UNITED STATES OF AMERICA
DEPARTMENT OF HOMELAND SECURITY
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	:	DECISION OF THE
	:	VICE COMMANDANT
v.	:	
	:	ON APPEAL
MERCHANT MARINER LICENSE & MERCHANT MARINER DOCUMENT	:	
	:	NO. 2692
Issued to: AARON LOUIS CHRISTIAN	:	

This appeal is taken in accordance with 46 U.S.C. § 7703, 46 C.F.R. Part 5, and the procedures set forth in 33 C.F.R. Part 20.

By a Decision and Order (hereinafter "D&O") dated November 13, 2009, Bruce T. Smith, an Administrative Law Judge (hereinafter "ALJ") of the United States Coast Guard at New Orleans, Louisiana, granted a Motion to Dismiss filed by Mr. Aaron Christian (hereinafter "Respondent") upon finding that the Coast Guard had failed to prove the *misconduct* charge alleged in the Coast Guard's Amended Complaint.

FACTUAL AND PROCEDURAL HISTORY

Respondent was employed by Higman Marine Services and holds a merchant mariner's license and a merchant mariner's document issued by the U.S. Coast Guard. [D&O at 2] According to the Coast Guard's Complaint, on November 14, 2008, Respondent took and failed an alcohol test, providing a breath sample that indicated a blood alcohol content in excess both of federal limits and those permitted by his employer. [*Id.*]

The Coast Guard filed its original Complaint against Respondent's Coast Guard-issued mariner credentials on May 6, 2009, alleging that Respondent committed *misconduct* and

violation of law or regulation by manifesting a blood alcohol content level in excess of the Department of Transportation's Breath Alcohol Test standards. [D&O at 2] On August 5, 2009, the Coast Guard amended its Complaint to remove the "violation of law or regulation" allegation. [*Id.*] The Coast Guard did not remove the allegation of misconduct[1], and it remained a pending charge at all stages of the proceeding. [*Id.*] The misconduct allegation alleged that Respondent violated a company policy which prohibits employees from reporting to work under the influence of alcohol.

The hearing in the matter convened on September 22, 2009, in Houston, Texas. During the first day of the hearing, the Coast Guard called three of its eight witnesses and presented a series of exhibits, while Respondent presented one exhibit. [D&O at 3] The Coast Guard's second witness, John Frye, was a representative of Respondent's employer responsible for implementing the company's drug and alcohol testing policy. [D&O at 6] Although the company purported to implement random tests, it was clear from Frye's testimony that in the specific instance of the tests conducted on November 14, 2008, the company's selection for testing of the oncoming crew that included Respondent was not wholly random. [D&O at 6-9]

Mr. Frye testified that he uses two dice and, on occasion, a number-generating website, to produce the randomly-assigned number for a vessel that would be subject to random drug and alcohol testing. [D&O at 7-8] As Mr. Frye explained it, there were logical and statistical flaws in the company's dice-based selection process, and he never explained how or when he would opt to use the website instead of the dice. [D&O at 9-10]

As the hearing began on the second day, Respondent moved to dismiss the matter, and the ALJ granted the Coast Guard an opportunity to submit a brief in opposition. [D&O at 3] The Coast Guard filed its opposition brief on October 8, 2009, and Respondent filed a reply to that brief on October 26, 2009. On October 27, 2009, the ALJ issued an order granting Respondent's Motion to Dismiss, with prejudice. [D&O at 14] The ALJ issued an amended

[1] Under Coast Guard regulations, "misconduct . . . is human behavior which violates some formal, duly established rule" which may be found in, among other places, "a ship's regulation or order." 46 C.F.R. § 5.27. Misconduct "is an act which is forbidden or a failure to do that which is required." *Id.*

order—which discussed the basis for dismissal in greater detail—on November 13, 2009. The Coast Guard appeals.

BASES OF APPEAL

This appeal is taken from the ALJ's D&O, which dismissed the Coast Guard's Complaint, with prejudice. The Coast Guard raises six bases of appeal:

I. *The court did in fact apply the Exclusionary Rule, a rule held by the Commandant to be inapplicable to the Coast Guard's administrative actions, by requiring the Coast Guard to prove a scientifically and mathematically valid random testing procedure prior to the introduction of a positive alcohol breath test into the evidentiary record.*

II. *The court's citation to 46 C.F.R. 16.230 in support of its Decision & Order finding a deficiency in a random alcohol test is misplaced and incorrect;*

III. *The court erred by deciding the potentially dispositive issue of "relinquishment or abandonment of a right or privilege" in its D&O with regard to Respondent's employment agreement without providing either party an opportunity to be heard on the issue;*

IV. *The court misapprehended factual allegation fifteen in the complaint and incorrectly asserted that the Coast Guard alleged the Respondent violated 49 C.F.R. § 40.285(b);*

V. *The court confused the purpose of the Coast Guard Administrative Hearing Process with the adjudication of constitutional issues.*

OPINION

The standard of review for abuse of discretion is highly deferential:

> A reviewing court conducting review for abuse of discretion is not free to substitute its judgment for that of the trial court, and a discretionary act or ruling under review is presumptively correct, the burden being on the party seeking reversal to demonstrate an abuse of discretion . . . [A]buse of discretion occurs where a ruling is based on an error of law, or, where based on factual conclusions, is without evidentiary support.

Appeal Decision 2610 (BENNETT) (quoting 5 Am. Jur. 2d Appellate Review § 695 (1997)).

Given this standard of review and the fact that the Coast Guard's appeal does not allege that the ALJ's factual conclusions were without evidentiary support, the inquiry on appeal becomes whether the presiding ALJ committed an error of law in granting Respondent's motion to dismiss. I conclude that the ALJ did, in fact, commit an error of law, and thereby abused his discretion, in granting Respondent's motion to dismiss. Given my conclusion with regard to the Coast Guard's second basis of appeal, it is unnecessary to consider the other bases of appeal raised in the Coast Guard's brief.

The ALJ began his examination of the case by identifying regulations that relate to drug and alcohol testing, including 46 C.F.R. Part 16, 49 C.F.R. Part 40, and 33 C.F.R. Part 95. [D&O at 4-5] On review, the ALJ determined: "The Coast Guard did not allege, nor was there proof that Respondent operated a vessel while under the influence of alcohol. Hence, 33 C.F.R. Part 95 . . . is inapplicable." [D&O at n. 3] The ALJ further noted: "Because 33 C.F.R. Part 95 is both inapplicable to the facts at bar and because it is silent regarding the means by which a mariner is selected for alcohol testing, the provisions of 46 C.F.R. § 16.230 provide guidance." [D&O at 5] The ALJ added: "Even IF 49 C.F.R. Part 40 and/or 46 C.F.R. § 16.230 are not specifically controlling . . . they are, in the absence of any guidance from 33 C.F.R. Part 95, certainly persuasive." (emphasis in original) [D&O at 11] After quoting 46 C.F.R. § 16.230(c), which requires that selection of crewmembers for random drug testing must be made by a scientifically valid method, the ALJ concluded that "it was incumbent upon the Coast Guard at the hearing . . . to establish an appropriate foundation that either [Higman Marine's] 'dice' method or the 'website' method met the criteria of scientific or mathematical validity, free of human intervention or discretion." [D&O at 10] I do not agree.

The ALJ's overestimate of the law's requirements is understandable in light of the fact that current alcohol and drug regulations do not parallel one another. 46 C.F.R. § 16.230 mentions and governs only random *drug* testing, not random *alcohol* testing. "Alcohol" and "dangerous drugs" are defined separately in 46 C.F.R. Part 16. The terms are not interchangeable, and the meaning of "dangerous drug" does not include alcohol. 46 C.F.R. § 16.105. The non-applicability of 46 C.F.R. Part 16 is confirmed by the Coast Guard final rule

that revised 46 C.F.R. Parts 4, 5 and 16 in 2001. In its response to public comments on the interim rule, the Coast Guard stated: "DOT alcohol testing requirements published in their December 19, 2000, final rule [49 C.F.R. Part 40] do not apply to the maritime industry. *The alcohol testing requirements that the maritime industry must comply with are found in 46 C.F.R. Subpart 4.06 and 33 C.F.R. Part 95.*" Chemical Testing, 66 Fed. Reg. 42,964, 42,965 (Aug. 16, 2001) (emphasis added). Neither 46 C.F.R. Subpart 4.06 nor 33 C.F.R. Part 95 mandates procedures for selection of crew members for random alcohol testing, and thus there are no regulations that govern the maritime industry's selection of mariners for random alcohol testing.

This absence of governing regulation is at the heart of the ALJ's error. In his D&O, the ALJ twice acknowledged that 46 C.F.R. Part 16 might not apply to the present situation, but then, in a search for analogous law to provide "guidance," he seized on 46 C.F.R. Part 16 and strictly applied it to the facts anyway. [D&O at 10] By strictly applying an inapplicable regulation, 46 C.F.R. 16.230, the ALJ committed an error of law and thereby abused his discretion.

The ALJ attempted to support his application of 46 C.F.R. Part 16 with a line from Appeal Decision 2659 (DUNCAN), which in turn quoted the *Federal Register*: "The *acceptability* of a particular test required by a marine employer will be established during an administrative or judicial hearing." Operating a Vessel While Intoxicated, 52 Fed. Reg. 47,526 (Dec. 14, 1987) (quoted in Appeal Decision 2659 (DUNCAN) (emphasis in D&O, at 11)). "In essence," the ALJ concluded in a footnote, "Duncan creates an *ad hoc* standard, to be determined on a case-by-case basis for the admissibility of a given alcohol test." [D&O at n. 5] The ALJ thus relied on DUNCAN as providing him authority to rule on all aspects of administration of the alcohol test.

In Appeal Decision 2659 (DUNCAN), a mariner appealed the ALJ's decision against his mariner credential on the grounds that the technician that administered a breathalyzer test was merely "trained" to operate the test apparatus rather than "certified" to do so. The mariner claimed that the Department of Transportation regulations in 49 C.F.R. Part 40 required that the technician in question be certified in operation of the breathalyzer. On appeal, it was clarified

that the regulations in 49 C.F.R. Part 40 govern only testing mariners for dangerous drug use, not alcohol use, and thus the regulations imposed no such requirement. The case noted that the Coast Guard had previously addressed this lack of regulatory specificity in the Final Rule implementing 33 C.F.R. Part 95, which said:

> Section 95.030 now simply states that personal observation of apparent intoxicated behavior or a chemical test are acceptable as evidence of intoxication. . . . The rule does not preclude the use of other evidence at a hearing, nor does it mandate the use of the specified evidence . . . The acceptability of a particular test required by a marine employer will be established during an administrative or judicial proceeding.

Appeal Decision 2659 (DUNCAN) (quoting Operating a Vessel While Intoxicated, 52 Fed. Reg. 47,526, 47,530 (Dec. 14, 1987)). Following this excerpt, the decision stated: "Accordingly, in this case, it was the ALJ's responsibility to determine whether the evidence presented, including evidence involving the administration of the chemical test and the qualification of the technician, was sufficient to show that Respondent was 'under the influence of alcohol.'" Appeal Decision 2659 (DUNCAN).

While it is true that DUNCAN allows the ALJ to determine the acceptability of an alcohol test, the inquiry in DUNCAN is focused not on whether requirements have been complied with during the administration of the test, but rather whether the test and its results constitute reliable evidence of intoxication. In this case, the ALJ granted Respondent's motion to dismiss based on his conclusion that selection of the mariner for testing did not comport with the regulatory requirements for random testing set forth in 46 C.F.R. Part 16. In so doing, the ALJ focused on whether the selection of individuals for testing was random, rather than, as in DUNCAN, the reliability of the alcohol test and its results. Whether the selection of individuals for testing is random does not affect the reliability of the test to show intoxication. Accordingly, the ALJ's reliance on DUNCAN to give himself authority to accept or reject the selection of individuals for testing was misplaced.

The purpose of suspension and revocation proceedings is to promote safety at sea. 46 U.S.C. § 7701(a). *See also* 46 C.F.R. § 5.5 ("[Suspension and revocation] actions are intended to help maintain standards for competence and conduct essential to the promotion of

safety at sea.") Granting the motion to dismiss based on inapplicable regulations frustrated the purpose of suspension and revocation proceedings and constituted error. To allow the ALJ's decision in this case to stand would require that the Coast Guard prove that a maritime employer's selection of individuals for alcohol testing complies with regulations that simply do not apply to alcohol testing. There might be good policy reasons for such requirements; the ALJ makes this argument in his discussion of randomness as a protector of individual rights. *See* D&O at 5-6. However, suspension and revocation proceedings are not the appropriate place to impose such requirements on policy grounds. If the Coast Guard were to impose alcohol test selection requirements that match those of its drug testing regulations, it would be free to do so by using standard rulemaking procedures. I decline to endorse imposition of this requirement on the maritime industry absent such regulations.

CONCLUSION

The ALJ improperly imposed the inapplicable testing requirements of 46 C.F.R. § 16.230(c) on Respondent's employer. His dismissal on that basis constituted reversible error.

ORDER

The ALJ's Order, dated November 13, 2009, is reversed and the case is remanded for proceedings consistent with this opinion.

Sally Brice-O'Hara
VADM, USCG Vice Commandant

Signed at Washington, D.C. this 28th day of February, 2011.