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

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UNITED STATES COAST GUARD
Complainant

vs.

JOSEPH ROBERT ANDRIE

Respondent

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Docket Number 2009-0483
Enforcement Activity No. 3430747

**DEFAULT ORDER**
**Issued: July 08, 2010**

**By Administrative Law Judge:**
**Honorable George J. Jordan**

**Appearances:**

**CWO Paul F. Lonardo**
**Sector Houston/Galveston**
**For the Coast Guard**

**JOSEPH ROBERT ANDRIE, Pro se**
**For the Respondent**

**ORDER AND REASONS GRANTING THE AGENCY'S MOTION FOR DEFAULT ON AN AMENDED COMPLAINT AND ORDER TO SHOW CAUSE**

This administrative proceeding concerns the suspension or revocation of Joseph Robert Andrie's (Respondent) Merchant Mariner's Credential pursuant to 46 U.S.C. §§ 7701 et seq. and United States Coast Guard (Coast Guard) regulations found at 46 C.F.R. Part 5. This proceeding is conducted under the Administrative Procedure Act (5 U.S.C. § 551 et seq.) and the Rules of Practice, Procedure, and Evidence for Administrative Proceedings of the Coast Guard found at 33 C.F.R. Part 20. The Coast Guard initiated this proceeding by filing a Complaint seeking to revoke Respondent's Coast Guard issued Credentials for Respondent's alleged refusal to submit to a chemical test ordered by the master of a vessel on which Respondent was serving. The Coast Guard alleges this refusal constitutes misconduct. This matter comes before me for review and approval of the Coast Guard's Motion for Default under 33 C.F.R. § 20.310. [Docket 2009-0483, Docket Item 05]

## I. PROCEDURAL HISTORY

1. The Coast Guard initiated an administrative proceeding seeking Revocation of Respondent's Merchant Mariner Document by filing a Complaint on November 19, 2009. [Docket Item 01]
2. The Complaint alleged Misconduct and stated as its jurisdictional basis that Respondent is the holder of a Merchant Mariners Document (MMD) and that Respondent acted under the authority of that MMD on December 13, 2008 by serving as Able Seaman aboard the vessel KAREN ANDRIE as required by his employer as a condition of employment. The Complaint included the following factual allegations:

    a. On December 13, 2008, a Coast Guard boarding team boarded the Integrated Tug and Barge (ITB) KAREN ANDRIE (O.N. 297527).

b. An ION scan swipe test was performed by the Coast Guard boarding team members on various surfaces of the ITB KAREN ANDRIE indicating the presence of Cocaine.

c. All crewmembers were ordered to be chemically tested for dangerous drugs by the master of the ITB KAREN ANDRIE, Robert Dorchak.

d. The Respondent wrongfully refused to submit to a federal drug test, a violation of 49 CFR 40.191.

3. The Complaint and its accompanying Certificate of Service indicated an address for Respondent in New Braunfels, Texas.

4. On December 9, 2009, the Coast Guard filed a return of service form indicating that Respondent was served with a copy of the Complaint by Certified Mail, Return Receipt on December 4, 2009 in New Braunfels, Texas. [Docket Item 04]

5. The Coast Guard ALJ Docketing Center had not received an answer from Respondent as of March 1, 2010.

6. The Coast Guard filed its Motion for Default with the Coast Guard ALJ Docketing Center on March 1, 2010 [Docket Item 05] with a Certificate of Service indicating Respondent's address in Waco, Texas. [Docket Item 06]

7. In the Motion for Default, the Coast Guard stated that Respondent's parole officer had provided the Coast Guard an address for Respondent in Waco, Texas.

8. On March 22, 2010, the Coast Guard filed a return of service form indicating that the Motion for Default was received at a forwarded address in Crawford, Texas on March 15, 2010. Someone other than Respondent signed the Return of Service form. [Docket Item 07]

9. On March 25, 2010, the Coast Guard filed an Amended Certificate of Service indicating service on Respondent at the Crawford, Texas address on March 15, 2010. [Docket Item 08]

10. The Coast Guard ALJ Docketing Center received no further filings, and on April 14 2010, this matter was assigned to me for review and disposition. [Docket Item 09]

## II. STANDARD OF REVIEW

Because Respondent failed to respond to both the Complaint and the Motion for Default, the threshold question is whether a default has occurred. This process involves reviewing the record to determine whether: (1) there is been proper service of the Complaint; (2) the period for filing an Answer has expired; and (3) there has been proper service of the Motion for Default.

If a default has occurred, that is not the end of the inquiry. If there was a default, then the judge's role shifts to a review of the pleadings to determine whether: (1) the Coast Guard has jurisdiction in this matter; (2) the Complaint is legally sufficient; and (3) the proposed sanction of revocation is consistent with Coast Guard regulation and policy.

There was no hearing in this matter. Because this case arises from a default action, the facts supporting the jurisdictional and factual allegations are found solely within the confines of the Complaint and the record. The review is therefore limited to the Docket Record. See Appeal Decision 2677 (WALKER) (2008).

## III. ANALYSIS

### *A. Default*

The record reveals that the Coast Guard has filed sufficient evidence that the Complaint was properly served on Respondent at Respondent's last known address on December 4, 2009. Under 33 C.F.R. § 20.306, Respondent had until December 28, 2009 to file an Answer to the Complaint. No such Answer was received. The record reveals that the Coast Guard was advised about Respondent's change of address to Waco, Texas by Respondent's parole officer; there was

contact with Respondent; and there were unsuccessful discussions on settlement. Respondent still did not file an Answer with the Coast Guard ALJ Docketing Center.

On March 1, 2010, the Coast Guard filed a Motion for Default and filed a certificate of service indicating the place of service as Respondent's Waco, Texas address. The record shows the Motion for Default was delivered to a forwarding address in Crawford, Texas on March 15, 2010. Further, the person who signed for the Motion was not Respondent. Respondent has not timely responded to the Complaint as required by 33 C.F.R. § 20.308(a) or to the Motion for Default as required by 33 C.F.R. § 20.310(b).

The Commandant has considered service in default cases several times. In Appeal Decision 2647 (Brown) (2004), the Commandant stated:

> A review of the applicable procedural rules shows that personal service is not required in Coast Guard Suspension and Revocation proceedings. 33 C.F.R. § 20.304 establishes the service requirements applicable to the instant case. Pursuant to 33 C.F.R. Table 20.304(D), a Complaint may be served by either Certified mail with return receipt requested, express courier service that has a receipt capability, or by personal delivery. In addition, 33 C.F.R. Table 20.304(F) states that a Complaint must be sent to "[t]he last known address of the residence…of the person to be served." Since the record shows that the Complaint was properly mailed to Respondent's address of record (by both Certified mail and express courier) and that the complaint was received at that address, service was completed in accordance with Coast Guard regulation.

The forwarding of the Motion for Default did not create improper service. The Commandant has long held that a respondent has an affirmative duty to provide the Coast Guard with a proper address. Appeal Decision 2645 (MIRGEAUX ) (2004). The Confirmation and Tracking Data provided by the United States Post Office and attached to Docket Item Seven (7), the Return of Service for Motion for Default, indicates that the document was forwarded to an address where Respondent intended to receive mail. "When the receipt of something sent via mail is at issue, a rebuttable presumption of receipt arises upon a showing that the item was mailed." See *In re Cendant Corp. PRIDES Litg.*, 311 F.3d 298, 304 (3d Cir.2002)" Blomeyer v. Levinson, 2006 WL 463503 (E.D.Pa. 2006).

Under 33 C.F.R. § 20.304(g)(3)(i), service was complete when the document was delivered to Respondent's address and signed for by a person of suitable age and discretion. Here, the Certified Mail Receipt, Return Receipt postcard, and tracking results, as well as the Coast Guard's Certificate of Service establish that the service copy of the Motion for Default was properly addressed, mailed, forwarded and delivered. Thus, receipt by Respondent can be presumed. Both the Complaint and the Motion for Default were thus properly served on Respondent and his failure to reply to each cannot be excused for any service defect.

Accordingly, Respondent has not timely responded to the Complaint as required by 33 C.F.R. § 20.308(a) or to the Motion for Default as required by 33 C.F.R. § 20.310(b). Therefore the Respondent is found to be in default. Default by Respondent constitutes, for purposes of this action, "an admission of all facts alleged in the complaint and a waiver of …his right to a hearing on those facts." 33 C.F.R. § 20.310(c)

***B. Jurisdiction***

Although this case arises from a default action within which all alleged facts are considered admitted, the burden of establishing jurisdiction nonetheless remains. See 33 C.F.R. § 20.310(c); Appeal Decision 2677 (WALKER) (2008); see also Appeal Decision 2656 (JORDAN) (2006).

Respondent is charged with Misconduct in this proceeding. The Commandant in Walker stated that:

> 46 U.S.C. § 7703 makes clear that to establish jurisdiction in a misconduct case, the action of misconduct alleged must be proven to have occurred while the mariner was "acting under the authority" of his merchant mariner credential. A definition of the term "acting under the authority" is found at 46 C.F.R. § 5.57. 46 C.F.R. § 5.57(a) states, in relevant part, that a person employed in the service of a vessel is "acting under the authority" of a merchant mariner credential when the holding of the credential is either "[r]equired by law or regulation" or "[r]equired by an employer as a condition for employment."

As in Walker, this case arises from a default action, and the facts supporting the jurisdictional allegation are found solely within the confines of the Coast Guard's Complaint. The Complaint contains the following allegation: "Respondent acted under the authority of MMD – [redacted], on 12/13/2008 by: serving as Able Seaman aboard the vessel KAREN ANDRIE as required by an employer as a condition of employment[.]"

The specificity of this allegation distinguishes this case from Walker, in which it was only alleged that Respondent was a "holder" of a credential and was "silent as to how—or even if—Respondent was 'acting under the authority' of his credential when the test was requested." Here, there is an adquate allegation, now deemed admitted, that supports jurisdiction. Accordingly, the record supports jurisdiction, and I so find jurisdiction established.

### *C. Legal sufficiency of the Complaint*

The Complaint alleges that on December 13, 2008 a Coast Guard boarding team boarded the ITB KAREN ANDRIE. The Complaint further alleges that the Coast Guard boarding team performed an ION scan swipe test on various surfaces of the vessel, which indicated the presence of cocaine, and that "[a]ll crewmembers were ordered to be chemically tested for dangerous drugs by the master . . . ." Finally, the Complaint alleges that the "Respondent wrongfully refused to submit to a federal drug test, a violation of 49 CFR 40.191."

#### 1. Refusal to Submit to a Drug Test Ordered by the Master

The first issues to be considered are: (1) does a Master have the authority to order such a test and (2) is it misconduct to refuse such a test?

Misconduct is defined in 46 C.F.R. § 5.27 as follows:

> "Misconduct" is human behavior which violates some formal, duly established rule. Such rules are found in, among other places, statutes, regulations, the common law, the general maritime law, a ship's regulation or order, or shipping articles and similar sources. It is an act which is forbidden or a failure to do that which is required.

A refusal to follow a lawful order of a vessel's master constitutes Misconduct. Appeal Decision 1857 (POUTER) (1971) (disobedience to a lawful order is an offense in any kind of jurisprudence.) The orders of the Master of a vessel are given special recognition and protection by the laws of not only the United States but of the international community as well. See Appeal Decision 2616 (BYRNES) (2000). The Master has a great responsibility in ensuring the safety of his vessel and crew. This responsibility was confirmed in the case of The Styria, 186 U.S. 1, 22 S.Ct. 731 (1901), where the Court said:

> The master of a ship is the person who is entrusted with the care and management of it, and the great trust reposed in him by the owners, and the great authority which the law has vested in him, require on his part and for his own sake, no less than for the interest of his employers, the utmost fidelity and attention.

In Spentonbush/Red Star Companies v. N.L.R.B.,106 F.3d 484 (2nd Cir. 1997), the Second Circuit held that pursuant to long-standing tradition, a tug's captain is the ship's master and that:

> The tug captains thus occupied a position that was markedly different from that of a foreman or lead person in a shore-based enterprise. See June T, Inc. v. King, 290 F.2d 404, 406 n. 1 (5th Cir.1961). This difference was summarized by the Supreme Court in Southern Steamship Co. v. NLRB, 316 U.S. 31, 38, 62 S.Ct. 886, 890, 86 L.Ed. 1246 (1942), in the following, oft-quoted language:
>
> > Ever since men have gone to sea, the relationship of master to seaman has been entirely different from that of employer to employee on land. The lives of passengers and crew, as well as the safety of ship and cargo, are entrusted to the master's care. Every one and every thing depend on him. He must command and the crew must obey.
>
> A multi-volume work entitled Limited Master, Mate & Operators License Study Course, Book 4 Revised Edition "G", Editor Richard A. Block, 1994, contains the following, more-detailed description of a master's duties:
>
> > He must maintain proper order and discipline on board at all times. He shall be held responsible for any disorderly conduct or violation of the law or of rules covered in the manual, which might have been prevented by proper administration and supervision on his part. He shall not

> permit any alcoholic beverages, illegal drugs or other intoxicants on board his vessel at any time.
> Id. at SB-4.

The Commandant has stated, "[a]s demonstrated by the courts, the master is regarded as the individual primarily charged with the care and safety of the vessel and crew. The presence of drugs aboard a vessel is a direct threat to the master's ability to carry out this duty, a threat whose seriousness is illustrated by the severe sanctions provided … for violation of the drug laws of the United States by a seaman." Appeal Decision 2098 (CORDISH) (1977). See also Appeal Decisions 2476 (BLAKE) (1988), affd sub nom Commandant v. Blake, NTSB Order No. EM-156 (1989); 2504 (GRACE) (1990) and 2525 (ADAMS) (1991).

In Appeal Decision 2616 (BYRNES) (2000), the Commandant concluded, citing Pouter, Cordish and The Styria, supra, that giving an order to a mariner to sit for a chemical test is within the powers given to the Master by maritime law. The facts of Respondent's case are consistent with the reasoning of these earlier cases. Here, the Master was notified of the presence of drugs aboard the vessel and ordered the crew to be tested. The Master's instruction to be tested was a lawful order to take a drug test for the reasons given above. This authority of the Master to search for drugs or even test for drugs or alcohol pre-exists and is separate from the Federal mandate to employers to test under certain circumstances which began in 1989. See Cordish and Blake, supra. See also Appeal Decision 2518 (HENNARD) (1989) (drug test predated federal chemical test rules.) "Additionally, it must be stressed that a ship's master cannot violate the Fourth Amendment to the U.S. Constitution by conducting a warrantless search, since he conducts that search in his capacity as a private citizen, not as a Federal or State official. Appeal Decision 2115 (CHRISTEN), affirmed sub nom. *Commandant v. Christen*, NTSB Order EM-71 (1978)." Blake, supra.

Therefore, I find that the Master's order to the crew to submit to a drug test was lawful and the Respondent's failure to obey that order has been deemed admitted by his default. That failure constituted Misconduct.

**2. Refusal to Submit to Federal Drug Test, a Violation of 49 C.F.R. § 40.191**

The Complaint also alleges that the refused test was a Federal Drug Test and in violation of 49 C.F.R. § 40.191. Part 40 of Title 49, Code of Federal Regulations, contains the Department of Transportation's Procedures for Transportation Workplace Drug and Alcohol Testing Programs. The section cited in the allegations is entitled: "What is a refusal to take a DOT drug test, and what are the consequences?" and it describes the various ways an employee can refuse to take a drug test. However, throughout this section are references that the test must be "consistent with applicable DOT agency regulations" and/or limiting the scope of a DOT-refusal to test only "for any drug test required by this part or DOT agency regulations." In particular, paragraph (e) of Section 40.191 reads as follows (emphasis added):

> As an employee, when you refuse to take a non-DOT test or to sign a non-DOT form, you have not refused to take a DOT test. There are no consequences under DOT agency regulations for refusing to take a non-DOT test.

The Transportation Workplace Chemical Testing rules for maritime workers are the Coast Guard's responsibility and are found in 46 C.F.R. Part 16. Coast Guard rules describe the following federally mandated chemical tests for drugs.

1. Pre-employment Tests at 46 C.F.R. § 16.210
2. Periodic Tests at 46 C.F.R. § 16.220
3. Random Drug Testing at 46 C.F.R. § 16.230
4. Serious Marine Incident Tests at 46 C.F.R. § 16.240 and 46 C.F.R. Subpart 4.06
5. Reasonable Cause Tests at 46 C.F.R. § 16.250 and 33 C.F.R. § 95.035

A review of the allegations shows that the only federal drug test that Respondent's requested test would fall under is a Reasonable Cause or Reasonable Suspicion test. Only a few Coast Guard Guidance Documents and Commandant Decisions provide guidance on reasonable cause testing and at first glance they appear conflicting. In Appeal Decision 2625

(ROBERTSON) (2002), the Respondent argued that because there was no particularized reasonable suspicion that he was using drugs, his act of providing an adulterated urine sample when tested should not have be considered by the ALJ and that "a reasonable basis for believing one person aboard a vessel was using drugs does not automatically extend to the entire crew." The Respondent further argued that because all crewmembers of the vessel were drug tested, if the Master's reasonable suspicion analysis did not apply to all of them, then all the results must be ignored by the ALJ. The Commandant held that "the more rational approach is to ask whether the marine employer properly found reasonable suspicion to drug test the Respondent."

However, a number of facts distinguish Robertson from the case at hand. First, there was a casualty in Robertson and also the employer testified that he concluded that the Respondent was experiencing a diminution in performance (a factor noted as a justification for testing in the employee handbook) and determined that he had a duty to drug test the Respondent. Robertson also involved an adulterated sample and was not a refusal to submit to a test.

But here the issue is not use but possession. This case presents the question of whether evidence of the mere presence of drugs on a vessel creates a reasonable suspicion that a particular mariner is using drugs. It also raises the issue of whether such evidence justifies a federally mandated chemical test for all crewmembers.

The District Court for the District of Columbia in Transportation Institute v. U.S. Coast Guard, 727 F. Supp. 648, 660 (D.D.C. 1989) held that regulations allowing testing a crewmember on the basis of reasonable suspicion that the crewmember has used a dangerous drug did not transgress the Fourth Amendment. The Court noted that such "testing on the basis of reasonable suspicion is limited to those times when an employer has 'a reasonable and articulable belief . . . based on direct observation of specific, contemporaneous physical, behavioral or performance indicators of probable use.' 53 Fed.Reg. 47,081 (to be codified as 46 C.F.R. § 16.250(b))". Id. at n.12. The Court further stated:

> …*Skinner [v. Railway Labor Executives Association*, 489 U.S. 602 (1989)] makes clear that the government's interest in safety outweighs the privacy interest of crewmembers who are reasonably suspected to have used a dangerous drug based on direct observation of specific, contemporaneous physical, behavioral or performance indicators of probable use. … *See also* *National Treasury Employees Union v. Lyng*, 706 F.Supp. 934 (D.D.C. 1988) (holding that reasonable suspicion testing of employees was permissible, provided that such testing is based upon reasonable, articulable, and individualized suspicion that a specific employee may be under the influence of drugs while on duty), and *Bangert v. Hodel*, 705 F.Supp. 643 (D.D.C.1989) (holding that reasonable suspicion testing was permissible, provided that such testing is based upon reasonable suspicion of on-duty drug use or on-duty drug-related job impairment). The Court further notes that the diminished privacy interests of employees by virtue of their employment in a highly regulated industry also comes into play in the context of reasonable suspicion testing**.**

Id. at 660. In the preamble to the final rule for 46 CFR Part 16, the Coast Guard stated at 53 FR 47064, 47065-66:

> The drug testing requirements of the final rule place constraints on an employer's discretion in conducting drug testing. For example, the requirement for random drug testing calls for selection of an employee to be tested in a scientifically acceptable manner, such as use of a computer-based random number generator. Requirements for testing based on reasonable cause or post-accident testing also *are severely circumscribed in order to limit an employer's discretion in administering these tests* to employees. (emphasis added).

The Coast Guard has also provided recent guidance to employers on reasonable suspicion testing. The Marine Employers Drug Testing Guidebook September 2009 provides the following guidance at pp. 31-32:

> **Making a Reasonable Cause Determination:** "The marine employer's decision to test must be based on a reasonable and articulable belief that the individual has used a dangerous drug based on direct observation of specific, contemporaneous physical, behavioral, or performance indicators of probable use. Where practicable, this belief should be based on the observation of the individual by two persons in supervisory positions." {Reference: 46 CFR 16.250(b)} behavioral, or performance indicators of probable use.
>
> > i) The practical application of this rule is the "judge test." If you as the marine employer or supervisor would feel confident in your ability to tell a judge exactly what physical, behavioral, emotional, or job performance cues indicated to you that a mariner needed to be drug or alcohol tested for reasonable cause, you probably have reasonable cause probability to conduct the test. It is highly recommended that all observations, employee discussions, etc., be documented.

In a recent Appeal Decision, the Commandant reiterated this policy. In Appeal Decision 2672 (MARSHALL) (2007), the Commandant held that the determination as to whether reasonable cause exists to support a request for the administration of chemical testing is a factual determination made by the ALJ based upon all the evidence available. See Appeal Decisions 2625 (ROBERTSON) (2002) and 2624 (DOWNS) (2001). In Marshall, the ALJ rejected a chemical test ordered on the observations of one individual finding that it was "practicable" for the marine employer to base its determination of reasonable cause of intoxication on the part of a Respondent on the observation of two persons. The ALJ then concluded that the marine employer lacked, as a matter of law, the requisite "reasonable cause" to make this request. See USCG v. Marshall, SR-2004-19 at 16. (USCG ALJ Dec. 2004).

Based on a review of the record and the regulations, the employer must have a reasonable and articulable belief that the individual has used a dangerous drug in order to require a reasonable suspicion drug test under DOT rules. There must be some evidence raising a reasonable suspicion concerning the charged mariner. See Robertson, supra. Here, there is only evidence of the presence of drugs on the vessel. Such a fact alone does not create a sufficient basis to allow a federal drug test of each crewmember.

However, federal drug tests are not the only tests permitted. The DOT rules do not prevent non-DOT drug tests. See 49 C.F.R. § 40.13 (outlining the relationship between DOT and non-DOT tests). The Master has authority under maritime law to order tests outside the DOT procedures. The Coast Guard guidance to Marine Employers notes as follows:

> **Expanding the Reasonable Cause Definition:** Many marine employers expand the definition of a reasonable cause drug test to include a number of situations. Examples include, "being reasonably suspected of possessing drugs or alcohol aboard a company vessel", "being reasonably suspected of dealing drugs aboard a company vessel", "being suspected of having been involved in an accident on company time" and many others.

Importantly, while the language of 49 C.F.R. 4.191(e) makes it clear that refusal to take a non-DOT test will not result in consequences under the DOT-testing regime (i.e., for drug tests required by DOT agency regulations), it does not absolve one from any and all consequences whatsoever for such a refusal. The scope of Misconduct under 46 C.F.R. § 5.27 is broader than sanctions for violations of DOT agency regulations. Here, the general maritime law requirement that crewmembers obey lawful orders of a master is the substance of the violation at hand. Additionally the courts have found "the right to test employees for alcohol or drug use upon a showing of reasonable cause, on threat of discharge, is critical to achieving the objective of the Coast Guard regulations … Were employees permitted to refuse to submit to such chemical tests, it is difficult to imagine why any drug user would consent." Exxon Shipping Co. v. Exxon Seamen's Union, 73 F.3d 1287, 1294 (3d Cir. 1996) (reviewing arbitration decision and finding that even if regulations did not require dismissal of employee who refused drug test under a "reasonable cause" test, public policy would be violated by reinstating employee to employment after such refusal, but refusing to disturb arbitrator's decision in this case to reinstate employee where there was insufficient cause to order the test).

As I have stated above, the Commandant has held that the presence of drugs aboard a vessel is a direct threat to the Master's ability to care for safety of vessel and crew and therefore the Master may direct drugs tests and conduct searches for drugs. Given this broad authority under general maritime law, the Master's order to the crew to submit to a drug test was lawful even though it was not a federal drug test. See Byrnes, Pouter, Cordish and The Styria, supra. The consequences for Respondent's failure to obey the vessel's Master is the issue here, not whether the Master's order regarding the drug test falls within the realm of those tests required by DOT-regulations.

### 3. Amendment of Pleadings to Conform to Proof

Finding that the refused test was not a federal drug test under 49 C.F.R. § 40.191 means that there was a minor defect in the factual allegations in this Complaint. However, defects in a complaint's specification do not necessarily demand dismissal of this action. See Appeal Decision 2545 (JARDIN) (1992). Long-standing Coast Guard precedent establishes that an ALJ may amend the specifications of the Complaint to conform to the proof. See Appeal Decision 2630 (BAARSVIK) (2002) (noting that the Commandant has previously held the ALJ has authority to make necessary amendments to conform specifications to the proof); see also Appeal Decision 2585 (COULON) (1997) ("The purpose of pleadings is to provide notice and not to make a ritualistic recitation of the details").

No Appeal Decisions have considered amendment of allegations in default cases yet. There are only a few Appeal Decisions addressing this issue under the previous "in absentia" process.[1] In Appeal Decision 2422 (GIBBONS) (1986), the Commandant found a specification defective but found that the defect did not require dismissal of the specification. In another decision, the Commandant stated that "[a] failure of a person to appear for the hearing after proper notice cannot prevent litigation of a matter as to which he was on notice. A failure to appear does, however, frustrate litigation of a matter as to which he had been given no notice." Appeal Decision 1884 (HOPPE) (1972). However, here also the Commandant considered whether the "specification must be dismissed or whether there is something salvable of it." Id. In both Gibbons and Hoppe, a specification alleging assault was reduced to wrongful use of threatening language.

Accordingly, I will amend the Complaint's allegations to conform to the proof by striking the term "federal" and "in violation of 49 CFR 40.191" from paragraph four. Such an

[1] In adopting its Rules of Practice, Procedure, and Evidence for Administrative Proceedings (1999 Procedural Rules) the Coast Guard sought to improve its adjudicative process by eliminating unnecessary procedures from S&R proceedings. One of the

amendment to the Complaint is appropriate, as the substance of both the original and amended allegations is that Respondent refused the Master's order to submit to a drug test (a far less significant amendment than in Gibbons or Hoppe).[2]

Since the adoption of the Rules of Practice, Procedure, and Evidence in 1999, a few cases have considered the issue of amendment of pleadings to conform to the proof. In Baarsvik, supra, the Commandant cited 33 C.F.R. § 20.305 and held that no such amendment "may broaden the issues without an opportunity for any other party or interested person both to reply to it and to prepare for the broadened issues." A recent appeal decision by the Commandant reiterated that an ALJ has the authority to amend pleadings to conform to proof and found that even where the specific regulatory cite of the violation found proved was not alleged in the complaint, the Respondent had adequate notice for due process purposes where the substance of the alleged violation was indentified. See Appeal Decision 2687 (HANSEN) (2010).

Merely striking the term "federal" and "in violation of 49 C.F.R. 40.191" [3] from paragraph four of the Complaint does not inappropriately broaden the issues. The refusal to follow the lawful order of the Master to take a drug test is the substance of the allegations here. Respondent therefore suffers no prejudice through such an amendment. Nevertheless, because this matter is not being considered at hearing (unlike Baarsvik and Hansen) but only on the pleadings, motions and the record, it is appropriate to provide the parties notice and opportunity to respond to the amendment following the Commandant's holding in Baarsvik, supra (requiring an opportunity to reply after amendment).

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unnecessary procedures eliminated was the "in absentia" hearing and its replacement by the default process (33 C.F.R. § 20.310) and default for failure to appear (33 C.F.R. § 20.705).

[2] In Appeal Decision 2234 (REIMANN) (1981), the Commandant stated, "Appellant's complaint that he has been denied due process of law because he was never served with the amended charges is not valid. The charge was amended at the first session of the hearing held *in absentia*. …. Accordingly, Appellant cannot *now* be heard to complain that he was denied due process of law by a "housekeeping" amendment which was made at a hearing at which he did not deign to appear."

[3] Because of the amendment I will not reach the issue of whether one can violate 49 C.F.R. § 40.191. This section describes what constitutes a "refusal to test" under DOT rules. I need not reach the question whether it is proscriptive or merely descriptive because it states that it is not applicable to non-DOT tests 49 C.F.R § 40.191(e). See Appeal Decision 2551 (LEVENE) (1993) (one cannot violate a regulation that is not prescriptive in nature).

The APA states that the agency "shall give all interested parties opportunity for … the submission and consideration of facts, arguments . . . when time, the nature of the proceeding, and the public interest permit . . . ." 5 U.S.C. § 554(c)(1). The Coast Guard Rules of Practice, Procedure, and Evidence for Administrative Proceedings state that the "ALJ shall have all powers necessary to the conduct of fair, fast, and impartial hearings" (33 C.F.R. § 20.202) including the power to regulate the course of the hearing (33 C.F.R. § 20.202 (f)). Therefore, even though I have found that this amendment does not inappropriately broaden the issues, I will provide the parties an opportunity to reply to the change in the specifications of the Complaint. In order to provide the parties this opportunity to reply, I order that the record remain open for thirty (30) days to allow either party to submit facts and arguments on this issue and/or for Respondent to provide good cause why the default order on the amended allegations should be set aside under 33 C.F.R. § 20.310(e).

Allowing the amendment of a defective complaint with an opportunity to respond is consistent with the intentions of the Coast Guard Rules of Practice, Procedure, and Evidence for Administrative Proceedings to eliminate unnecessary procedures and to secure just, speedy, and inexpensive determinations. It is also consistent with FRCP Rule 15 regarding amendment of the pleadings. See 33 CFR 20.103(c). Based on the default, the allegation that Respondent refused to submit to a drug test is deemed admitted and the Charge of Misconduct, as amended above, is **PROVED**.

## IV. DISCUSSION CONCERNING APPROPRIATE ORDER

Having found Respondent in default, the regulations require that I "issue a decision against" Respondent. 33 C.F.R. § 20.310(d). In issuing a decision, the ALJ must include the disposition of the case including any appropriate order. 33 C.F.R. § 20.902(b). Here, the Coast Guard has proposed an order of revocation. Respondent failed to respond to the Complaint so

the underlying facts are proven and there is no evidence of any remedial actions or mitigation by Respondent in the record. However, the recommended order exceeds the range of orders suggested in the Table entitled "Suggested Range of an Appropriate Order" in 46 C.F.R. § 5.569 and some explanation is warranted to outline why revocation in this case is, or is not, appropriate. This Table of Appropriate Orders has been considered to be guidance for the ALJ and has been virtually unchanged since 1985. However, the main changes to the Table in 1989 and 2001 both deal with the refusal to take chemical tests.

Longstanding Coast Guard law on the area of appropriate orders states that the order is in the discretion of the ALJ and the ALJ is not bound by the table. Other factors may be considered in fashioning an appropriate order. However, in Coast Guard v. Moore, NTSB Order No. EM-201 (2005), the NTSB disapproved a license revocation order in a refusal to test case because the Coast Guard neither proved, nor did the ALJ find, specific factors in aggravation sufficient to depart from the guidance provided in 46 C.F.R. Table 5.569.

Because this is a default case, the record is limited to the pleadings and there has been no testimony or documentary evidence in aggravation entered into the record that would trigger a greater result than suggested in the Table. Any evidence in aggravation must be found in the facts deemed admitted in the pleadings. Several Appeal Decisions have held that revocation may be considered an appropriate sanction in refusal to test cases. See Appeal Decisions 2578 (CALLAHAN) (1996) and 2624 (DOWNS) (2001). However, both of those cases predate the NTSB decision in Moore. Subsequently, the Commandant has reiterated the Callahan and Downs rationale in Appeal Decision 2666 (SPENCE) (2007) finding revocation appropriate for

refusal to submit to a chemical test without any reference to Moore.[4] Indeed, no Appeal Decision to date has cited, distinguished or discussed the NTSB position in Moore.

Only a number of ALJ Decisions have considered Moore 's application to a proposed revocation in refusal to test cases in which the Respondent has defaulted. While decisions of other Coast Guard ALJs are not binding on another Coast Guard ALJ, they may be considered as persuasive authority. However, these decisions are not consistent. For example, in one, the Respondent failed to answer an allegation of the refusal to take an alcohol test, and the ALJ decided that in the absence of aggravating or mitigating evidence a 24-month suspension was appropriate. USCG v Koch, SR-2008-12. In another the default was a failure to appear, and the ALJ held, citing Callahan and Downs, that given "Respondent's failure to submit to testing, his failure to appear at the hearing and his apparent dishonesty in explaining that absence, outright revocation [was] deemed appropriate." USCG v Johnson SR-2008-08.

The closest description to what occurred in this matter in Table 5.569 is a "refusal to take chemical drug test" which is listed under Violation of Law and not Misconduct. However, refusal to test is commonly charged under Misconduct. See, e.g., Callahan, and Spence, supra. In Appeal Decision 2041 (SISK) (1975), the Commandant held that violations of marine safety law may be charged as misconduct or even as negligence. Therefore, I hold that the recommended sanction in Table 5.569 is as applicable to refusal cases charged under Misconduct as to those charged under Violation of Law.

While Table 5.569 has been considered guidance for the judges, there are other sections of the rules that also provide guidance as to appropriate orders or even mandate sanctions in certain circumstances. For example, 46 C.F.R. § 5.59 lists the lists the offenses for which

[4] I note that the ALJ in Spence found that revocation is mandated in any DOT Drug test refusal ignoring Table 5.569. SR-2004-10 at 20. The Appeal Decisions only find it appropriate under the circumstances of these cases and the Moore decision holds the opposite.

revocation of licenses, certificates of documents is mandatory (these offenses include "misconduct for wrongful possession, use, sale, or association with dangerous drugs" while acting under the authority of a credential) and 46 C.F.R. § 5.61, which outlines the circumstances under which revocation of a license, certificate, or document may be sought. In particular, I have considered 46 C.F.R. § 5.61(b), which states that revocation is appropriate when the circumstances of an act or offense found proved "indicates that permitting such person to serve under the credential or endorsements would be clearly a threat to the safety of life or property, or detrimental to good discipline." Without more in the record, there is simply not enough evidence to determine definitively that Respondent is such a clear threat or detrimental to good discipline. Nevertheless, a significant sanction is warranted for Respondent's refusal to submit to the Master's lawful order to sit for a drug test.

A number of decisions state that the "selection of an appropriate order by the Administrative Law Judge should involve the consideration of the promotion of safety of life at sea and the welfare of individual seamen." Appeal Decision 2573 (JONES) (1996) See also Appeal Decisions 2017 (TROCHE) (1975), 2551 (LEVENE) (1993), 2570 (HARRIS) (1995). In Spence, supra, the Commandant held that the refusal to submit to a chemical test for dangerous drugs raises serious doubts of the individual's ability to perform safely and competently in the future. See also Downs and Callahan, supra. Upon consideration of the above, I find that a mariner's refusal to take a test for drugs when ordered to do so by the Master is a serious offense that at a minimum warrants at least a 12-24 month suspension and for which the revocation of that individual's Coast Guard issued credential may be appropriate, depending on the particular circumstances. In this case, the Coast Guard's pleadings have alleged, and Respondent's default has deemed admitted, evidence of aggravating factors that could support exceeding the suggested range contained in Table 5.569.

In particular, it has been deemed admitted that the Respondent refused to follow a lawful order of the Master to submit to chemical testing after the discovery of drugs aboard a vessel. Before and after the Moore decision, the Commandant has found revocation appropriate for refusal to submit to testing three times: (1) in Callahan (post incident testing); (2) in Downs (reasonable suspicion testing); and (3) in Spence (respondent was intoxicated and refused confirmatory alcohol test and a drug test). In these cases, refusals were all of federally mandated tests. The circumstances of the refusals also clearly endangered the safe operation of the vessel and were detrimental to good order and discipline. Here, there is no federal mandate involved. Because the record is confined to the pleadings, there is inadequate evidence in aggravation to clearly support an upward deviation from the suggested sanction provided in Table 5.569. Having chosen not to answer, likewise nothing has been provided by the Respondent in remediation or mitigation.

"An Administrative Law Judge has wide discretion to formulate an order adequate to deter the Appellant's repetition of the violations he was found to have committed. Appeal Decision (2475) (BOURDO)" Callahan, supra. However, the NTSB has stated that the Coast Guard's position concerning revocation in refusal cases as set forth in Callahan and Downs is "in conflict with the Coast Guard's articulation of a 12-24 month suspension as the 'appropriate' sanction, absent mitigating or aggravating factors." The Board stated that "unless and until the Coast Guard changes its regulation, [the Board] will not uphold an upward departure from the policy currently embodied in the Coast Guard's regulation without a clearly articulated explanation of aggravating factors." Moore at 16.

Given the record in this case, I cannot provide such an explanation of aggravating factors. Recognizing that the provisions in Table 5.569 about chemical test refusals were added in furtherance of the DOT drug testing rules[5] and because the master ordered the testing for reasons not

[5] See 53 FR 47079, Nov. 21, 1989; and 66 FR 42967, Aug. 16, 2001

covered by federal drug tests rules, some downward deviation is appropriate.

At the same time, the sanction must be severe enough to enforce the strong public policy to require a drug-free transportation system. As part of its drug enforcement prevention program, the Coast Guard has defined the process by which a mariner can establish "cure". See Appeal Decision 2535 (Sweeney) (1992) and its progeny. If a mariner had accepted a so-called "Sweeney" settlement agreement and successfully completed it, an average suspension of between fourteen and fifteen months would have been served. So as not to undermine that remedial program, any period of outright suspension in a refusal case should be longer. In the case at hand, there is no evidence that this Respondent has attempted to undertake any rehabilitation.

Accordingly, I find that an outright suspension of eighteen (18) months plus an additional suspension of six (6) months on a probationary period of twelve (12) months is an appropriate sanction adequate to deter the Respondent's repetition of this violation and not thwart public policy to maintain a drug-free maritime transportation system.

## V. ORDER

**WHEREFORE:**

1. **IT IS HEREBY ORDERED** that the Coast Guard's Motion for a Default Order is **GRANTED**; and **IT IS HEREBY FURTHER ORDERED** that the Allegations in the Complaint are modified as given above and are found **PROVED**; and
2. **IT IS HEREBY FURTHER ORDERED** that Respondent's Mariner's credential is **SUSPENDED OUTRIGHT** for **EIGHTEEN (18) MONTHS** from the date the credential is surrendered to the Coast Guard. The Respondent's credential; is further **SUSPENDED ON PROBATION** for an additional **SIX (6) MONTHS** for a **TWELVE (12) MONTH PERIOD OF PROBATION** beginning at the end of the period of outright suspension; and

3. **IT IS HEREBY FURTHER ORDERED** that the parties have thirty (30) days from the service of this Order to submit any facts or argument requesting reconsideration of the amendment to the Complaint and Respondent has (30) thirty days from the service of this Order to provide good cause why the default should be set aside and this matter heard on the merits.

4. **IT IS HEREBY FURTHER ORDERED** that the suspension of Respondent's Mariner's credential is stayed for thirty (30) days from service of this Order. If a party submits a timely response to this Order, the stay will continue until such time as a final order is issued and the record is closed in this matter. If no party submits a timely response to this Order, the stay will expire and the record will be closed.

If the stay expires, the Respondent must immediately surrender his credential to the Coast Guard. If you knowingly continue to use your document after this time, you may be subject to criminal prosecution.

If this order of default enters into full force and effect, an Administrative Law Judge may set aside this finding of Default under the provisions of 33 C.F.R. § 20.310(e) for good cause shown. You may file a motion to set aside the findings with the ALJ Docketing Center, Baltimore.

The parties' right to appeal, as set forth in 33 C.F.R. Subpart J, Section 20.1001 (Attachment A), will be triggered upon the expiration of the stay upon the Order of Suspension or such final order as will be entered in this matter based upon the timely submissions of the parties as outlined herein.

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**George J. Jordan**
**US Coast Guard Administrative Law Judge**

Date: July 08, 2010