

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

UNITED STATES COAST GUARD

Complainant

vs.

ALDO R. LOYAL

Respondent.

Docket Number: CG S&R 07-0007
CG Case No. 2855751

DECISION AND ORDER

Issued: February 23, 2007

Issued by: Thomas E. P. McElligott, U.S. Administrative Law Judge

Appearances:

Lt. Robert S. Butts and
YN1 Seth Dugan
U.S. Coast Guard
Commander St. Petersburg
155 Columbia Drive
Tampa, FL 33594
For the Coast Guard

Eric C. Thiel, Esq.
Fowler White Boggs Banker, PA
P.O. Box 1438
Tampa, FL 33601
For the Respondent

PRELIMINARY STATEMENT

This is an expedited proceeding, including expedited hearings and decision and order, and U.S. Coast Guard Investigating Officers seeking revocation of the Merchant Mariner's License (license) issued by U.S. Coast Guard to Aldo R. Loyal, the respondent in this case (Respondent). This action was brought pursuant to 46 U.S.C. 7702(d), 33 CFR Part 20, Subpart L and 46 CFR Part 5.

On Sunday, January 14, 2007, the United States Coast Guard Investigating Officers (Coast Guard or Agency) served a complaint personally on Respondent. The complaint states that on Saturday, January 13, 2007, the Coast Guard temporarily suspended and took possession of the Respondent's license. The jurisdictional allegations of the complaint state that Respondent is the holder of license number 1010870, he performed a safety sensitive function when acting under the authority of that license by serving as master aboard the fishing vessel SHARK; and there is probable cause to believe that Respondent has performed the safety sensitive function in violation of law or regulation regarding the use of alcohol or dangerous drugs. The factual allegations of the complaint state:

1. On 13 January 2007, the Respondent was operating the uninspected passenger vessel (UPV) SHARK.
2. Respondent was acting under the authority of U.S. Merchant Mariner license 1010870 as required by law or regulation.
3. Respondent performed his duties in a manner causing passengers to fear for their personal safety.
4. Respondent was subject to search and was found to be in possession of a syringe, drug paraphernalia and an unknown substance.
5. On 13 January 2007, Respondent was taken to Health works Medical Group drug/alcohol testing facility and provided a urine sample.

On January 16, 2007, this case was assigned to the U.S. Administrative Law Judge Thomas E. P. McElligott for adjudication. The expedited proceeding was conducted in accordance with 33 CFR Part 20 and the U.S. Administrative Procedure Act, codified in 5 U.S.C. §§ 551-59.

Pursuant to 33 CFR 20.1206, a prehearing telephone conference was scheduled and held on January 19, 2007. Lieutenant (Lt.) Robert S. Butts, Respondent Aldo Loyal, and his father, Respondent's employer and vessel owner Gus Loyal, all participated in the prehearing conference. Following the prehearing conference, the allegations contained in the complaint were found proved based on Respondent's admission of use of cocaine on Friday, January 12, 2007. See Appeal Decision 2559 (NEILSEN). The Respondent further admitted that he still felt the effects of the cocaine use the next morning, Saturday, January 13, 2007, when he reported for duty about 7:00 a.m. local or Eastern Time as the only licensed master and captain on board the UPV SHARK. Thus, the remaining issue concerned the sanction and whether the Coast Guard

On February, 7, 2007, Respondent sought issuance of a subpoena to secure the testimony of a substance abuse professional. The subpoena was signed by the Chief Administrative Law Judge for the United States Coast Guard.²

A trial-type evidentiary hearing was held by U.S. Administrative Law Judge, Thomas E. P. McElligott on February 8, 2007 in the R. L. Timberlake, Jr. Federal Building in Tampa, FL as scheduled. The Coast Guard appeared at the hearing represented by Lt. Robert S. Butts and Yeoman First Class (YN1) Seth Dugan. Respondent also appeared at the hearing together with his attorney, Mr. Eric C. Thiel. Eight (8) witnesses testified at the hearing and a total of thirteen (13) exhibits were admitted into evidence by the judge. The witness and exhibit lists are found in Attachment A.

FINDINGS OF FACT

1. Respondent Aldo R. Loyal was the holder of U.S. merchant mariner license number 1010870 (Issue Number 2) that was issued by the Coast Guard on April 19, 2002 and expires on April 19, 2007. (*Coast Guard Exhibit (CG Ex.) 1*).
2. The license authorizes Respondent to serve as an "Operator of uninspected passenger vessels as defined in 46 U.S.C. 2101(42) upon near coastal waters not more than 100 miles offshore for domestic voyages only." (*Id.*)³
3. On January 13, 2007, Respondent served as the only captain and master on board the UPV SHARK, chartered by Joseph Walter Capstick and John Thomas (Tom) Burns who invited four (4) clients from Georgia on a fishing trip in waters about sixty-five (65) miles off the coast of Sarasota, Florida in the Gulf of Mexico (Gulf).
4. In addition to Respondent and his unlicensed mate/deckhand, Thomas (Tom) Ryan Weller, there were a total of six (6) passengers on board the UPV SHARK on Saturday, January 13, 2007.

² On February 7, 2007, the day before the hearing date, Respondent filed a motion for a subpoena of Betty Dominic, the substance abuse professional. The subpoena was signed by the Hon. Joseph N. Ingolia, Chief Administrative Law Judge because the undersigned judge was traveling from Houston, Texas to Tampa, Florida en route to the hearing and was unavailable to sign this subpoena.

³ Title 42 U.S.C. 2101(42) defines "uninspected passenger vessel" as follows:

(42) "uninspected passenger vessel" means an uninspected vessel--
 (A) of at least 100 gross tons as measured under section 14502 of this title, or an alternate tonnage measured under section 14302 of this title as prescribed by the Secretary under section 14104 of this title--
 (i) carrying not more than 12 passengers, including at least one passenger for hire; or
 (ii) that is chartered with the crew provided or specified by the owner or the owner's representative and carrying not more than 12 passengers; and
 (B) of less than 100 gross tons as measured under section 14502 of this title, or an alternate tonnage measured under section 14302 of this title as prescribed by the Secretary under section 14104 of this title--
 (i) carrying not more than 6 passengers, including at least one passenger for hire; or
 (ii) that is chartered with the crew provided or specified by the owner or the owner's representative and carrying not more than 6 passengers.

5. The UPV SHARK is a forty-one (41) foot uninspected six (6) passenger vessel owned by Respondent's father, Giustino (Gus) Loyal. (CG Ex. 2 and 5A).
6. The UPV SHARK is required by law to have a Coast Guard licensed master on board when operating or navigating at sea or in bay waters. See 46 U.S.C. 8301(a)(1).
7. The UPV SHARK departed from Sarasota, Florida around 7:15 A.M. on Saturday, January 13, 2007. The vessel operated only under Respondent's direction and control.
8. Immediately after departing port, the UPV SHARK went for fuel and then went only bait fishing in the Bay in accordance with customary practice.
9. Around 8:00 A.M. on Saturday, January 13, 2007, the UPV SHARK got underway and headed for the Gulf at a slow rate of speed of approximately four (4) knots.
10. Shortly after getting underway, Mr. Weller (Respondent's deckhand and mate) noticed Respondent falling asleep in the captain's chair behind the controls and wheel of the vessel, located on the roof of the vessel's only cabin.
11. Mr. Weller attempted to wake up Respondent, who would stay awake for approximately five (5) minutes and then nod off to sleep again.
12. The passengers observed Mr. Weller attempting to wake Respondent, and asked Mr. Weller what was going on.
13. Mr. Weller indicated Respondent was "out of it."
14. At one point in time, Respondent directed Mr. Weller to bait the rods. Mr. Weller found this request to be quite unusual because the UPV SHARK was only approximately three (3) miles off the coast of Sarasota, Florida.
15. When the passengers asked Respondent what was going on, Respondent expressed a reluctance to speak and when he did speak Respondent's speech was slurred.
16. Sometime between 9:00 A.M. and 10:00 A.M., Mr. Weller used a passenger's cellular telephone to contact Gus Loyal and inform him that there was a problem on board the UPV SHARK, with Respondent, his son.
17. Gus Loyal also spoke with passenger Tom Burns, who expressed concern because the UPV SHARK was just drifting aimlessly off the coast of Sarasota and the passengers were not deep sea fishing.
18. Gus Loyal then called the ship-to-shore telephone and spoke with his son, the Respondent.
19. The passengers overheard Respondent tell his father that the UPV SHARK was 65 miles off shore when, in fact, the vessel was approximately five (5) to seven (7) miles

off shore. The shore was easily visible to the passengers and their phones worked. Usually after 12 miles or more from shore, the cell phones do not operate.

20. Gus Loyal decided to refund the passengers' money for the charter and asked his son, the Respondent, to return the vessel to port. Respondent did not comply with this request.
21. During another telephone conversation, upon the passengers' request, owner Gus Loyal asked seaman Mr. Weller to return the vessel to port even though he was fully aware that Mr. Weller does not hold any Coast Guard license and he was not qualified to navigate and operate the UPV SHARK.
22. Respondent refused to relinquish control of the vessel to Mr. Weller.
23. The passengers became concerned about their safety and about what might happen if they proceeded further out to sea. Consequently, as a precautionary measure, the passengers called the Coast Guard via cellular telephone.
24. When the passengers received the local Coast Guard's telephone answering machine, they called 911 and the attendant placed them in direct contact with the U.S. Coast Guard.
25. Petty Officer (PO) Glenn Janzer of the United States Coast Guard received the call on Saturday, January 13, 2007 around 11:00 am, and organized a boarding team of about 4 U.S. Coast Guard personnel to go out to the UPV SHARK.
26. The passengers notified Respondent that the Coast Guard was on its way.
27. Upon being notified that the Coast Guard was on its way, Respondent agreed to return the UPV SHARK to port.
28. Respondent then ordered his mate/deckhand, Mr. Weller, to pull up the anchor when, in fact, the anchor had not been dropped.
29. Respondent also asked Mr. Weller how many fish were in the vessel's box, which is unusual because the only thing they had in the box was bait because they had not gone fishing.
30. Without warning, on two separate occasions, Respondent threw the vessels controls into full throttle or speed almost causing two passengers to fall off the vessel into the water.
31. One passenger, who had a tracheotomy, grabbed a life jacket.⁴

⁴ A "tracheotomy" is a surgical procedure performed on a human being's neck to open a direct airway through an incision in the throat and trachea (the windpipe). See <http://en.wikipedia.org/wiki/Tracheotomy> (downloaded on 2/13/2007).

32. The passengers eventually managed to push Respondent out of the way, take control of the vessel, and take the keys out of the ignition while Mr. Weller placed the vessel's electronics offline.
33. The passengers provided via cell phones the Coast Guard with the position and coordinates of the UPV SHARK.
34. Respondent retired to the head or bathroom in the lower cabin.
35. Upon Respondent's request, Mr. Weller retrieved Respondent's blue bag (re: contents in exhibits) and gave it to Respondent in the lower cabin where the vessel's head or bathroom was located.
36. Respondent then remained down in the lower cabin's head or bathroom until the Coast Guard arrived.
37. Sometime between 11:30 A.M. and 12:00 noon on Saturday, January 13, 2007, the Coast Guard boarding team boarded the UPV SHARK.
38. The Coast Guard performed a routine vessel inspection.
39. During the investigation, PO Janzer learned that Respondent claimed he was "feeling under the weather," he suffered from a previous injury from an accident not related to this case, and he was taking pain medication.
40. An alcohol field sobriety test was performed. Respondent successfully passed the sobriety test.
41. About ten (10) to fifteen (15) minutes after the Coast Guard's arrival, Respondent's father, Gus Loyal, arrived and the Coast Guard permitted him to board and take control of the UPV SHARK.
42. Respondent was taken aboard the Coast Guard's vessel, and the Coast Guard followed closely behind the UPV SHARK as it approached Marina Jacks in Sarasota, Florida where the Coast Guard's investigation continued. (*CG Ex. 3 and 4*).
43. Coast Guard Investigating Officer, Lt. Robert S. Butts interviewed Respondent and directed him to submit to required chemical testing for dangerous drugs (drug test). (*Id.*).
44. Respondent agreed to submit to drug testing and went to the UPV SHARK to retrieve his blue bag and its many contents from the lower cabin. (*CG Ex. 4*).
45. Lt. Robert S. Butts observed Respondent take something out of Respondent's blue bag and place it in his front left pants pocket. (*CG Ex. 3 and 4*). Investigating Officer Butts requested a body search of Respondent.

46. Respondent then consented to a body search before being transported to the drug testing facility.
47. The Sarasota, Florida Police Department assisted the Coast Guard in the investigation and while searching Respondent located a syringe and a bottle cap containing a small piece of white material enclosed in a cellophane bag in Respondent's front left pants pocket. (*CG Ex. 3, 4, and 5C*).
48. Respondent disputes that the bottle cap contained cocaine. (See *CG Ex. 3 (stating that Respondent admitted that the bottle cap contained cocaine)*; contra *Transcript of Telephonic Prehearing Conference Scheduling Order dated Jan. 19, 2007 (Jan. 19, 2007 Prehearing Telephone Conference Tr.)*, at 25 (*denying that the bottle cap contained cocaine*); *Respondent's Brief on Availability of SWEENEY Cure (Resp. Brief) dated Feb. 5, 2007*, at 1 (*denying the misconduct allegation based on Respondent's possession of cocaine*).
49. At the January 19, 2007 prehearing telephone conference, Respondent stated that the bottle cap contained "spit" out of his mouth, and his "spit" might have contained residual cocaine from his prior use or from rubbing cocaine on his gums but Respondent denied possessing any cocaine in the bottle cap. (*Jan. 19, 2007 Prehearing Telephone Conference Tr. at 24-25*).
50. Police Officer Todd Tschetter of the Sarasota Police Department who formerly handled drug sniffing dogs, testified that a field test was performed on the white material that was found in the bottle cap, and the white material tested positive for cocaine. (*CG Ex. 3 and 4*). As a result, the Sarasota Police Department arrested Respondent and charged him criminally with possession of cocaine and drug paraphernalia. (*Id.*). The possession of cocaine criminal charge was subsequently dropped by the Sarasota Police Department because the cellophane bag containing the bottle cap and cocaine was inadvertently discarded after being in the Sarasota, Florida Police Department's possession as their exhibits.
51. Respondent also authorized the police and the Coast Guard to search his blue carrying bag. (*CG Ex. 4*).
52. Respondent's blue carrying bag contained among other things, a syringe, a prescription bottle, an Advil bottle, an Everglades Seasoning container that was duct taped on both ends, and a clear Ziploc bag that contained several pills that were later identified as oxycodone, hydrocodone, and one other prescription medication. (*CG Ex. 4 and 5E*).
53. The following items were found in the Everglades Seasoning container: 1) a pair of tweezers; 2) a Crest bottle filled with liquid; 3) a white water bottle filled with liquid; 4) a metal container filled with liquid, and 5) a syringe surrounded by a paper towel liner. (*CG Ex. 5F and 5G*). Respondent admitted to using a syringe to help inject himself with cocaine about midnight, Friday, February 12, 2007.
54. Before being arrested, Respondent provided a urine sample for drug testing on Saturday, January 13, 2007. (*CG Ex. 3 and 4*). This drug test by a certified laboratory

and a Medical Review Officer showed a high positive for cocaine use by Respondent within three days prior to Respondent giving his urine sample for drug testing on Saturday, January 13, 2007.

55. During the prehearing telephone conference conducted on January 19, 2007 in this expedited administrative proceeding, Respondent admitted to using cocaine late Friday night about midnight on the 12th of January 2007. (*Jan. 19, 2007 Prehearing Telephone Conference Tr. at 3-5, 7*). Respondent further admitted that he could still feel the effects of the cocaine on the morning of Saturday, January 13, 2007 when he assumed command of the passenger fishing vessel UPV SHARK. (*Id. at 7*).
56. Respondent is currently enrolled in a bona fide substance and drug abuse treatment program. (*Resp't Ex. 1 and 2*). Respondent enrolled following the incidents of January 12 - 13, 2007.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent Aldo R. Loyal and the subject matter of this proceeding fall within the jurisdiction vested in the Coast Guard under 46 U.S.C. 7702(d).
2. The Coast Guard proved by a preponderance of reliable, probative, substantial and credible evidence that on Saturday, January 13, 2007, Respondent was a merchant mariner license holder performing in a safety sensitive function while acting under the authority of that license by serving as the only licensed master on board the UPV SHARK; and there is probable cause to believe that Respondent performed those safety sensitive function in violation of law or regulation regarding the use of alcohol or dangerous drugs.
3. The Coast Guard's use of dangerous drugs allegation is proved based on Respondent's admission of use of cocaine. See Appeal Decision 2559 (NEILSEN).
4. The Coast Guard's misconduct allegation based on Respondent's wrongful possession of a dangerous drug (to wit cocaine) and paraphernalia is proved by a preponderance of the evidence.
5. The mere fact that the Sarasota Police Department dropped the criminal drug possession charge because the evidence supporting the charge was inadvertently discarded does not vitiate the Coast Guard's misconduct allegation. See generally Appeal Decision 2331 (ELLIOTT) (1983).
6. The Coast Guard's negligence allegation is proved by a preponderance of the evidence.
7. Under 46 CFR 5.59(a), the only appropriate sanction is revocation.

DISCUSSION

In these proceedings, the burden of proof is on the Coast Guard to prove the allegations contained in the complaint by a preponderance of the evidence. See 33 CFR 20.702(a); 5 U.S.C. 556(d); Appeal Decision 2573 (JONES) (1996) (citing Steadman v. Securities Exch. Comm'n, 450 U.S. 91 (1981)). The term "preponderance of the evidence" is synonymous with substantial evidence. Appeal Decision 2477 (TOMBARDI) (1988). Preponderance of the evidence is the standard of proof enunciated in the U.S. Administrative Procedure Act ("APA"), 5 U.S.C. 551-59. It is the standard of proof which governs Coast Guard suspension and revocation trial-type hearings and proceedings. See 46 U.S.C. 7702(a) (adopting the APA for Coast Guard suspension and revocation hearings).

Under the APA, sanctions may only be imposed if upon consideration of the record as a whole the allegations are supported by "reliable, probative, and substantial evidence." 5 U.S.C. 556(d). This simply requires the Coast Guard to establish to the trier of fact "that the existence of a fact is more probable than its nonexistence . . ." 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, 371-372 (1970). (Harlan, J., concurring) (brackets in original)). In doing so, the Coast Guard may rely on either direct or circumstantial evidence, or both. See Simkins v. R.L. Morrison & Sons, 107 F.2d 121, 122 (5th Cir. 1939) (holding that, in the absence of proof to the contrary, the circumstances show that the fire onboard the tug SALLIE was the result of respondent's negligence); United States v. Bethlehem Steel Co., 302 F. Supp. 600, 604 (D. Md. 1969) (ruling that "the government's case may be proved by circumstantial as well as direct evidence"); Detyens Shipyards, Inc. v. Marine Indus., Inc., 234 F. Supp. 411, 414 (D.C. SC 1964) (finding that the tug captain was negligent even though there was no direct evidence).

In its brief dated February 1, 2007, the Coast Guard clarifies that the complaint filed on January 16, 2007 is not exclusive to a use of a dangerous drug allegation. The Coast Guard alleges that Respondent committed three separate offenses: 1) Use of Dangerous Drugs; 2) Negligence; and 3) Misconduct. First, the Coast Guard alleges that while acting under the authority of his license by serving as the only licensed Master aboard the UPV SHARK on January 13, 2007, Respondent used a dangerous drug, cocaine, in violation of law and Federal regulation. Second, the Coast Guard alleges Respondent was negligent when he operated the UPV SHARK on January 13, 2007 under the influence of a dangerous drug and he endangered the lives, limbs and properties of others. Third, the Coast Guard alleges Respondent committed misconduct by possessing a dangerous drug and drug paraphernalia on January 13, 2007. After careful review of the facts and applicable law, all three allegations are found proved by the Coast Guard Investigating Officers.

I. Jurisdictional Allegations are Proved

The Coast Guard is authorized under 46 U.S.C. 7702(d) to take possession and temporarily suspend a merchant mariner's credentials under certain circumstances. Section 7702(d) provides in pertinent part as follows:

- (d)(1) The Secretary may temporarily, for not more than 45 days, suspend and take possession of the license, certificate of registry, or merchant mariner's document held by an individual if--
- (A) that individual performs a safety sensitive function on a vessel, as determined by the Secretary; and
 - (B) there is probable cause to believe that the individual--
 - (i) has, while acting under the authority of that license, certificate, or document, performed the safety sensitive function in violation of law or Federal regulation regarding use of alcohol or a dangerous drug . . .

See 46 U.S.C. 7702(d)(1).

To prevail on the jurisdictional allegations, the Coast Guard must show: 1) Respondent possesses or holds Coast Guard issued credentials; 2) Respondent performs a safety sensitive function on a vessel; and 3) there is probable cause to believe that Respondent has, while acting under the authority of his Coast Guard issued credentials, performed a safety sensitive function in violation of law or Federal regulation regarding use of alcohol or a dangerous drug.

In this case, there is no dispute that Respondent holds a Coast Guard issued merchant mariner license that was issued by the Coast Guard on April 19, 2002. (*Coast Guard Exhibit (CG Ex.) 1*). There is also no dispute that, on Saturday, January 13, 2007, Respondent was serving as the only licensed master or captain on board the UPV SHARK. (*Entire Administrative Record*). The Commandant has long recognized the captain or master as the primary individual responsible for the safety of the vessel, its crew, and its passengers. See Appeal Decision 2098 (CORDISH) (1977); Appeal Decision 976 (WILLIAMS) (1957). Therefore, serving as a captain or master on board such a vessel is deemed and found to be a safety sensitive function. Consequently, the first and second elements of the jurisdictional allegations are found proved.

The Coast Guard Investigating Officers have also proved and established by a preponderance of reliable, probative, substantial and credible evidence that, on January 13, 2007, probable cause existed to believe that Respondent, while acting under the authority of his license, performed a safety sensitive function by serving as the only master on board the UPV SHARK in violation of law or Federal regulation regarding use of alcohol or a dangerous drug. A mariner is deemed to be "acting under the authority of his license" when the holding of such a license is required by law or as a condition of employment. See 46 CFR 5.57(a). The UPV SHARK is a forty-one (41) foot uninspected six (6) passenger vessel, which is required under 46 U.S.C. 8301(a)(1) to have a licensed master on board when navigating or operating on navigable waters. (*CG Ex. 2 and 5A*). There were a total of eight (8) people aboard on the date in question and more vessels and people nearby.

The record evidence shows that the Coast Guard had probable cause to believe that Respondent was operating the UPV SHARK on January 13, 2007 while impaired by alcohol or a dangerous drug. PO Janzer of the Coast Guard testified that a boarding team was organized after he received an emergency telephone call from passengers on the UPV SHARK who thought Respondent was operating the vessel under the influence of alcohol or a dangerous drug.

Accordingly, the Coast Guard has established the jurisdictional allegations by a preponderance of reliable, probative, substantial and credible evidence.

II. The Use of Dangerous Drug Allegation is Proved by Respondent's Admission

Now turning to the Use of Dangerous Drug allegation, Congress enacted 46 U.S.C. 7704(c) with the express intent of removing those individuals using a dangerous drug from service on board United States vessels. See House Rep. 338, 98th Cong., 1st Sess. 177 (1983); see also Appeal Decision 2634 (BARRETTA) (2002). Under 46 U.S.C. 7704(c), revocation of a merchant mariner's license is required when it is proved at a trial-type hearing before a U.S. Administrative Law Judge that the merchant mariner is a user of, or addicted to, a dangerous drug such as cocaine unless the mariner provides satisfactory proof of cure. A "dangerous drug" is "a narcotic drug, a controlled substance, or a controlled-substance analog (as defined in section 102 of the Comprehensive Drug Abuse and Control Act of 1970 (21 U.S.C. 802))." See 46 CFR 16.105. By definition, cocaine is recognized as a "dangerous drug". See Id.; 21 U.S.C. 802(17).

During the prehearing telephone conference conducted on January 19, 2007, Respondent admitted that he used cocaine between late Friday night and midnight Friday on the 12th of January 2007. (*Jan. 19, 2007 Prehearing Telephone Conference Tr. at 3-5, 7*). Respondent not only admitted that he used cocaine prior to assuming command of the UPV SHARK around 7:00 A.M. on Saturday, January 13, 2007, but he also described the manner in which the cocaine was injected by Respondent into his body. (*Id.*).

Here, Respondent's admission is sufficient to support a finding that an allegation is proved. See Appeal Decision 2559 (NEILSEN) (1995). Respondent's admission also obviates the need for the Coast Guard to otherwise prove or establish a prima facie case, and constitutes a waiver of all non-jurisdictional defects and defenses. See generally Appeal Decision 2376 (FRANK) (1985) (holding that a guilty plea obviates the requirement for otherwise establishing a prima facie case); Appeal Decision 2385 (CAIN) (1985).

III. The Negligence Allegation is Proved by a Preponderance of the Evidence

The Coast Guard's allegation of Negligence is also proved. In these proceedings, Negligence is defined as "the commission of an act which a reasonable and prudent person of the same station, under the same circumstances, would not commit, or the failure to perform an act which a reasonable and prudent person of the same station, under the same circumstances, would not fail to perform." See 46 CFR 5.29. Consequently, the breach of the standard of care alone constitutes Negligence. See Appeal Decision 2395 (LAMBERT) (1985). Contrary to the argument of Respondent's counsel, actual damage or injury is not a required element to be proved by the Coast Guard in these proceedings. *Id.* Likewise, causation is also not a required element of negligence that the Coast Guard must prove in order to prevail. *Id.* To prevail, the Coast Guard need only show duty and breach of duty on the part of the respondent. See generally Appeal Decision 2599 (GUEST) (1998).

As previously indicated a captain or a master on board and in charge of a vessel has a duty to ensure the safety of the vessel, its crew, and its passengers. See Appeal Decision 2098 (CORDISH); Appeal Decision 976 (WILLIAMS). Operating a vessel under the influence of a dangerous drug (i.e., cocaine) constitutes a breach of the master's duty of care. See generally Appeal Decision 2098 (CORDISH). A mariner is deemed to be operating "under the influence of a dangerous drug" when the individual is operating any vessel and the effect of the intoxicant(s) consumed by the individual on the person's manner, disposition, speech, muscular movement, general appearance or behavior is apparent by observation. See 33 CFR 95.020(c).

During the prehearing telephone conference conducted on January 19, 2007, Respondent admitted that he could still feel the effects of the cocaine on the morning of Saturday, January 13, 2007 when he assumed command and control of the UPV SHARK. (*Jan. 19, 2007 Prehearing Telephone Conference Tr. at 7*). Further, at the trial-type evidentiary hearing held on February 8, 2007, the witnesses all testified that, on January 13, 2007, Respondent kept nodding off to sleep behind the steering wheel and controls of the vessel, Respondent was non-responsive and, when he did speak, Respondent's speech was slurred. The witnesses also testified that Respondent did not know his vessel's location. This point is evidenced by the fact that the witnesses overheard Respondent tell his father, Gus Loyal, that the vessel was 65 miles offshore when, in fact, the vessel was only 5 to 7 miles offshore. This point is further evidenced by the fact that Respondent thought the anchor had been dropped and he had taken the passengers fishing, when in fact the anchor had not been dropped and, except for only bait fishing in Tampa Bay, the passengers had not been taken deep sea fishing. These facts, viewed in totality, clearly prove and establish that Respondent operated the UPV SHARK under the influence of a dangerous drug on January 13, 2007. Thus, the Coast Guard has proved Respondent's Negligence by a preponderance of reliable, probative, substantial and credible evidence.

IV. The Misconduct Allegation was Proved by a Preponderance of Reliable, Probative, Substantial and Credible Evidence

Misconduct is defined in 46 CFR 5.27 as "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. See 46 CFR 5.27. The Misconduct of which Respondent is charged in this case stems from his alleged wrongful possession of a dangerous drug (i.e., cocaine) and drug paraphernalia in violation of Florida Statute 893.13 and 893.147.⁵

The record evidence clearly establishes Respondent possessed drug paraphernalia, including several syringes, in violation of Florida law. (*CG Ex. 3, 4, 5C, 5F and 5G*). The ultimate question is whether the Coast Guard proved by a preponderance of the evidence that Respondent wrongfully possessed cocaine.

⁵ Florida Statute 893.13 makes it unlawful for any person to possess, with the intent to sell, a dangerous drug. And, Florida Statute 893.147 makes it unlawful for any person to possess, with the intent to use, drug paraphernalia such as Respondent possessed in his pants and/or his blue carrying bag (see exhibits and colored photographs in evidence) of the drug paraphernalia and syringe. Respondent admitted using a syringe to inject cocaine into his hand.

Respondent disputes that the bottle cap contained cocaine. (*Jan. 19, 2007 Prehearing Telephone Conference Tr. at 25 (denying that the bottle cap contained cocaine); Resp. Brief at 1 (denying the misconduct allegation based on Respondent's possession of cocaine)*). At the January 19, 2007 prehearing telephone conference, Respondent stated that the bottle cap contained "spit" from his mouth. (*Jan. 19, 2007 Prehearing Telephone Conference Tr. at 24-25*).

At the trial-type hearing conducted on February 8, 2007, Police Officer Tschetter of the Sarasota, Florida Police Department testified that a field test was performed on the white material that was found in the bottle cap, and the white material tested positive for cocaine. (*CG Ex. 3 and 4*). A field test is sufficient to support a finding that the white material at issue in this case was cocaine. See Appeal Decision 2525 (ADAMS) (1991). The simple fact the white material was inadvertently lost/discarded and the Sarasota, Florida Police Department dropped the criminal possession of cocaine charge do not give rise to a finding that the misconduct allegation of this trial-type hearing is not proved. The amount or quantum of proof required in a criminal case is much higher and differs markedly from the amount or quantum of proof required in an administrative trial-type proceeding or hearing. See Appeal Decision 2254 (YOUNG) (1981); see also Appeal Decision 2493 (KAAUA) (1989) (holding that proof beyond a reasonable doubt is not the standard to be applied in these administrative proceedings); Appeal Decision 2346 (WILLIAMS). The preponderance of the evidence is the standard of proof that must be met by the Coast Guard Investigating Officers in these trial-type hearings before U.S. Administrative Law Judges.

Respondent's stated that the bottle cap contained "spit" from his mouth and the "spit" might have contained residual amounts of cocaine. (*Jan. 19, 2007 Prehearing Telephone Conference Tr. at 24-25*). This is especially true given the fact that Respondent possessed drug paraphernalia and, he admitted to using cocaine a mere 7 to 8 hours before assuming command of the UPV SHARK on January 13, 2007. Accordingly, the Misconduct allegation is proved by the Coast Guard by a preponderance of reliable, probative, substantial and credible evidence.

SANCTION

The main purpose of suspension and revocation proceedings is to protect lives and property against actual and potential dangers and not to assess blame for casualties. 46 U.S.C. 7701(a). The selection of an appropriate order is exclusively within the purview of the judge. 46 CFR 5.569(a). Since this case involves wrongful use and possession of dangerous drugs, the Coast Guard correctly points out that 46 CFR 5.59 is applicable. See generally Appeal Decision 2518 (HENNARD) (1991). Section 5.59 lists the offenses for which revocation of licenses, certificates of documents are mandatory. See 46 CFR 5.59. These offenses include "misconduct for wrongful possession, use, sale, or association with dangerous drugs." 46 CFR 5.59(a). This regulation also provides for revocation where "[t]he respondent has been a user of, or addicted to the use of, a dangerous drug." 46 CFR 5.59(b).

Where, as here, an allegation of misconduct based on possession of dangerous drugs is found proved, the judge is required to issue an order of revocation unless the dangerous drug is marijuana and the judge is satisfied that the possession was a result of experimentation by the

respondent and the respondent has submitted satisfactory evidence of cure. 46 CFR 5.59(a); Appeal Decision 2476 (BLAKE) (1988); Appeal Decision 2471 (BARTLETT) (1988); Appeal Decision 2121 (GIBBLE) (1978). In Appeal Decision 2535 (SWEENEY) (1992), the Commandant held that a mariner could establish proof of cure by showing that he had successfully completed a drug abuse rehabilitation program and that he had not had any associations with drugs for at least one year as evidenced by successful participation in an active drug abuse monitoring program which incorporates random, unannounced drug testing during that year. The Commandant has also held where a Respondent demonstrates "substantial involvement in the cure process by proof of enrollment in an accepted [drug] rehabilitation program," a judge may stay the revocation and continue the hearing. Appeal Decision 2634 (BARRETTA) (2002); see also Commandant Review Decision 18 (CLAY).

In this case, the Coast Guard proved that Respondent used and possessed cocaine, not marijuana. Therefore, the undersigned has no choice but to revoke under 46 CFR 5.59(a).

While revocation is a severe order, it is not necessarily permanent. The undersigned judge recognizes that Respondent has taken appropriate early steps by enrolling in a bona fide drug rehabilitation program. (*Resp. Ex. 1 and 2*). Consequently, Respondent's attention is directed to 33 CFR 20.904(f), which allows a respondent, within three (3) years or less after his Coast Guard issued mariner license or document is revoked, to file a written motion to reopen this matter and seek modification of the order of revocation upon a showing that the order of revocation is no longer applicable and the issuance of a new license, certificate, or document is compatible with the requirement of good discipline and safety of lives and properties at sea. In cases involving wrongful use and/or possession of dangerous drugs, the revocation order may be modified upon a showing that the individual or Respondent:

- (1) Has successfully completed a bona fide drug abuse rehabilitation program;
- (2) Has demonstrated complete non-association with dangerous drugs for a minimum of one year following completion of a drug rehabilitation program and;
- (3) Is actively participating in a bona fide drug abuse monitoring or testing program.

See generally 46 CFR 5.901. The drug abuse monitoring program must include random, unannounced testing during that year. Appeal Decision 2535 (SWEENEY).⁶

WHEREFORE,

⁶ After three years, Respondent may apply directly to the U.S. Coast Guard in Washington, DC, U.S. Coast Guard Headquarters, for issuance of a new license. See 46 CFR 5.901 to 5.905, Subpart L.

ORDER

IT IS HEREBY ORDERED that the Merchant Mariner's License issued to Respondent Aldo R. Loyal is **REVOKED**.

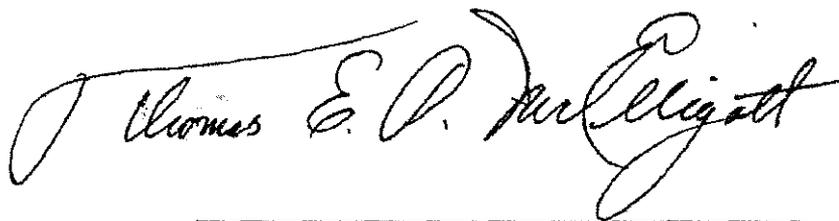
PLEASE TAKE NOTICE that, within three (3) years or less, Mr. Loyal may file a motion to reopen this matter and seek modification of the order of revocation upon a showing that the order of revocation is no longer applicable and the issuance of a new license, certificate, or document is compatible with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

- (1) Has successfully completed a bona fide drug abuse rehabilitation program;
- (2) Has demonstrated complete non-association with dangerous drugs for a minimum of one year following completion of the drug rehabilitation program; and
- (3) Is actively participating in a bona fide drug abuse monitoring and testing program.

See generally 46 CFR 5.901. The drug abuse monitoring program must incorporate random, unannounced testing during that year. Appeal Decision 2535 (SWEENEY)

PLEASE TAKE FURTHER NOTICE that the service of this Decision and Order on the Respondent's counsel serves as notice to the Respondent of his right to appeal, the procedures for which are set forth in 33 CFR 20.1001 through 20.1003.

Done and dated February 23, 2007
Houston, Texas



Thomas E.P. McElligott
Administrative Law Judge

ATTACHMENT A**WITNESS AND EXHIBIT LISTS****WITNESS LIST****COAST GUARD'S WITNESSES**

1. Giustino (Gus) Loyal – Respondent's father, employer & owner of vessel FV SHARK
2. Petty Officer Glenn Janzer, - USCG
3. Thomas (Tom) Ryan Weller - mate aboard FV SHARK
4. Joseph Walter Capstick - passenger
5. John Thomas (Tom) Burns - passenger
6. Howell Junior Edwards - passenger
7. Police Officer Todd Tshetter - Sarasota, FL, Police Dept, formerly drug sniffing dog handler

RESPONDENT'S WITNESSES

1. Elizabeth "Betty" Dominic - Drug counselor for Respondent ALDO R. LOYAL

EXHIBIT LIST**COAST GUARD'S EXHIBITS**

- IO Ex. 1 Merchant Mariner License issued to Aldo R. Loyal, Respondent, by USCG
- IO Ex. 2 Vessel Critical Profile for the UPV SHARK, passenger fishing vessel
- IO Ex. 3 Sarasota County, FL Probable Cause Affidavit
- IO Ex. 4 Sarasota, FL Police Department Incident Report
- IO Ex. 5A Color Photo of the UPV Shark, passenger fishing vessel
- IO Ex. 5B Color Photo of Contents of Aldo R. Loyal's Blue traveling Bag – taken by Sarasota, FL Police

- IO Ex. 5C Color Photo of Syringes and Cellophane Bag found in Respondent's possession
- IO Ex. 5D Color Photo of Aldo R. Loyal's Blue Traveling Bag
- IO Ex. 5E Color Photo of Contents of Aldo R. Loyal's Blue Traveling Bag
- IO Ex. 5F Color Photo of Contents of the Everglade Seasoning Bottle
- IO Ex. 5G Color Photo of the Crest Bottle and White Bottle

RESPONDENT'S EXHIBITS

Resp't Ex. 1 Substance Abuse Participation Plan

Resp't Ex. 2 Verification of Enrollment in Coastal Behavioral Healthcare, Inc. Drug Treatment Program by Respondent Aldo R. Loyal after January 13, 2007.

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.