

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

UNITED STATES COAST GUARD

Complainant

vs.

JOHN C. RUSSELL

Respondent.

Docket Number: CG S&R 06-0578
CG Case No. 2812911

DECISION AND ORDER

Issued: January 30, 2008

Issued by: Hon Thomas E. McElligott, Administrative Law Judge

Appearances:

For the Coast Guard

LTJG Lincoln Puffer
Ens. Patrick Grizzle
MSU Morgan City
800 David Drive
Morgan City, LA 70380

For the Respondent

Mr. John Charles Russell, *pro se*

PRELIMINARY STATEMENT

The United States Coast Guard (Coast Guard) initiated this administrative action seeking revocation of the Merchant Mariner's Document (MMD) issued to John Charles Russell, the Respondent. This case was brought pursuant to the legal authority contained in 46 U.S.C. 7701-05 and 46 Code of Federal Regulations (CFR) Part 5.

On December 11, 2006, the Coast Guard filed and served a Complaint pursuant to 46 U.S.C. 7703 and 46 CFR 5.33 (Violation of Law or Regulation) against Respondent. The jurisdictional allegations of the complaint state, in pertinent part, that Respondent acted under the authority of his MMD on September 21, 2006 by serving as an Able Seaman aboard the vessel DISCOVERY as required by his employer as a condition of employment. The factual allegations state that Respondent committed a Violation of Law or Regulation by refusing to submit a urine sample for a required random drug test on September 21, 2006.

Respondent filed a timely Answer to the Complaint. Therein, Respondent admitted the jurisdictional allegations but denied that he was asked to submit to a drug test. He also denied that he ever refused to submit a urine sample. The sole issue in this case is whether Respondent's actions on September 21, 2006 constitute a refusal to test within the meaning of 46 CFR 16.105 and 49 CFR 40.191(a).

A hearing was held in Morgan City, Louisiana on August 29, 2007. The hearing was conducted in accordance with the Administrative Procedure Act (APA), amended and codified at 5 U.S.C. 551-59, the Coast Guard Administrative Procedure statute codified at 46 U.S.C. 7702, and the procedural regulations governing Suspension & Revocation (S&R) proceedings codified at 33 CFR Part 20. Five (5) witnesses (including Respondent) testified at the hearing and seven

(7) exhibits were admitted into evidence. The list of witnesses and exhibits is contained in Attachment B.

Following the hearing, the parties were provided an opportunity to file post-hearing briefs, including proposed findings of facts and conclusions of law. Both parties timely filed post-hearing briefs. Rulings on the Coast Guard's proposed findings of fact are contained in Attachment C. No rulings on Respondent's proposed findings of fact are rendered because he failed to enumerate such findings. However, the facts and issues raised in Respondent's post-hearing brief are addressed in the body of this Decision.¹

FINDINGS OF FACT

The following facts are established by a preponderance of the evidence based on a thorough and careful analysis of the witnesses' testimony and documentary evidence:

1. As a condition of employment with Diamond Services Corporation (Diamond Services Corp.), on September 21, 2006 and all relevant times mentioned herein, Respondent was the holder of a MMD that authorizes him to serve as an able seaman on offshore supply vessels (AB-Special (OSV)). (*Investigating Officer Exhibit (IO Ex.) 2; Transcript (Tr.) at 39*).²
2. Respondent has been a merchant mariner since 1968 and he has no record of prior violations. (*Transcript (Tr.) at 112-13*).

¹ See generally American President Lines, Inc. v. NLRB, 340 F.2d 490, 492 (9th Cir. 1965) (holding that where the Agency's order informs the parties of disposition of all of its exceptions, the APA is not violated simply because the Agency failed to make separate rulings on each exception and state the reasons for such rulings); but see Appeal Decision 2502 (RABATSKY) (1990) (ALJ's rulings on proposed findings of fact were found deficient where the judge failed to issue a brief statement specifying those portions of the proposed findings that were accepted, those that were rejected, and the reasons therefore).

² The MMD also contained a Wiper endorsement and an endorsement authorizing Respondent to serve as a foodhandler (FH) in the stewards department. (*IO Ex. 2*).

3. Upon accepting employment, Respondent received and signed Diamond Services Corp.'s Drug/Alcohol Policy (Drug/Alcohol Policy). (*IO Ex. 1*).
4. The Drug/Alcohol Policy provides for random drug/alcohol testing of all Diamond Services Corp. employees at any time. (*Id. at 1*).
5. Prior to commencing employment with Diamond Services Corp., Respondent also consented to being tested for the use of drugs and/or alcohol by signing the company's Investigations and Searches Policy. (*IO Ex. 4*).³
6. At all relevant times on September 21, 2006, Respondent served under the authority of his MMD on the OSV DISCOVERY, owned and operated by Diamond Services Corp. (*Tr. at 35, 116*).
7. On September 21, 2006, David Myron Rattray, Sr. served as the Vessel Manager/Port Captain aboard the OSV DISCOVERY. (*Tr. at 27, 30*). Early that same day, Mr. Rattray received notification that a random drug test would be conducted aboard the OSV DISCOVERY by Multi-Management Services, Incorporated (MMSI), a third party contractor. (*Tr. at 31-33*).
8. Between 2:00 p.m. and 2:30 p.m., Mr. Charles Ledet, a collector for MMSI, arrived to conduct a random drug test on the entire crew aboard the OSV DISCOVERY. (*Tr. at 32-34*).
9. When Mr. Ledet arrived on the vessel, Mr. Rattray told him how many people had to be tested and ordered all the crewmembers to come into the galley. (*Tr. at 81, 86*).

³ It is noted that the Safety/Supervisor failed to sign the Investigations and Searches Policy. No determination is made concerning whether the Investigations and Searches Policy is effective without the Safety Supervisor's signature.

10. Once the crew assembled in the galley, Mr. Ledet identified himself and advised the crew that a random drug test would be performed. From that point in time, everyone in the galley was on lock down – they could not leave. (*Tr. at 81, 87-88*).
11. Mr. Rattray testified that Mr. Ledet began the collection process by securing the area in the ship’s galley, requesting everyone’s identification card (ID), and completing the drug testing paperwork in accordance with applicable regulations. (*Id.*).
12. At 2:45 p.m. on September 21, 2006, Respondent could not be found on board the OSV DISCOVERY or Diamond Service Corp.’s premises; therefore, in accordance with MMSI company policy, Mr. Ledet recorded the test as “refusal to take test” and a “refusal to sign” because Respondent was present in the galley at the time testing commenced. (*IO Ex. 3; Tr. at 81-86, 88*).
13. At the time Mr. Ledet recorded Respondent’s test as a “refusal”, he had not seen Respondent, nor had he personally asked Respondent for a urine sample. Mr. Ledet based his determination solely on the headcount that had been provided by Mr. Rattray, and the fact that everyone except one person had been accounted for - - that person was the Respondent. (*Tr. at 81-86*).
14. Respondent terminated employment with Diamond Services simultaneously as the collector for MMSI was setting up for the urine specimen collection on board the OSV DISCOVERY on September 21, 2006. (*Tr. at 20, 23-24, 116-17, 119-20*).

15. Respondent was disgruntled about his daily salary. He expected to receive a minimum salary of \$ 225.00 per day; instead the paycheck received on September 20, 2006 reflected a salary of \$195.00 per day which Respondent found to be unacceptably low. (*Respondent Exhibit (Resp't Ex.) 1; Tr. at 21, 40-41, 50, 55, 61-64, 119*).
16. Upon receiving a daily salary of \$195.00, Respondent packed his bags to leave the vessel; then he orally provided Mr. Rattray with his notice of termination - that notice of termination was provided on September 21, 2006, which was the same date of the drug test. (*Tr. at 20, 23-24, 49, 56, 116-17*).
17. Mr. Rattray does not recall whether Respondent's bags were packed, but Mr. Rattray recalls that the drug screener was present on board the vessel when Respondent provided his oral notice of termination, Mr. Rattray also acknowledges that Respondent was dissatisfied with his salary. (*Tr. at 50, 60-62*).
18. Under Diamond Services Corp.'s policy, a verbal resignation is an acceptable means of terminating employment; however, the individual must immediately vacate the premises because the individual is subject to Diamond Services Corp.'s regulations (including the drug testing policies) so long as that individual remains on the premises. (*IO Ex. 4; Tr. at 60, 68-71*).
19. Mr. Rattray advised Respondent that he was going to attempt to secure a pay increase to \$215.00 for Respondent and his co-worker. By immediately terminating his employment rather than waiting for subsequent pay checks, Respondent never gave Mr. Rattray the opportunity to commence the procedures necessary to secure the requested pay increase. (*Resp't Ex. 1; Tr. 50, 62, 67-68*).

DISCUSSION

The U.S. Administrative Procedure Act (APA), codified at 5 U.S.C. 551-59, governs Coast Guard S&R proceedings. 46 U.S.C. 7702(a). The APA only authorizes imposition of sanctions 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). “The term substantial evidence is synonymous with preponderance of the evidence as defined by the Supreme Court.” Appeal Decision 2477 (TOMBARI) (1988). The burden of showing something 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 Prods. of California, Inc. v. Constr. 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 applicable procedural regulations, the Coast Guard bears the burden of proving the allegations 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 violation alleged.

The regulations governing chemical testing of certain merchant mariners for dangerous drugs is codified in 46 CFR Part 16, which adopts by reference the Department of Transportation’s (DOT) Procedures for Transportation Workplace Drug and Alcohol Testing codified in 49 CFR Part 40. See 46 CFR 16.201(a). The Coast Guard drug testing regulations require marine employers to establish programs for the chemical testing for dangerous drugs on a random basis of crewmembers on inspected vessels who occupy positions that directly affect the safe navigation and operation of a vessel and who, in an emergency, are assigned to tasks critical

to the safety of the vessel and its passengers. See 46 CFR 16.230(a); see also Transportation Inst. v. United States Coast Guard, 727 F. Supp. 648, 655-58 (D. Ct. DC. 1989) (enjoining the Coast Guard from implementing the part of the drug testing rules that required random drug testing of all crew members).

Under 46 CFR 16.105, a mariner “refuses to submit” when that individual “refuse[s] to take a drug test as set out in 49 CFR 40.191. That section provides in pertinent part as follows:

As an employee, you have refused to take a drug test if you [among other things]

(1) Fail to appear for any test (except a pre-employment test) within a reasonable time, as determined by the employer, consistent with applicable DOT agency regulations, after being directed to do so by the employer. This includes the failure of an employee (including an owner-operator) to appear for a test when called by a C/TPA [Consortium/Third Party Administrator] (see § 40.61(a));

(2) Fail to remain at the testing site until the testing process is complete; Provided, That an employee who leaves the testing site before the testing process commences (see § 40.63(c)) for a pre-employment test is not deemed to have refused to test;

(3) Fail to provide a urine specimen for any drug test required by this part or DOT agency regulations; *Provided*, That an employee who does not provide a urine specimen because he or she has left the testing site before the testing process commences (see § 40.63 (c)) for a pre-employment test is not deemed to have refused to test;

See 49 CFR 40.191(a). A mariner’s refusal or failure to submit to drug/alcohol testing constitutes a Violation of Regulation. See 46 CFR 5.569(d); but see Appeal Decision 2641 (JONES) (2003) (affirming judge’s finding of Misconduct proved based on mariner’s refusal to submit to drug testing ordered by employer); Appeal Decision 2615 (DALE) (2000).

In this case, Respondent expressed dissatisfaction regarding the daily salary of \$195.00 to the port captain when he first boarded the OSV DISCOVERY on September 15, 2006. (*Resp’t Ex. 1*). At the evidentiary hearing, Mr. Rattray acknowledged Respondent’s dissatisfaction with respect to the salary. (*Tr. at 50, 60-62*). The record evidence also shows that Respondent did not

plan to wait very long to see a salary increase. (*Resp't Ex. 1*). While it may have been prudent for Respondent to have waited to see whether Mr. Rattray could successfully secure the salary increase, Respondent was under no obligation to do so.

Louisiana is an "at-will" employment state in which employers may terminate employees for any reason or no reason and employees are free to leave their employment at any time.

Article 2747 of the Louisiana Civil Code provides:

A man is at liberty to dismiss a hired servant attached to his person or family, without assigning any reason for so doing. The servant is also free to depart without assigning any cause.

In other words, employment may be terminated by either party at any time or for any reason without liability. Fauntleroy v. Rainbow Marketers, 888 So.2d 1045, 1048 (La. App. 2004).

Respondent's undisputed testimony establishes that on September 21, 2006, after receiving a paycheck containing an unacceptable salary, Respondent boarded the OSV DIAMOND, packed his bags with the intent to quit, and he subsequently provided Mr. Rattray, his supervisor, an oral notice of resignation. (*Tr. at 20, 23-24, 49, 56, 116-17*). At the time the notice of resignation was rendered, the urine specimen collector happened to be on board the vessel. (*Tr. at 20, 23-24, 116-17, 119-20*). This appears to be a coincidence.

There is no evidence establishing that Respondent had prior knowledge of the random drug screen or that Respondent terminated his employment with Diamond Services specifically to avoid submitting to the drug test. Mr. Rattray's testimony that once it was Respondent's turn to produce his ID, he said, "No, I quit. I'm not taking this test"; then, he left the boat is not credible. (*Tr. at 34, 60-61*). Mr. Rattray does not recall whether Respondent's bags were packed, but Mr. Rattray merely recalls that the drug screener was present on board the vessel when Respondent provided his oral notice of resignation. (*Tr. at 50, 60-62*).

The evidence further shows that a verbal/oral notice of resignation is an acceptable means of terminating employment under Diamond Services Corp.'s Policy. (*Tr. at 60, 68-71*). Since an oral notice of resignation is an acceptable means of terminating employment, a Diamond Services Corp. employee must be given a reasonable amount of time to vacate the premises in accordance with company policy once the notice of resignation is provided.

Under the facts limited specifically to this particular case, Respondent's action on September 21, 2006 does not constitute a refusal to test within the meaning of 46 CFR 16.105 and 49 CFR 40.191(a). This is specifically true given Respondent's unblemished career since 1968 as a merchant mariner. Accordingly, the Coast Guard's allegations contained in the Complaint are found **NOT PROVED**.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent and the subject matter of the hearing are properly within the jurisdiction vested in the United States Coast Guard under 46 U.S.C. 7703(1)(b); 46 CFR Part 5; and 33 CFR Part 20.
2. At all relevant times mentioned herein and specifically on September 21, 2006, Respondent was the holder of a Coast Guard issued MMD authorizing him to serve as an able seaman on offshore supply vessels (AB-Special (OSV)). (*IO Ex. 2*).
3. At all relevant times on September 21, 2006, Respondent served under the authority of his MMD on the motor vessel (OSV) DISCOVERY, operated by Diamond Services Corp. (*Tr. at 35, 116*).
4. The Coast Guard failed to prove by a preponderance of reliable and credible Respondent committed a Violation of Law or Regulation under 46 CFR 5.33 by

refusing to submit a urine sample for a required random drug test on September 21, 2006.

5. David Rattray's testimony is not found credible.
6. Respondent's testimony is found to be credible.
7. Under the facts limited specifically to this particular case, Respondent's action on September 21, 2006 does not constitute a refusal to test within the meaning of 46 CFR 16.105 and 49 CFR 40.191(a).

WHEREFORE,

ORDER

IT IS HEREBY ORDERED that the Complaint dated December 11, 2006 served by the United States Coast Guard against John Charles Russell is **DISMISSED**.

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 January 30, 2008
Houston, Texas

HON THOMAS E. MCELLIGOTT
Administrative Law Judge
United States 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

David Rattray

Charles Ledet

RESPONDENT'S WITNESSES

Bobby Blankenship

Reed Rhodes, Sr.

John Charles Russell, Respondent

EXHIBIT LIST

COAST GUARD'S EXHIBITS

IO Ex. 1	Diamond Services Drug Policy
IO Ex. 2	MISLE Printout showing MMD validity
IO Ex. 3	Drug Screen Refusal Form
IO Ex. 4	Diamond Services Corp. Investigations and Searches Policy

RESPONDENT'S EXHIBITS

Resp't Ex. 1	Journal Entry dated Sept. 15 th Friday, 2006
Resp't Ex. 2	Letter dated Aug. 27, 2007 from Johnnie Sue Pearce
Resp't Ex. 3	Letter dated July 3, 2007 from Carol Sealine

ATTACHMENT C

RULINGS ON PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Coast Guard Proposed Findings of Fact

Ultimate Finding

1. John Charles Russell, holder of U.S. Coast Guard Document number 063441 did on September 21, 2006, refuse to submit to a certified DOT random drug test onboard the vessel *Discovery* while a crewmember of the vessel.

RULING: REJECTED. Under the facts limited specifically to this particular case, Respondent's action on September 21, 2006 does not constitute a refusal to test within the meaning of 46 CFR 16.105 and 49 CFR 40.191(a).

Evidentiary Findings

1. On September 21, 2006, Diamond Services Corporation, Owner/Operator to the Offshore Supply Vessel *Discovery* scheduled a random DOT drug test for the entire crew of the *Discovery*. (*Transcript pages 31 & 32*).

RULING: ACCEPTED AND INCORPORATED.

2. On September 21, 2006, the Respondent, John Charles Russell was employed as a crewmember on board the *Discovery* and filled the position of documented deckhand. This position required John Charles Russell to possess a Merchant Mariner Document as a condition of employment, which the Respondent did, MMD # 0643`. (*Transcript page 39*).

RULING: ACCEPTED AND INCORPORATED.

3. Mr. Charles Ledet was the certified collector assigned to administer the DOT random drug test to the entire crew of the *Discovery* on September 21, 2006. When Mr. Ledet boarded the *Discovery* he mustered everyone from the crew in the galley. Mr. Ledet secured the area and the bathroom and then asked everyone to produce identification. Mr. Russell said, "No, I quit. I'm not taking this test." Mr. Russell left the vessel following his statement that he was not going to take the test. (*Transcript pages 33-36 & 83-87*).

RULING: ACCEPTED IN PART, REJECTED IN PART. The record evidence shows that Mr. Ledet was the certified collector assigned to administer the random drug test on September 21, 2006. (*Tr. at 32-34*). The record evidence also shows that Mr. Ledet asked David Rattray, the Vessel Manager/Port Captain how many people had to be tested and ordered all the crewmembers to come into the galley. (*Tr. at 81, 86*). However, Mr. Rattray's testimony that once it was Respondent's turn to produce his ID, he said, "No, I quit. I'm not taking this test"; then, he left the boat is not credible. (*Tr. at*

34, 60-61). Mr. Rattray does not recall whether Respondent's bags were packed, but Mr. Rattray merely recalls that the drug screener was present on board the vessel when Respondent provided his oral notice of resignation. (*Tr. at 50, 60-62*). Given Respondent's unblemished career as a merchant mariner since 1968, the fact that the record evidence shows Respondent planned on terminating employment with Diamond Services Corp. because he was dissatisfied with the salary, and the fact that a verbal notice of resignation is an acceptable method to terminate employment under the company's policy, Respondent's testimony is found to be more credible.

4. Witness testimony from David Rattray, Vessel Manager/Port, stated that Mr. Russell was in the galley when Mr. Ledet informed the crew of the drug test and that the Respondent did not quit at any time prior to the drug tester boarding the *Discovery*. (*Transcript page 34 & 35*).

RULING: ACCEPTED IN PART, REJECTED IN PART. The record evidence shows that Respondent most likely did not provide his notice of termination prior to the drug screener boarding the *Discovery*. (*Tr. at 20, 23-24, 116-17, 119-20*). However, Respondent's undisputed testimony establishes that on September 21, 2006, after receiving a paycheck containing an unacceptable salary, Respondent boarded the OSV DIAMOND, packed his bags with the intent to quit, and he subsequently provided Mr. Rattray, his supervisor, an oral notice of resignation. (*Tr. at 20, 23-24, 49, 56, 116-17*). A verbal/oral notice of resignation is an acceptable means of terminating employment under Diamond Services Corp.'s policy. (*Tr. at 60, 68-71*). Since an oral notice of resignation is an acceptable means of terminating employment, a Diamond Services Corp. employee must be given a reasonable amount of time to vacate the premises in accordance with company policy once the notice of resignation is provided. There is no evidence establishing that Respondent had prior knowledge of the random drug screen or that Respondent terminated his employment with Diamond Services specifically to avoid submitting to the drug test, and Mr. Rattray's testimony is not found to be credible. Under the facts limited specifically to this particular case, Respondent's action on September 21, 2006 does not constitute a refusal to test within the meaning of 46 CFR 16.105 and 49 CFR 40.191(a). This is specifically true given Respondent's unblemished career since 1968 as a merchant mariner.

Certificate of Service

I hereby certify that I have this day served the foregoing **Decision and Order** upon the following parties and limited participants (or designated representatives) in this proceeding at the listed facsimile and address:

**Commanding Officer
LTJG Lincoln Puffer
Ens. Patrick Grizzle
Marine Safety Unit Morgan City
800 David Dr., Room 232
Morgan City, LA 70380-1304
Comm: (985) 380-5342
Fax: (985) 380-5379**

**ALJ Docketing Center, Baltimore
40 S. Gay Street, Room 412
Baltimore, MD 21202-4022
Comm: (410) 962-7434
Fax: (410) 962-1746**

I further certify that I have served the foregoing documents(s) by First Class Mail, Postage Prepaid to the Respondent as follows:

**Mr. John Charles Russell
[REDACTED]**

Done and dated: January 30, 2008
Houston, Texas

Janice M. Emig
Paralegal Specialist to the
ALJ Houston