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

UNITED STATES COAST GUARD,

Complainant,

vs.

AARON LOUIS CHRISTIAN,

Respondent.

Docket No: 09-0171

CG Enforcement Activity No: 3468937

AMENDED ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

Issued: November 13, 2009

Issued by: HON. BRUCE TUCKER SMITH
Administrative Law Judge

Appearances:

For Complainant
Bruce Davies, Esq.
MSTC Christina L. Jeanes
USCG Marine Safety Unit Port Arthur

For Respondent
Craig Schexnaider, Esq.
Conley & Schexnaider

I. PRELIMINARY STATEMENT

The United States Coast Guard (Coast Guard) initiated this administrative action seeking 12 months outright suspension, followed by 24 months probation, of Respondent Aaron Louis Christian's (Respondent) Coast Guard-issued Merchant Mariner's Document (MMD) and Coast Guard-issued Merchant Marine License (MML) (*hereinafter*, collectively referred to as Coast Guard-issued credentials). This action is brought pursuant to the legal authority codified at 46 U.S.C. §§7703 and the underlying regulations contained in 46 C.F.R. §5.27 and §5.33.

The Coast Guard's Original Complaint, filed on May 6, 2009, alleged, *inter alia*, that Respondent committed misconduct and violated a law or regulation by testing in excess of the Department of Transportation's Breath Alcohol Test standards on October 14, 2008, during a random drug and alcohol test ordered by his employer, Higman Marine Services. On May 21, 2009, Respondent filed an Answer to the Original Complaint wherein he denied the jurisdiction and factual allegations made therein and posited several affirmative defenses.

On August 5, 2009, the Coast Guard filed an Amended Complaint removing Allegation No. 13 (allegation relating to a third breath alcohol test) and Count 2 (allegations relating to violation of law or regulation). On August 18, 2009, the Coast Guard filed a second Amended Complaint ostensibly removing the second charge, violation of a law or regulation, from the Amended Complaint; however, Factual Allegation 15 therein still pleads a violation of 49 C.F.R. Part 40. On September 8, 2009, Respondent filed an "Original Answer to Amended Complaint and Counter-Claim" wherein he denied both the jurisdictional allegations and factual allegations of the

Amended Complaint. Respondent pled numerous affirmative defenses to the Second Amended Complaint.[1]

On September 22, 2009, this matter came on for hearing at the United States District Court for the Eastern District of Texas, Beaumont Division in Beaumont, Texas. The proceeding was conducted in accordance with the Administrative Procedure Act, as amended and codified at 5 U.S.C. §§551-59 and Coast Guard procedural regulations located at 33 C.F.R. Part 20. Bruce L. Davies, Esq. and Investigating Officer MSTC Christina L. Jeanes, United States Coast Guard Marine Safety Detachment Port Arthur, appeared on behalf of the Coast Guard. Respondent was present through counsel Craig Schexnaider, Esq.

Three (3) witnesses testified as part of the Coast Guard's case-in-chief and the Coast Guard offered twelve (12) exhibits into evidence, all of which where admitted. Respondent cross-examined the witnesses offered by the Coast Guard and offered one (1) exhibit into evidence, which was admitted.[2]

At the outset of the second day of the hearing of this matter, Respondent filed a Motion to Dismiss (Motion) asserting the Coast Guard had failed to establish that the random drug and alcohol screen at issue herein was truly random. The court ordered briefs or responses in opposition to Respondent's Motion, if any, were to be filed not later than October 9, 2009. Respondent was ordered to file his rebuttal thereto, if any, not later than October 23, 2009. The court thereupon recessed the hearing pending ruling on

[1] The full procedural history of the instant matter is not reviewed herein.
[2] Citations referencing the transcript are as follows: Transcript followed by the volume number and page number (Tr. at __). Citations referring to Agency Exhibits are as follows: Investigation Officer followed by the exhibit number (CG Ex. 1, etc.); Respondent's Exhibits are as follows: Respondent followed by the exhibit letter (Resp. Ex. A, etc.); ALJ Exhibits are as follows: ALJ followed by the exhibit Roman numeral (ALJ Ex. I, etc.).

Respondent's Motion to Dismiss. The court has received and reviewed the parties' respective briefs and affidavits.

Upon due consideration, Respondent's Motion to Dismiss is hereby **GRANTED** for the reasons described *infra*.

II. DISCUSSION

Drug and alcohol testing for maritime personnel is mandated and defined in 46 C.F.R. Part 16, subpart B and 49 C.F.R. Part 40.[3] In particular, both 46 C.F.R. subpart B, and the Higman Marine (Respondent's employer's) "Policy and Procedures Manual," (Manual) specify five clearly-defined circumstances under which a marine employee is subject to drug and alcohol testing[4]:

1. Pre-employment: 46 C.F.R. §16.210;
2. Periodic: 46 C.F.R. §16.220;
3. Random: 46 C.F.R. §16.230;
4. Post-Serious Marine Incident: 46 C.F.R. §16.240; and
5. Reasonable cause: 46 C.F.R. §16.250

Drug testing of marine employees is clearly justified based upon the federal government's compelling interest in protecting public safety and ensuring safety in an often-hazardous maritime work environment. However, the court notes with particularity that neither 33 C.F.R. Part 95, nor 49 C.F.R. Part 40 make provision for a "voluntary" urinalysis or blood-alcohol test. Neither does Higman's own Manual identify a "voluntary" alcohol or blood test. Rather, that Manual only lists the same five types of

[3] 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 "Operating a Vessel While Under the Influence of Alcohol or Dangerous Drugs" is inapplicable. Rather, the Coast Guard's second Amended Complaint, dated August 18, 2009, alleged Respondent violated 49 C.F.R. §40.285(b), apparently in contravention to the rule in Appeal Decision No. 2659 (Duncan) (2006). Thus, reference to 49 C.F.R. Part 40 is apt.

[4] Although 33 C.F.R. Part 95 is inapplicable, I note that regulation contains no reference to the bases for selection for alcohol testing; i.e., "random," "pre-employment," "post-casualty," etc.

employee drug/alcohol testing as mandated in 46 C.F.R. Part 16, subpart B. (CG Ex. 1 at 6-20; CG Ex. 4 at 2).

Here, the Coast Guard's second Amended Complaint, filed August 18, 2009, alleges that Respondent was chosen at random for testing on November 14, 2008. 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[5]:

> **The selection of crewmembers for random drug testing shall be made by a scientifically valid method**, such as a random number table or a computer-based random number generator that is matched with crewmembers' Social Security numbers, payroll identification numbers, or other comparable identifying numbers. Under the testing frequency and selection process used, **each covered crewmember shall have an equal chance of being tested each time selections are made** and an employee's chance of selection shall continue to exist throughout his or her employment. As an alternative, **random election may be accomplished by periodically selecting one or more vessels and testing all crewmembers covered by this section, provided that each vessel subject to the marine employer's test program remains equally subject to selection**.
> (emphasis added).[6]

Plainly, 46 C.F.R. §16.230(c) requires that the means by which random selections are made must be by a scientifically or mathematically valid method and that each crewmember or vessel must have a mathematically equal chance of selection.

"Randomness" is essential to a fair drug and alcohol testing process in the maritime industry. Absent true "randomness," the drug and alcohol testing regimen is

[5] In Appeal Decision No. 2559 (Duncan) (2006), the Commandant cites the Final Rule implementing 33 C.F.R. Part 95, saying in part, "the acceptability of a particular test required by a marine employer will be established during an administrative or judicial hearing." In essence, Duncan creates an *ad hoc* standard, to be determined on a case-by-case basis for the admissibility of a given alcohol test. Absent specific guidance, an ALJ must, therefore, draw on other sources of the law for guidance regarding admissibility. Thus, even IF 49 C.F.R. Part 40 or 46 C.F.R. Part 16 are not specifically controlling, the provide, in the absence of specific guidance to the contrary, compelling guidance.

[6] October 1, 2008 revision.

subject to criticism of favoritism. Absent true "randomness" marine employees might reasonably believe they are subject to individuous discrimination or targeting by an employer or that they have been victimized by a subterfuge to justify a warrantless search of the mariner's bodily fluids.

Testimony and evidence adduced at the hearing of this matter reveal that John Barber Frye (Frye) is Higman's corporate drug and alcohol representative. In that capacity, Frye oversees Higman's random drug and alcohol testing policies and procedures. (Tr. at 6). (All citations to testimony are contained in the stand-alone transcript of Frye's testimony.)

According to Frye, Higman has three offices and fifty vessels. (Tr. at 7; 16). Frye testified that, "on a random day, we choose a random vessel, and that vessel and/or office will be selected for a drug screen and everybody at that facility will be tested." (Tr. at 6). Frye further testified that he rolls dice to determine the vessel or the office to be tested and then he compares the number rolled on the dice to a company telephone list. (Tr. at 7).

Frye was clear that he uses a "physical die" – two dice in fact – which are thrown to produce a number. He explained that if he was throwing dice for Higman offices, "a 1 or a 2 would indicate our Houston office or Channel view office; a 3 or a 4 would be our Orange office, a 5 or a 6 would be our Mobile office." (Tr. at 7).

Conversely, he explained that if he threw a "1 and a 5, it would be Boat 15 on the phone list." (Tr. at 7 – 8). He then testified that once a number was thrown and a corresponding vessel or office was identified from the company phone list, everyone "oncoming" to a vessel during a crew changeover would be selected for chemical testing.

(Tr. at 8). Frey did not explain how me made the initial decision to throw one die (offices) or two dice (boats/crews).

Frey testified that on November 14, 2008, the Higman office in Orange, Texas, was randomly selected for alcohol and drug testing of all oncoming crewmembers. (Tr. at 9).[7] Thereafter, Respondent was administered multiple breath alcohol tests which resulted in a finding leading to the instant charges.

Frey's testimony, however, revealed a variety of mathematical impossibilities inherent to the "dice" method when selecting vessels and crews for testing as evidenced by his testimony on cross-examination:

> Q. By throwing two dice, how do you pick which boat out of 50?
> A. I use a phone list, and I count down the phone list. If I roll the dice and I get a 15, I go down to the 15th boat and I select that vessel.
>
> * * *
> Q. How do you do Boat 17? You roll a 7?
> A. Well, basically, it will end up evening out. If I do those boats and I randomly select them through the dice roll.
> Q. Well, how would you . . . How do you—how do you get to Boat No. 28? Dice only have 1 through 6 on it.
> A. Oh, I see what you're saying. If for some reason I've rolled a boat that I've done recently, I will actually roll again. And if I can get a 2-8, I will get it.
>
> * * *
> Q. How do you get to Boat No. 28?
> A. If—using the dice, that's usually how I get it, sir.
>
> * * *
> Q. Id' like to know. How do you get to Boat No. 18?
> A. If I roll a 1 and a 5, I will get 15.
> Q. How do you get to No. 18, 1 – 8?
> A. I'll roll – excuse me. Sir, I just have to say that's the way I've always done it.
> Q. So you don't ever test Boat No. 18?
> A. Yes, sir. I would have to say that I did test Boat No. 18.

[7] Contrary to Respondent's assertions, the court is satisfied Respondent was a Higman "crewmember" for the purposes of random drug testing. (Tr. at 29-31).

Q. Okay. How do you get to Boat No. 18 with two dice.
A. Sir, I don't think I've ever explored that before.

* * *

Q. Do you understand that a dice only has 1 through 6 on it…
A. Yes, sir.
Q. On either sides of the dice. There's no zero. There's no 7, there's no 8, there's no 9. How do you get to Boat No. 10? 1 – 0?
A. There's actually a website too that I use that will select random – it's called random. org.

* * *

Q. …When you select the boat to be tested, you throw two dice?
A. Yes, sir.
Q. How do you select Boats 1 through 9 or 1 through 10 with two dice?
A. You either add the two dice or – I've used random.org which I've used dice and/or I have used a random selection between 1 and 50.
Q. What helps you make the decision for you to use the physical throw or the dice or go to random.org? What is that decision criteria?

* * *

Q. Why would you go to a website as opposed to throwing the physical dice is my question. What is the decision-making criteria you use to either physically throw the dice or go to the website?
A. Because the website has a set of dice on it, and you can click – you can pick five dice, you can pick two dice.
Q. Do you physically pick up the dice and throw them, or do you use electronic dice on that website?
A. I use an electronic device.
Q. So you don't really throw dice?
A. I can use either one. I've used real dice or I've used random.org.
Q. How do you know the mathematical reliability of random.org?
A. I've read through their website and they stand on their statistics as far as their program.

* * *

Q. Apart from reading the website where they declare they are truly mathematically random, do you have any kind of verification of that?
A. No, sir. I don't.
Q. Just by way of education and training, what is your education post high school?
A. I have a BA in agriculture economics.
Q. Any specific training in mathematics beyond that?
A. No, sir.

(Tr. at 16 – 20; 32-33).

The problems inherent to the "two dice method" are obvious. Recall that Frye did not explain his decision to throw one or two dice. That is, he did not explain how he decides to test either offices (1 die) or vessels (2 die). Hence, at the outset, he admits exercising personal choice or discretion in choosing to throw one or two die. This initial decision vitiates the notion of true randomness *vis-à-vis* the entire pool of Higman employees.

Next, Frye's testimony reveals that the process by which he selects a given vessel/crew is fraught with human intervention. He could not explain, for instance, how "Boat 28" could be selected by throwing two, six-sided die. Nor could he explain how "Boats 1 – 9" could ever be selected using the same two die. (Query: if two dice were thrown and a "1" and a "4" came up, would that mean "Boat 14" or "Boat 41" or "Boat 5" would be selected?) Again, there is too much human discretion and intervention in this process to ensure a random selection could ever be made.

Under the Higman "two dice" selection method, neither "Boats 10, 20, 30, 40, nor 50" could ever be selected for crew testing, because there is no "zero" on a six-sided die. Likewise, neither could "Boats 17, 18, 19, 27, 28, 29, 37, 38, 39, 47, 48, 49" ever be selected either, because there is no "seven," eight," or "nine" on a six-sided die. It is problematic whether Boats 1 through 9 could ever be chosen using two dice, either. Thus it is apparent that at least seventeen boats out of a fleet of fifty could never be selected for testing, absent human intervention and discretion.

Frye's alternate explanation during his testimony that he also used an Internet web site, "random.org," does not alleviate the dilemma, either. Again, Frey could not

articulate the basis for his decision to use either physical dice or the website. Moreover, Frey could not establish an evidentiary foundation for the scientific reliability of the website he used. Nor does Frey have a sufficient academic background in mathematics or computer science to establish an evidentiary foundation for his reliance upon the website.

The regulatory protections contained in 46 C.F.R. §16.230(c) require that the selection of crewmembers for random drug testing shall be made by a scientifically valid method. Hence, it was incumbent upon the Coast Guard at the hearing of this matter to establish an appropriate foundation that either the "dice" method or the "website" method met the criteria of scientific or mathematical validity, free of human intervention or discretion.

The factual obstacles revealed by Frye's testimony, his own involvement with the selection process, the numerical impossibilities inherent to the "two dice" method and the absence of any proof that random.org is mathematically/scientifically valid rendered this an impossible burden for the Coast Guard to meet. The Higman selection process was simply too fraught with human intervention and caprice. Hence, the test was not a "random" selection as contemplated by the Department of Transportation (DOT) regulations contained in 46 C.F.R. subpart B.

Federal courts have recognized that DOT drug-testing administrative regulations do not exist in a vacuum. "Once the government requires an employer to administer random…tests to a certain class of workers, the Fourth Amendment is implicated; thus the 'search' effected by **a …test is subject to the Fourth Amendment's reasonableness requirement**." Skinner v. Railway Labor Executives' Assoc., 489 U.S. 602, 615-617

(1989); Southern Cal. Gas Co. v. Util.Workers, Local 132, 265 F. 3d 787, 796 (9th Cir. 2001) (emphasis added). Such is clearly the case here.

The courts have held that to excuse non-compliance with DOT regulations or to adopt a 'substantial compliance' standard would undercut an individual's Fourth Amendment rights. Because the employer is responsible for ensuring compliance with the DOT regulations, failure to comply with those regulations renders the testing procedures invalid. Util.Workers, Local 132, *supra* at 795-796. Appeal Decision No. 2659 (Duncan) (2006) apparently renders 49 C.F.R. Part 40 inapplicable to the facts at bar. Duncan cites the Final Rule implementing 33 C.F.R. Part 95, which reads in part, "The acceptability of a particular test required by a marine employer will be established during an administrative or judicial hearing." (emphasis added) *See* 52 Fed. Reg. 47,526 and 47, 530 (Dec. 14 1987). Whether the selection process at bar is "acceptable" is measured against the Constitutional dictates of Skinner, supra, and its progeny. Even IF 49 C.F.R. Part 40 and/or 46 C.F.R. §16.230 are not specifically controlling in light of Duncan, they are, in the absence of any guidance from 33 C.F.R. Part 95, certainly persuasive.

Therefore, the court specifically finds that the selection methods employed by Higman, were not scientifically or mathematically valid. Each vessel in the Higman fleet was not equally subject to selection. Accordingly, the court further finds that Higman crewmembers did not have an equal, random chance of being tested each time selections were made. Thus, Respondent's employer indubitably violated the clear requirements of 46 C.F.R. §16.230,[8] if not the "reasonableness" requirement imposed by the Fourth Amendment.

[8] October 1, 2008 revision.

The second Amended Complaint did not allege that Respondent consented to the alcohol test. Hence, that issue was not before the undersigned nor did Respondent have notice of, nor an obligation to defend against such an allegation. That issue only arose in the Coast Guard's post-hearing brief, where it argued that because Respondent did not protest the testing, he essentially provided a "voluntary" sample. In support of this position, the Coast Guard filed post-hearing three witness affidavits. For the limited purposes of the pending Motion, the court accepts as fact that Respondent did not protest the drug and alcohol test imposed upon him by his employer. However, given the facts of this case, acquiescence does not equate to voluntariness. Both Appeal Decision No. 2668 (Merrill) (2007) and Appeal Decision No. 2545 (Jardin) (1992) discuss the voluntariness of a chemical test. Both cases are factually distinguishable from the facts at bar. As an aside, it is questionable whether Respondent's participation in the test was, in fact, "voluntary." Higman's clearly-stated corporate drug testing policy is that "Any personnel…who refuses to cooperate with the…tests included in this policy shall be terminated." [sic] (CG Ex. 1 at 6-20; CG Ex. 4 at 2, CG Ex. 7 at 68). *See*, Bolden v. SEPTA, 953 F.2d 807 (3d Cir. 1991).

To reiterate, there is no circumstance or category of test called "voluntary" in the regulatory scheme described in 46 C.F.R. §§16.210-.250 or in the Higman corporate drug and alcohol policy.

Interestingly, the Coast Guard relies upon Administrator v. Boyle, 7 NTSB 616 (1990), which is clearly distinguishable from the case at bar. In Boyle, a helicopter pilot was asked to submit to an alcohol breath test upon reasonable suspicion by his employer that the pilot had been drinking. Evidence in that case suggested that co-workers

observed the pilot had alcohol on his breath, which, in turn, triggered the request for what was, essentially, a "reasonable cause" alcohol testing.

In the instant matter, there was no such evidence of Respondent's impairment which would have supported a request for a "reasonable cause" test under 46 C.F.R. §16.250 or the Higman drug and alcohol policy. (CG Ex. 1 at 6-20; CG Ex. 4 at 2). Had there been any such evidence, such as evidence of alcohol on Respondent's breath, slurred speech or instability while walking, a "reasonable cause" breath/blood test might have been authorized.[9]

The court is mindful, on the one hand, of the serious consequences to employees precipitated by random drug and alcohol testing; and, on the other hand, of the need to take steps to ensure that drug or alcohol related impairment does not result in potentially serious workplace accidents. Independent Oil Workers Union v. Mobil Oil Corp., 777 F. Supp. 391 (D. N.J. 1991). However, the dictates of the pertinent regulations, due process and the considerations inherent to the Fourth Amendment outweigh any risk Respondent may have posed on the waterways.

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[9] See also 33 C.F.R. §95.030. The Higman "Alcohol and Drug Screen Consent" form Respondent signed on September 6, 2005 is noteworthy. (CG Ex. 5 at 14). There, Respondent plainly indicated his agreement to be tested for alcohol or drugs "at any time" while he was employed by Higman. He agreed to participate in "any such test," knowing that the use of liquor is inconsistent with health and safety considerations. On its face, CG Ex. 5 seems to indicate that Respondent consented to be tested at any time, any place and for any reason—without reference to the five clearly-defined circumstances identified in 46 C.F.R. subpart B or Higman's alcohol policy. In short, the Coast Guard may assert that Ex. 5 constitutes Respondent's "waiver" of any rights inherent to 46 C.F.R. Part 16, subpart B and 49 C.F.R. Part 40.

The classic definition of waiver, however, is "an intentional relinquishment or abandonment of a known right or privilege." Francis v. Henderson, 425 U.S. 536, 544-545 (1976). Exhibit 5 was signed more than three years prior to the November 14, 2008 "random" test at issue, here. Hence, Exhibit 5 cannot be asserted as Respondent's "intentional relinquishment or abandonment of known rights or privileges" or of any rights he may have held three years later. Moreover, Exhibit 5 cannot be now advanced as evidence of "substantial compliance" with the clearly-defined and limited alcohol testing regimen set forth in either 46 C.F.R. subpart B or Higman's alcohol policy. Util.Workers, Local 132, Id. At 795-796.

Simply stated, if either the DOT or the Coast Guard or Higman wanted to impose a blanket requirement that mariners be subject to drug and alcohol testing "at any time" then they were free to do so by the appropriate administrative rule-making process.

III. CONCLUSION

After careful consideration of the testimony and documentary evidence offered at the hearing, and there being good legal cause therefor, Respondent's Motion to Dismiss is **GRANTED WITH PREJUDICE**. 33 C.F.R. §20.311(d)(2).

WHEREFORE,

ORDER

IT IS HEREBY ORDERED, that Respondent's Motion to Dismiss is **GRANTED** and the Coast Guard's Amended Complaint is hereby **DISMISSED WITH PREJUDICE**.

PLEASE TAKE NOTE that issuance of this decision serves as the parties' right to appeal under 33 C.F.R. Part 20, Subpart J. A copy of Subpart J is provided as Attachment B.

Done and dated this the 13th day of November, 2009,
at New Orleans, Louisiana

S/BRUCE TUCKER SMITH
HON. BRUCE TUCKER SMITH
ADMINISTRATIVE LAW JUDGE
UNITED STATES COAST GUARD

ATTACHMENT A_ – EXHIBIT & WITNESS LIST

COAST GUARD EXHIBITS

1. Higman Marine Policy & Procedures Manual
2. Affidavit of Aaron Christian
3. Aaron Christian MMLD Information Screen Shot
4. Drug, Alcohol and Contraband Policy
5. Aaron Christian application for employment with Higman Marine—Excluding page 27
6. Policy & Procedures Manual Amendments
7. Higman Marine Policy & Procedures Manual, 2003
8. Active Employee Total Report
9. Crew Change Report
10. Higman Marine Policy & Procedures Distribution
11. Vessel Logs
12. Crew Change Calendar

COAST GUARD WITNESSES

1. Kyle Shaw, Higman Marine
2. Kayla McAda, Higman Marine Services
3. John Frye, Higman Barge Lines

RESPONDENT EXHIBITS

W. E-mail from David Duvall to Kyle Shaw

RESPONDENT WITNESSES

None offered

ALJ EXHIBITS

None

ALJ WITNESS LIST

None