

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

UNITED STATES COAST GUARD

Complainant

vs.

Barry James Trahan

Respondent.

Docket Number: CG S&R 05-0407
CG Case No. 2426264

DECISION AND ORDER

Issued: November 22, 2005

Issued by: Walter J. Brudzinski, Administrative Law Judge

Appearances:

CWO Jason A. Boyer, USCG
LT Elizabeth Dominy, USCG
Marine Safety Office Morgan City, Louisiana

For the Coast Guard

Barry J. Trahan
In Proper Person

For the Respondent

PRELIMINARY STATEMENT

This matter came to be heard by Complaint filed on July 14, 2005 by the United States Coast Guard (“Coast Guard” or “CG”) against the Coast Guard issued License held by Barry James Trahan (“Respondent”), in the discharge of its duty to promote safety of life and property at sea. See 46 U.S.C. 7701(a). The Coast Guard initiated this administrative action under the authority of 46 U.S.C. 7703 and its underlying regulations at 46 CFR Part 5. These proceedings are further governed by the Administrative Procedure Act, 5 U.S.C. 551, *et seq.* and 33 CFR Part 20.

The Coast Guard Chief Administrative Law Judge assigned this case originally to Judge Jeffie J. Massey of New Orleans on July 18, 2005. Due to the disruptions caused by Hurricane Katrina, this matter was reassigned to the undersigned on September 13, 2005 and set for hearing on October 18, 2005 at Marine Safety Office Morgan City, Louisiana.

The Coast Guard alleges that Respondent engaged in Misconduct in that 1) on 20 June 2005, he was requested by North Bank Towing to submit to a Random Drug Screen; and 2) a urine specimen was not collected. Respondent refused to submit a sample. The Coast Guard proposed Revocation in accordance with 46 U.S.C. 7703.

Respondent submitted a timely Answer to the Complaint admitting all jurisdictional allegations but denying that he refused a drug screen. He did not allege an affirmative defense but expressed his desire to be heard on the proposed order.

Investigating Officers CWO Jason A. Boyer, USCG and LT Elizabeth Dominy, USCG represented the Coast Guard at the hearing. Respondent appeared without professional representation. The Coast Guard presented three witnesses and introduced 11 exhibits. The Respondent testified on his own behalf and introduced 2 exhibits. The undersigned made a copy of Respondent’s license part of the record as an ALJ exhibit.

At the hearing’s close, the Coast Guard requested the opportunity to prepare proposed findings of fact and conclusions of law as well as argument. Respondent made no decision to submit proposed findings but was instructed to advise the undersigned if he chose to do so. On November 14, 2005, the Coast Guard submitted its proposed findings. Respondent has not advised the undersigned whether he intends to submit proposed findings or a post hearing brief. Therefore, this matter is now ripe for decision.

Law

The applicable portion of Title 46 United States Code, Section 7703 reads as follows:

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 fails 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; or

(B) has committed an act of **misconduct** (emphasis added) or negligence....

The Coast Guard defines **misconduct** in Title 46, Code of Federal Regulations, Section 5.27 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.

Burden of Proof and Standard of Proof

Coast Guard procedural regulations at 33 Code of Federal Regulations (CFR) section 20.702 provides that "...the Coast Guard bears the burden of proof." 46 CFR 20.701 provides that "[t]he party that bears the burden of proof shall prove his or her case or affirmative defense by a preponderance of the evidence." Simply put, "preponderance" means "more likely than not." See Steadman v. S.E.C., 450 U.S. 91, 101, 101 S. Ct 999, 67 L.Ed.2d 69 (1981); 5 U.S.C. 556(d).

To prevail in the administrative hearing, the Coast Guard must prove it was more likely than not that Respondent was a holder of a valid Coast Guard license, certificate, or document and was acting under the authority of that license, certificate, or document. Further, the Coast Guard must prove that it was more likely than not Respondent's employer or the Coast Guard had established some formal rule, i.e., random chemical testing procedure for dangerous drugs; that Respondent was subject to the formally established testing procedure; and, that Respondent failed to do what was required of him (submit to a random drug screen) or did that which was forbidden (refused to submit to a random drug screen).

To determine whether the Coast Guard has met its burden of proof, it is necessary to find facts by the preponderance of the evidence, that are probative on the elements recited above.

FINDINGS OF FACT

I find that the following facts are supported by the preponderance of the evidence:

1. Respondent, Barry James Trahan is a holder of a Coast Guard License, serial number 1045379 certifying him as Master of Steam or Motor Vessels not more than 200 gross registered tons domestic but not more than 500 gross tons upon near coastal waters. The license expires on October 31, 2008 and is the third issue. (Tr. at 7, 8; ALJ-1).
2. Respondent had been employed by North Bank Towing Corporation of Berwick, Louisiana for approximately four years and on June 20, 2005 was operating under the authority of that license as Master of the Motor Vessel THAD A, an uninspected towing vessel owned by North Bank Towing Corporation. Company policy as well as Coast Guard regulations requires the master and

mate of uninspected towing vessels to be licensed. (Tr. at 16, 17, 29, 64; Investigating Officer [IO] Exhibit 1; 46 CFR 15.610).

3. Marine employers are required to have chemical testing programs for dangerous drugs on a random basis for crewmembers on uninspected vessels that are required by law or regulations to hold a Coast Guard license. (Tr. at 20; IO Exhibit 1; 46 CFR 16.230(b) (1)).

4. North Bank Towing is a marine employer. (Tr. at 19, 20; IO Exhibit 1).

5. As a marine employer, North Bank Towing Corporation had its drug and alcohol policy and chemical testing program for dangerous drugs in place on June 20, 2005. (Tr. at 16, 18-21, 22; IO Exhibit 2; 46 CFR Subpart 4.06).

6. Respondent was familiar with North Bank Towing Corporation's chemical testing program for dangerous drugs and understood that compliance with his employer's drug policy was a condition of employment. (IO Exhibit 2).

7. Thomas Galloway, the Human Resources Director for North Bank Towing Corporation, administered the company's chemical testing program for dangerous drugs on June 20, 2005. The company retained Multi Management Services Incorporated (MMSI) of Gray, Louisiana to conduct its alcohol and chemical testing program for dangerous drugs. (Tr. at 15, 17, 18, and 27).

8. On June 20, 2005, North Bank Towing Corporation owned three uninspected towing vessels: MR. EDDIE, MISS PATRICIA, and the THAD A. The vessels' primary work was coastwise towing. (Tr. 19, 20).

9. On June 20, 2005, two uninspected towing vessels, the MR. EDDIE and MISS PATRICIA, owned by North Bank Towing Corporation, were involved in an incident en route from Houma, Louisiana to Morgan City, Louisiana. (Tr. at 17).

10. Upon MR. EDDIE's and MISS PATRICIA's arrival at North Bank's docks, Mr. Galloway scheduled a post-incident chemical test for evidence of drug and alcohol use for personnel attached to those vessels. The THAD A., together with Respondent and his crew, was at North Bank Towing's docks. (Tr. at 17, 20; IO Exhibit 1; 46 CFR 16.240 and 4.06-10).

11. Because Multi Management Services Incorporated (MMSI) drug screen personnel would already be at the North Bank Towing Corporation's docks, Mr. Galloway also decided to schedule a quarterly, random chemical test for dangerous drugs for personnel on the THAD A. because the THAD A. was on MMSI's list for quarterly testing. Further, it was an opportunity for North Bank Towing to avoid duplicate costs. (Tr. at 17, 18, 27; IO Exhibit 1; 46 CFR 16.230).

12. Certified alcohol and chemical drug testing technicians Dallas O'Quinn and Dustin Dufrene of MMSI told the North Bank Towing Corporation's gate guard that no one would be allowed to leave the premises because drug testing was being conducted and that he (gate guard) was to log anyone who left the dock without paperwork indicating drug screen completion. (Tr. at 18; IO Exhibits 3, 4, 5, 6, and 10).

13. There was no advance notice of the drug test. Authorized North Bank Towing personnel instructed MMSI drug screen personnel which boats to go to and in what order. MMSI personnel were also instructed to collect personnel onboard these boats and then proceed with those personnel to a maintenance trailer on the premises to collect the samples. Approximately 12 personnel from the three vessels accompanied MMSI personnel to the trailer, including Respondent. (Tr. at 18, 19, 20, 25, 33; IO Exhibit 6).

14. As the test collection process was starting, Respondent called Mr. Galloway telling him that he had to leave the premises immediately because he had an emergency dentist appointment at 11:30. (Tr. at 20, 21, 35, 56, 68, 69).

15. Mr. Galloway told Respondent that he (Respondent) had never told him (Mr. Galloway) prior to that time that he had an appointment. Mr. Galloway told Respondent that the drug screen was part of the job and that he could go to the dentist after he had provided a sample and finished the drug screen. Further, Mr. Galloway told Respondent that leaving would be considered a refusal. In addition, (Tr. at 20, 21, 35, 56, 68, 69).

16. Respondent departed the testing trailer and North Bank Towing Corporation's property without permission. As he was leaving, the gate guard told him that if he left without taking the drug screen "he would get a refusal." Mr. Trahan responded that he would be back later to collect his belongings and then departed without permission. (Tr. at 41, 62; IO Exhibits 6, 7, and 8).

17. North Bank Towing Corporation policy is that no one is allowed to leave the facility without clearance from the operations manager on duty for that day or the Human Resources Director. (Tr. at 58).

18. Of the 12 mariners tested, two refused to test, including Respondent. There were also three positive test results. Of Respondent's crew on the THAD A, Steven Parfait tested positive for cocaine and alcohol. On the MR. EDDIE, the Master, Ricky Hammonds, tested positive for marijuana and alcohol and Scott Robicheaux refused to take the test. Another mariner, Timothy Peeples, tested positive for marijuana. (Tr. at 19, 20; IO 1).

19. MMSI specimen collectors expressed that the results were "pretty high" and Mr. Galloway expressed that the results were "quite disappointing." (Tr. at 20, 45, 50).

20. As a licensed mariner for twelve years, Respondent was not only well aware of the Coast Guard rules and regulations regarding drug testing but also he was trained as a supervisor in his employer's drug and alcohol policy so that he could explain it to his crew members. As a supervisor he was also certified on how to observe personnel exhibiting problematic behavior so that he could document reasonable cause suspicion for testing. (Tr. at 22, 71; IO Exhibits 2 and 3).

21. Dustin Dufrene, a certified collector, completed and signed the alcohol refusal form and the drug screen refusal form signifying that Respondent did not submit to the screens. (IO Exhibits 7 and 8).

22. Respondent had not previously refused to submit to a drug screen. (Tr. at 56).
23. Respondent called Mr. Galloway after he was finished at the dentist and asked if he could take the drug screen. Mr. Galloway told him that the drug screening procedure was over with. Respondent called Mr. Galloway the following day and offered to take a drug screen. (Tr. at 30, 31, 53, 62; Respondent's Exhibits A and B).
24. Had Respondent advised Mr. Galloway shortly after MMSI personnel arrived that he had an emergency dental appointment, he could have gone to the head of the line so he could get out of there quickly and get to his dentist appointment. (Tr. at 35, 36).
25. Respondent previously tested positive for cocaine as a result of a random chemical test for dangerous drugs in 1996. Respondent entered into a Settlement Agreement pursuant to Appeal Decision 2535 (SWEENEY) (1991). He completed rehabilitation and provided proof of cure, whereupon his license was returned to him. (Tr. at 72, 73; IO Exhibit 11).

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Respondent and the subject matter of this hearing are within the jurisdiction vested in the Coast Guard under 46 U.S.C. 7703.
2. To perform his duties as Master of an uninspected towing vessel, 46 CFR 15.610(a) required Respondent to have a Coast Guard license.
3. Respondent was operating under the authority of his license on June 20, 2005 at the time he was directed to submit to the random chemical test for dangerous drugs.
4. Pursuant to the requirements of 46 CFR 16.230(b) (1), North Bank Towing had a chemical testing program for dangerous drugs on a random basis.
5. Respondent was aware of Coast Guard regulations and his employer's policy regarding random chemical testing for dangerous drugs.
6. Pursuant to regulation and company policy, Respondent was directed to submit to a random chemical test for dangerous drugs on June 20, 2005.
7. On June 20, 2005, Respondent departed the collection trailer and North Bank Towing Corporation property without submitting to the random chemical test for dangerous drugs and without permission.
8. Under company policy and 49 CFR 40.191(a) (2), departing the premises without permission or failing to remain at the testing site constitutes a refusal to submit to a random chemical test for dangerous drugs.
9. 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.

9. The establishment of North Bank Towing Corporation's chemical testing program for dangerous drugs on a random basis for crewmembers on uninspected vessels who are required by law or regulation to hold a Coast Guard license is a formal, duly established rule pursuant to 46 CFR 16.230(b)(1).

10. A refusal to submit to a random chemical test for dangerous drugs ordered pursuant to that formal, duly established rule constitutes is an act which is forbidden or a failure to do that which is required

11. In accordance with 46 CFR 16.230(d), marine employers may form or otherwise use sponsoring organizations, or may use contractors, to conduct the required random chemical testing programs.

12. Respondent's refusal to submit to a random chemical test for dangerous drugs ordered pursuant to that formal, duly established rule constitutes Misconduct under 46 CFR 5.27. Therefore, by the preponderance of reliable, probative and substantial evidence, I find the Misconduct charge proved.

DISCUSSION

Respondent is charged with refusal under 46 U.S.C. 7703 and 46 CFR 5.27. Under 46 U.S.C. 7703(1), the Coast Guard must prove that Respondent had a validly issued Coast Guard license, certificate, or document and was acting under the authority of that license, certificate, or document. The evidence shows that on June 20, 2005, Respondent was a holder of a validly issued Coast Guard license. As Master of the THAD A, an uninspected towing vessel, Respondent was required to have a license. On June 20, 2005, Respondent was on the THAD A in the capacity of Master. Therefore, he was acting under the authority of his license, certificate, or document at the time of the offense.

Under subparagraph (B) of section 7703, the Coast Guard must prove that the Respondent committed an act of Misconduct. As noted above, "Misconduct is human behavior which violates some formal, duly established rule. . . ." It is clear from the testimony, exhibits, and the regulations that North Bank Towing Corporation was required to have a chemical testing program for dangerous drugs. The establishment of the testing program requiring compliance is a formal, duly established rule. As Master of an uninspected towing vessel, Respondent was subject to that formal, duly established rule. By refusing to submit to a random drug screen, Respondent failed to do that which was required and actually did that which was forbidden.

Respondent introduced two exhibits. Exhibit A is an undated, typewritten "To whom it may concern" letter with Dr. Edmund M. Ring, D.D.S. and an address typed at the top. The letter states that Respondent had tooth #19 extracted on June 13, 2005 and then returned on June 20, 2005. Exhibit B is a pre-printed, filled out form entitled "Excuse Slip" with Dr. Ring's name and address printed on it. Respondent's name, the date, June 20, 2005, and the appointment time,

11:30, are handwritten in the appropriate blank spaces. The “Excuse Slip” states that Respondent had an appointment on that date at the time indicated.

In weighing the evidence to determine whether Respondent refused to submit to a random chemical test for dangerous drugs, I accord these exhibits little weight. Even if they are true and correct and Respondent did, in fact, have an emergency dentist appointment, it did not relieve Respondent from the requirement to comply with the random chemical. Mr. Galloway told Respondent that once he submitted his sample, he could go to his dental appointment. The Coast Guard’s random chemical testing program for dangerous drugs would be severely compromised if mariners were free to opt out of random tests due to last minute notifications of dental appointments. However, accommodations can be made. Had Respondent notified Mr. Galloway as soon as MMSI technicians arrived, he would have been able to go to the head of the line, submit his sample, and then proceed to the dentist’s office. Instead, Respondent chose to leave the premises knowing the consequences. I find Mr. Galloway’s refusal to allow Respondent to depart the premises prior to submitting a sample was in accordance with his company’s drug policy and reasonable under the circumstances. Therefore, I find the charge that Respondent refused to submit to a random drug screen proved.

SANCTION

While 46 U.S.C. Section provides that a merchant mariner’s license, certificate of registry, or document may be revoked or suspended, Coast Guard regulations at 46 CFR 5.569 provide a suggested range from 12 to 24 months for refusal to take a chemical drug test. Therefore, it is necessary to decide whether Respondent’s license should be suspended or whether aggravating factors exist that would justify an upward departure from 12 – 24 months to revocation. In its post hearing brief, the Coast Guard argues that the appropriate sanction is revocation.

Coast Guard’s Argument

In support of its position, the Coast Guard refers to Appeal Decision 2587 (CALLAHAN) (1996). In CALLAHAN, the Respondent was charged with 1) wrongfully refusing to provide a specimen for a post incident drug test; 2) failure to obey an order of the Master regarding the navigation of the vessel; and 3) departing the vessel without being relieved.

The Commandant in CALLAHAN held that the ALJ’s decision to revoke Callahan’s license for refusal to test was not excessive. In the instant case, the Coast Guard’s brief focused on the language in CALLAHAN addressing the appropriateness of revocation for refusing a chemical drug test. Specifically, “[r]efusal to submit to a post incident chemical test raises a serious doubt about a mariner’s ability to perform safely and competently in the future.” The Coast Guard argues that although CALLAHAN deals with a post incident test, the doubts about a mariner’s ability to perform safely and competently in the future logically applies to refusal of any drug test. The Coast Guard alludes to the next sentence in CALLAHAN which reads, “[f]urthermore, if mariners could refuse to submit to chemical testing and face a lesser Order, it is difficult to imagine why anyone that may have used drugs would ever consent to be tested.”

The Coast Guard goes on to cite Appeal Decision 2624 (DOWNS) (2001). In DOWNS, the Respondent's employer told Downs to take a reasonable cause drug test the morning after an arrest for DUI led police to discover a crack pipe on his person. When the Respondent failed to call in or to take the test, he was charged by the Coast Guard for refusing the test. In response to Downs' argument that revocation was unduly harsh given a record of no prior disciplinary action in a thirty year career, the Commandant said,

An Administrative Law Judge has wide discretion to formulate an order adequate to deter the Appellant's repetition of the violations he was found to have committed. (Citations omitted).

Although CALLAHAN and DOWNS concern a post incident and reasonable cause test while the instant case deals with refusing a random test, the Coast Guard argues that there is no logical difference and that all chemical drug tests are equally important in ensuring maritime safety. See generally, Appeal Decision JONES (2003) (Revocation for refusing a random drug test upheld). Therefore, the Coast Guard avers, refusing post incident, reasonable cause, or random drug tests should carry the same sanction – revocation.

Recent NTBS Ruling on Sanctions for Drug Test Refusals

The Coast Guard's excellent discussion of Appeal Decisions 2578 (CALLAHAN) (1996), 2624 (DOWNS) (2001), and 2624 (JONES) (2003) is not only persuasive but it also provides helpful guidance when considering revocation as an appropriate sanction for random drug test refusal cases. However, recent case law from the National Transportation Safety Board requires that the Administrative Law Judge consider additional factors.

In Commandant v. Michael S. Moore, NTSB Order No. EM-201 (2005), the Administrative Law Judge (ALJ) revoked Respondent's license upon finding the "refusal to take a chemical drug test" charge proved. In his Decision and Order, the ALJ referred to 46 CFR 5.569 – Table of Suggested Range of Appropriate Orders, and noted that the suggested range for refusal to take a chemical drug test was suspension from 12 to 24 months. He went on to say that he is not bound by that Table and may exceed the suggested range or impose a sanction less severe when aggravating or mitigating factors are present. The ALJ imposed revocation holding that DOWNS and CALLAHAN are authority for the proposition that ALJs have discretion to formulate an appropriate order to deter mariners from repeating a violation.

On appeal, the Vice Commandant upheld the ALJ's decision stating that the required chemical testing regulations are preventative in nature to reduce the use of intoxicants and provide a drug-free, safe work environment for mariners. He referred to the Table in 46 CFR 5.569 and held that "[t]he authority to impose 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.*" Appeal Decision 2652 (MOORE) (2005).

On appeal, the National Transportation Safety Board specifically addressed 46 CFR Table 5.569. The Board found that

“neither the law judge nor the Vice Commandant articulated any aggravating factors that would justify going beyond the sanction range listed in the Coast Guard’s regulatory guidance. [46 CFR Table 5.569] While they both cited two prior cases in which revocation was imposed for refusal to submit to a drug test, they did not explain why the instant case warranted a sanction beyond the range given in the sanction table. Rather, both decisions merely cited the language in the rule permitting departure from the sanction range in the event aggravating factors are present without describing what those factors were in this case. The law judge included in his sanction discussion a recitation of the facts that led him to find that appellant had failed to comply with the ordered drug test, but made no finding that any of them constituted aggravating factors. The Vice Commandant cited the law judge’s reasoning on the sanction issue, and concluded (at p. 15 of his decision) by stating: ‘If mariners were allowed to refuse to submit to random drug tests and face any order less than revocation, the intent of the Coast Guard’s drug testing regulations would undoubtedly be thwarted. Accordingly, I find that the ALJ did not err in assessing a sanction of revocation in this case.’ This statement essentially constitutes a policy of automatically supporting revocation in every case when a mariner has refused to submit to a random drug test. Such a policy, while perhaps a sensible one, is in conflict with the Coast Guard’s articulation of a 12-24 month suspension as the ‘appropriate’ sanction, absent mitigating or aggravating factors.

Moore, NTSB Order No. EM-201 (2005) at 5, 6.

The NTSB concluded by stating that “unless and until the Coast Guard changes its regulation, we will not uphold an upward departure from the policy currently embodied in the Coast Guard’s regulation without a clearly articulated explanation of aggravating factors.” Therefore, the Board modified Moore’s sanction from revocation to 24 months suspension.

Aggravating Factors

In further support of its argument for revocation, the Coast Guard listed two factors in aggravation: 1) Respondent previously tested positive for cocaine in 1996; and 2) one of Respondent’s crewmen onboard the THAD A, Steven Parfait, tested positive for cocaine and alcohol on June 20, 2005. In addition to the above aggravating factors, there is another aggravating factor: Of the twelve (12) crewmen selected for testing from the three uninspected towing vessels, two refused to test and three others tested positive, one for marijuana, one for marijuana and alcohol, and one for cocaine and alcohol. A “clearly articulated explanation of aggravating factors” follows:

1. The prior positive test for cocaine. Concerning Respondent’s prior positive test for cocaine and his subsequent rehabilitation, it is reasonable to infer that one who has previously gone

through cure, and was actually cured, would have a heightened sense of awareness to avoid even the appearance of association with dangerous drugs. Refusing a random chemical drug test is conduct inconsistent with one who is trying to avoid such an appearance. Further, it raises even more doubt about the mariner's ability to perform safely and competently in the future, especially since Respondent is Master of an uninspected towing vessel. The safety of the vessel and his crew depend on his judgment. Therefore, this aggravating factor is accorded great weight in consideration of an upward departure fashioning an appropriate sanction.

2. One of Respondent's crewman tested positive for cocaine and alcohol. This factor is as close to Respondent as his own refusal. Respondent was not only well aware of Coast Guard regulations and his employer's policy regarding drug testing but he was also trained in his employer's drug and alcohol policy so that he could explain the policy to his crew members. As a supervisor, he was also certified on how to observe personnel exhibiting problematic behavior so that he could document reasonable cause suspicion for testing.

Respondent's crew consisted of 4 mariners including Respondent. It can reasonably be inferred that Respondent would have contact with each crewman on a daily basis and would be in the best position to observe and evaluate their behavior and make appropriate judgments. Therefore, doubts about Respondent's ability to perform safely in the future are evidenced not only by his failure to adhere to his company's substance abuse policy but also to enforce same on his crew.

3. Of the twelve (12) crewmen selected for testing, two refused to test and three others tested positive. That is high by any standard, especially in an industry where all employees are aware that they are subject to chemical testing for dangerous drugs and are also aware of the consequences for noncompliance. The MMSI drug testing technicians even remarked that the results were "pretty high." With over 40% of the company's boat crews refusing to test or testing positive, Respondent's actions reflect that he is part of the problem instead taking action as a supervisor to be part of the solution.

According great weight to the above aggravating factors I find that revocation is the appropriate sanction.

ORDER

IT IS HEREBY ORDERED that Respondent's U.S. Merchant Mariner's License number 1045379 is **REVOKED**. Barry James Trahan shall surrender his license immediately to the nearest Coast Guard Marine Safety Office or to Marine Safety Office Morgan City, 800 David Drive, Room 232, Morgan City, Louisiana 70380.

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 November 22, 2005
New York, NY

WALTER J. BRUDZINSKI
ADMINISTRATIVE LAW JUDGE
U.S. COAST GUARD

ATTACHMENT A

NOTICE OF 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.

ATTACHMENT B

WITNESS AND EXHIBIT LISTS

WITNESS LIST

COAST GUARD'S WITNESSES

1. Thomas Galloway
2. Dustin Dufrene
3. Dallas O'Quinn

RESPONDENT'S WITNESSES

1. Barry James Trahan

EXHIBIT LIST

COAST GUARD'S EXHIBITS

- | | |
|----------|---|
| IO Ex 1 | North Bank Towing Notification letter dated July 5, 2005 and signed by Thomas Galloway 1 page |
| IO Ex 2 | Acknowledgment and Receipt signed by Respondent, 1 page |
| IO Ex 3 | Certificate of Drug and Alcohol Awareness Program, 1 page |
| IO Ex 4 | Dustin Dufrene Certificate of Training for Breath Alcohol |
| IO Ex 5 | Dustin Dufrene Certificate for Specimen Collector, 1 page |
| IO Ex 6 | Letter from Dustin Dufrene and Dallas O'Quinn, 1 page |
| IO Ex 7 | Alcohol Refusal Form, 1 page |
| IO Ex 8 | Drug Screen Refusal Form, 1 page |
| IO Ex 9 | Dallas O'Quinn Substance Abuse Management Specimen Collector Certificate, 1 page |
| IO Ex 10 | Dallas O'Quinn Breath Alcohol Technician Training Certificate, 1 page |

IO Ex 11 Enforcement Summary, 1 page

RESPONDENT'S EXHIBITS

Resp't Ex A To Whom It May Concern letter from Dr. Edmund M. Ring, D.D.S., 1 page

Resp't Ex B Excuse Slip form bearing the printed letterhead of Drs. David and Edmund Ring, D.D.S, filled out in handwriting, 1 page

JUDGE'S EXHIBITS

ALJ Ex I Copy of Respondent's U.S. Merchant Marine Officer License #1045379, 1 page

ATTACHMENT C

RULINGS ON PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

COAST GUARD'S PROPOSED ULTIMATE FINDINGS

1. Barry Trahan, being the holder of U.S. Coast Guard license number 1045379, did on June 20, 2005, refuse to submit urine and breath specimens for a company directed random screen. Mr. Trahan not only departed the collection side, he also departed North Bank Towing's property.

Accepted and incorporated.

COAST GUARD'S PROPOSED EVIDENTIARY FINDINGS

1. On June 20, 2005, North Bank Towing coordinated with M.M.S.I. of Houma, LA to conduct a scheduled random drug/alcohol screen on the UTV *Thad A.* (I.O. Exhibit 1, North Bank Towing notification letter to Coast Guard.)

Accepted and incorporated.

2. On June 20, 2005, the Respondent was assigned to the UTV *Thad A.* and filled the position of Master onboard said vessel. This position required the Respondent to possess a valid Coast Guard License, which he did, license #10045379.

Accepted and incorporated.

3. Dallas O'Quinn and Dustin Dufrene were certified M.M.S.I. collectors assigned to conduct the random drug/alcohol screen aboard the North Bank Towing vessel *Thad A.* on June 20, 2005 (I.O. Exhibit 2, M.M.S.I. Letter).

Accepted and incorporated with the exception that the drug and alcohol screens were conducted in a trailer on North Bank Towing Corporation property, not onboard the *Thad A.* (Finding of Fact 9).

4. All crewmembers onboard the UTV *Thad A.* were informed by Dallas O'Quinn regarding the random drug/alcohol screen and were asked to proceed to the testing location. The Respondent immediately contacted Thomas Galloway, the Human Resources Director for North Bank Towing, to inform him of an emergency dental appointment. Mr. Galloway testified that he informed the Respondent to provide the required sample before departing for his appointment.

Accepted and incorporated.

5. The Respondent did not attend the testing location as ordered and did not submit a urine or breath sample as required by regulations to satisfy the D.O.T random testing requirement. A drug

screen refusal form and alcohol form were completed and signed by Dustin Dufrene, the certified collector. (I.O. Exhibit 3, Alcohol Refusal Form and I.O. Exhibit 4, Drug Test Refusal Form.) Accepted and incorporated except that the referenced exhibit numbers were changed to IO Exhibits 7 and 8 respectively. (Finding of fact 18).

RESPONDENT'S PROPOSED FINDINGS

Respondent submitted no proposed findings of fact.

Certificate of Service

I hereby certify that I have sent this Decision and Order to the following parties and entities by means set forth below:

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Done and dated November 22, 2005
New York, NY

Regina V. Thompson
Paralegal Specialist, Assistant to the
Administrative Law Judge