Respondent "refused" to submit a urine sample for purposes of testing on February 16, 2004. Second, whether or not it was a requirement of Tidewater Marine that the Respondent submit a urine sample on February 16, 2004.

I will deal with the second issue in dispute first. Company policy can serve as formal, duly established rule for a Misconduct allegation. See Appeal Decision 2640 (PASSARO) (2003). However, in this case Mr. Dawson testified that Tidewater Marine did not have a written policy concerning pre-access tests (Transcript, at 31-32). No other testimony was solicited on this point during the hearing. Accordingly, I conclude that Tidewater Marine did not have a requirement that Respondent submit to a urine test on February 16, 2004. Therefore, the allegation of Misconduct fails, because there is no evidence of a formal, duly established rule. Having concluded that the misconduct allegation has not been proven as a matter of law, I could end my discussion of the evidence relevant to this allegation without further comments on the testimony. However, I believe it is important to comment further on the testimony relevant to this allegation. My comments will further buttress and explain the conclusions I have made with respect to the unreliability of the USCG's testimonial evidence (as I reached the conclusion that the USCG's witnesses were unreliable based on the entirety of their testimony). Accordingly, let us assume for these purposes that there was a company policy that required the Respondent to

take a drug test and/or the Respondent was otherwise required to take a drug test per the provisions of 49 CFR Part 40. (After all, Tidewater was treating this test as if it was a DOT test.)

To determine whether or not the Respondent "refused" to submit a urine sample, let us begin with a close examination of the applicable regulations. The proper procedures for testing for drugs is governed by 46 CFR Part 16, which requires compliance with the provisions of 49 CFR Part 40. Whether or not a crew member "refuses" to submit a urine sample for testing is controlled by the provisions of 49 CFR §40.191. When a subject fails to provide a sufficient quantity of urine for the test, the provisions of §40.193 are invoked. Those provisions require that a subject be informed of two things: First, his or her right to have up to three hours to submit a sufficient sample, and the right to drink up to forty ounces of water during that three hour period, to facilitate the provision of a sufficient sample.[6] Second, if at the end of the three hour period, the subject is still unable to provide a sufficient sample, the subject must be informed by the Designated Employee Representative (in this case Mr. Dawson) that he or she has up to five days to obtain an evaluation by a physician who has expertise in the medical issues raised by the insufficient sample (shy bladder), and to obtain an opinion from said physician as to whether or not there exists a medical condition that precluded the subject from providing a sufficient sample, or that there is a high degree of probability that such a medical condition exists.[7]

There is conflicting testimony in this proceeding concerning what the Respondent was told after he provided the insufficient urine sample. Mr. Dawson testified that he was not aware that the Respondent had given an insufficient urine sample prior to the breath tests. Mr. Dawson's memory of conversations between himself and the Respondent was vague. He did

[6] I do not believe that depriving Respondent of an opportunity to provide a specimen after the first attempt was insufficient can be deemed a "minor technical infraction." See Appeal Decision 2633 (MERRILL) (2002).

admit that he never told the Respondent he had the right to follow up with a doctor's examination, saying that he had not had any training on the rights an employee has under these circumstances. In addition, Mr. Dawson was not able to corroborate Mr. Fournier's assertion that he informed the Respondent of his right to take up to three hours to give another sample, and his right to drink up to forty ounces of water during that period.

Mr. Fournier testified that he did so instruct the Respondent after the insufficient urine sample was given, and before the breath tests were administered. While Mr. Fournier was very clear in this assertion, I note that this alleged conversation was the only independent memory he was sure of, with respect to the events of February 16. By independent memory I mean that Mr. Fournier was able to testify to details that were reflected on an exhibit (document); however, when asked questions about other events or circumstances that occurred during the afternoon/evening of February 16, his memory failed him. In fact, on twenty-three occasions, Mr. Fournier responded "I don't remember" when asked about conversations, surroundings, or the Respondent's appearance. Mr. Fournier did say that if someone were "so intoxicated that their speech was slurred, their breath smelled like alcohol and their eyes were glassy", he would remember that. None of these conditions were observed with respect to the Respondent, by Mr. Fournier. As previously discussed, I find Mr. Fournier's testimony so tenuous as to be unreliable.

The Respondent clearly and repeatedly denied that he had been told by anyone (Mr. Dawson or Mr. Fournier) that he had up to three hours to submit another sample, during which time he could drink up to 40 ounces of water. He even took the initiative and called one of the Tidewater Managers to find out what, if anything, he could do about the positive breath test results. Why would he have done that if he had already been told about having up to three hours to give another urine sample?

[7] I have heavily paraphrased the provisions of 49 CFR §40.193.

Examining the record as a whole, I conclude that the Respondent was not told of his rights under §40.193. As such on the record before me, I would not conclude that there was a "refusal" to provide a urine sample. Had this been a test required by Respondent's employer or Part 40, I would have been forced to conclude that the USCG failed to prove, with reliable and probative evidence, that Respondent more likely than not committed a violation of a rule which amounts to Misconduct on the part of the Respondent.

ORDER

IT IS HEREBY ORDERED that the administrative action against Respondent Howard C. Mills' Coast Guard issued license shall be dismissed and removed from the docket.

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 A).

Done and dated October 27, 2004
New Orleans, Louisiana

JEFFREY J. MASSEY
ADMINISTRATIVE LAW JUDGE
U.S. COAST GUARD