U.S. DEPARTMENT OF HOMELAND SECURITY

UNITED STATES COAST GUARD

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Complainant

vs.
CHARLES E. SHANKS

Respondent

Docket No: 2010-0040
CG Enforcement Activity No: 3121424

DECISION & ORDER

DATE ISSUED: NOVEMBER 22, 2010

ISSUED BY: HON. BRUCE TUCKER SMITH
ADMINISTRATIVE LAW JUDGE

Appearances:

For Complainant
LT Angel Flood
LT Jason Franz
CWO4 Malcolm Dixon
USCG Marine Safety Unit Morgan City

For Respondent
Adam Swensek, Esq.
Jonathan Bourg, Esq.
Barrasso Usdin Kupperman Freeman & Sarver, LLC

I. PRELIMINARY STATEMENT

The United States Coast Guard (Coast Guard) initiated this administrative action seeking revocation of Respondent Charles E. Shanks' (Respondent) Coast Guard-issued Merchant Mariner's License (MML). This action was brought pursuant to the legal authority codified at 46 U.S.C. §§7703 and 46 C.F.R. §5.27.

On January 25, 2010, the Coast Guard filed a Complaint against Respondent's MML essentially alleging that Respondent committed misconduct and violated a law or regulation by refusing to submit to a random drug test ordered by his employer, International Marine, LLC.[1] The Complaint further alleged that "Respondent wrongfully failed to follow company policy by refusing a random drug test," but did not specifically allege why such a failure constituted "Misconduct."

On May 20, 2010, Respondent filed an Answer wherein he denied the jurisdiction and factual allegations of the Complaint.

On June 9, 2010, the Coast Guard filed an Amended Complaint correcting the name of a person involved in the res gestae, a minor, non-substantive change. Neither did the Amended Complaint specifically pled how or why, under 46 C.F.R. §5.27, Respondent's alleged conduct constituted "Misconduct."

[1] In both the original and Amended Complaint, the Coast Guard alleged that Respondent was employed by a corporate entity known as "International Marine, LLC." That entity, apparently, is a subsidiary of a business entity known as "International Boat Rentals, Inc." (Tr. Vol. I at 74). Toward the end of establishing Respondent's notice of the conduct that would constitute Misconduct, the Coast Guard offered Exhibit 10, a series of documents bearing Respondent's signature and acknowledgement of the drug policies of the business entity known as "International Boat Rentals, Inc." (See also Resp. Ex. B).
Respondent did not raise, thus this Decision need not address, whether the business relationship between the two entities is or was such that Respondent's acknowledgement of one entity's policies (International Boat Rental, Inc.) constitutes notice of a duty to the other (International Marine, LLC). Respondent apparently chose not to develop the issue and it appears, absent proof, that this court's decision herein is not affected by the matter. The undersigned only notes this anomaly for the purposes of ensuring a full record of these proceedings is made.

On July 2, 2010, Respondent filed an Answer to the Amended Complaint, wherein he denied and admitted certain jurisdictional and factual allegations of the Amended Complaint.

On October 4, 2010, this matter initially came on for hearing in the Hale Boggs Federal Building, New Orleans, Louisiana. The proceeding was conducted in accordance with the Administrative Procedure Act (APA), as amended and codified at 5 U.S.C. §§551-59 and Coast Guard procedural regulations located at 33 C.F.R. Part 20. Both parties were represented; Respondent was present in court with pro bono legal counsel.[2]

Following the October 4, 2010, hearing and consistent with the obligation to fully develop the administrative record, the court requested additional testimony from other essential witnesses. The court granted the parties a continuance to properly prepare for the testimony of those witnesses. On October 21, 2010, the hearing of this matter resumed wherein additional testimony was taken and closing matters were thereafter submitted by the parties.

During the October 4 and October 21, 2010 hearings,[3] the Coast Guard presented the testimony of six witnesses and offered nine items of documentary evidence, seven of which were admitted. Likewise, Respondent presented the testimony of three witnesses and offered three items of documentary evidence, all of which were admitted.

The administrative record was closed on November 5, 2010. 33 C.F.R. §§20.709, 20.903.

For the reasons set forth infra, the court finds that the allegations contained in the Amended Complaint are **PROVED**. Respondent Charles E. Shanks' Coast Guard-issued Merchant Mariner's License (MML) is hereby **REVOKED**.

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[2] Adam Swensek, Esq. and Jonathan Bourg Esq. appeared pro bono via the courtesy of the New Orleans law firm Barrasso, Usdin, Kupperman, Freeman & Sarver, LLC. "Every lawyer, regardless of professional prominence or professional workload, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer." ABA Model Rule 6.1: Voluntary Pro Bono Publico Service Comment 1. The legal matters involved in instant matter were decidedly complex and time consuming. However, Messrs. Swensek and Bourg acquitted themselves nobly, and by doing so, honored the legal profession and their firm by donating their time and energies on behalf of their client. The court is greatly appreciative of their professional efforts.

[3] References herein to testimony from the October 4 hearing are noted by "Vol. I." References to testimony from the October 21 hearing are noted by "Vol. II."

II. FINDINGS OF FACT

1. At all relevant times herein, Respondent Charles E. Shanks was the holder of a United States Coast Guard-issued Merchant Mariner's License, issue number 5, for 100 tons in and near Coastal Waters.
2. At all relevant times herein, Respondent Charles E. Shanks acted under the authority of his United States Coast Guard-issued Merchant Mariner's License.
3. Respondent Charles E. Shanks obtained his first Mariner's License in 1984. (Tr. Vol. I at 131).
4. Respondent Charles E. Shanks failed a pre-employment urinalysis (marijuana metabolites) in 2004, at which time his Coast Guard-issued Merchant Mariner's License was suspended for one year, and then reinstated following his completion of a Settlement Agreement with the Coast Guard. (Tr. Vol. I at 146-147, 150).
5. The terms of Respondent Charles E. Shanks' prior Settlement Agreement included attendance at a drug rehabilitation facility for twenty-eight days, submission to six random drug tests, and consultation with a substance abuse professional. (Tr. Vol. I at 147).
6. On March 15, 2006, Respondent Charles E. Shanks was employed by International Marine, LLC. (Tr. Vol. I at 134).
7. On or about March 15, 2006, Respondent Charles E. Shanks signed various documents provided to him by the business entity known as "International Boat Rentals, Inc." including documents entitled: "Substance Abuse Policy," "Alcohol and Controlled Substance Test Consent," "Acknowledgement Form," "Employee Certificate of Understanding and Agreement," "Acknowledgement USCG and NOT-DOT Policy," "International Boat Rentals, Inc.," and "Acknowledgement & Consent." (CG Ex. 10).

8. The business entity known as “International Marine, LLC” is a wholly owned subsidiary of the business entity known as “International Boat Rentals, Inc.” (Tr. Vol. I at 74).
9. Respondent Charles E. Shanks’ duties at International Marine, LLC included his service as a captain of offshore utility boats. (Tr. Vol. I at 135).
10. On or about October 25, 2007, International Marine, LLC owned or operated approximately forty vessels, including tug boats and offshore supply vessels. (Tr. Vol. I at 30.)
11. Prior to October 25, 2007, International Marine, LLC hired a business entity known as Complete Occupational Health Services to conduct drug testing on International Marine’s employees. Complete Occupational Health Services, in turn, contracted with a business entity known as SECON to conduct some urine specimen collection operations. (Tr. Vol. I at 27-28, 30-31).
12. In October 2007, International Marine, LLC anticipated that Complete Occupational Health Services would test the crew members aboard approximately one-quarter of its forty-vessel fleet each calendar quarter. (Tr. Vol. I at 33).
13. In October 2007, International Marine, LLC provided Complete Occupational Health Services with an alphabetical telephone list of the vessels owned/operated by International Marine, LLC so that Complete Occupational Health Services could select vessels from that list for random testing. International Marine, LLC presumed that Complete Occupational Health Services would randomly select vessels, rather than individual mariners, and that the persons aboard a selected vessel would then be tested. (Tr. Vol. I at 33-34, 57-58, 61, 88-89).
14. Complete Occupational Health Services is a business entity located in Galliano, Louisiana, owned and managed by Joey Fullilove. In and before October 2007, Complete

Occupational Health Services was under contract with International Marine, LLC to provide random drug screening services. (Tr. Vol. II at 38).

15. Among his duties at Complete Occupational Health Services, Mr. Fullilove (or a person in his employment) loaded the alphabetical list of the vessels owned/operated by International Marine, LLC into a computer located on the premises of Complete Occupational Health Services. That computer contained a software program called the "Randomizer" which would, upon request, provide a random list of vessels for testing. (Tr. Vol. II at 40-44, 52-56).
16. Upon receipt of the list of vessels produced by the "Randomizer" software, Mr. Fullilove would communicate that list to Ms. Kathy Dufrene at International Marine, LLC. (Tr. Vol. II at 66-69).
17. RandomTesting.com is an Internet-based company located in Toledo, Ohio. RandomTesting.com is the creator/patent or copyright holder of the software program known as "Randomizer." The "Randomizer" was developed for the Department of Transportation and the industries it regulates to generate random selections from lists of names. (Tr. Vol. II at 88.).
18. Essentially, the "Randomizer" software works in this manner: The software creates a sequence of random numbers based upon the time displayed by the internal processer clock inside of a personal computer. When the software is activated, the software picks one of between eight and ten digits displayed by the internal processor, which counts time by tenths of a second. Once the first digit (or seed number) is selected, the program starts a numerical sequence based upon the initial time displayed when the program was activated. Thereafter, the initially-generated random seed number is used to generate a second algorithm-based number, and so forth, until the requested number of items from a previously-loaded list is provided. Each generated number corresponds with a number

assigned to each item on a list of names, etc. previously loaded into the computer. (Tr. Vol. II at 90-93).

19. During October 2007, International Marine, LLC owned or operated approximately forty vessels, each with a crew of four, for an approximate total of 160 maritime employees. (Tr. Vol. I at 58).

20. During early October 2007, and at the beginning of each calendar quarter before, Complete Occupational Health Services would notify Ms. Kathy M. Dufrene, Human Resources Director for International Marine, LLC of which randomly-selected vessels were to be tested that calendar quarter. (Tr. Vol. I at 58, 90).

21. Neither the International Marine, LLC Safety Manager/safety coordinator, Mr. Tate Matherne, nor the International Marine, LLC Human Resources/Safety Manager, Ms. Kathy Dufrene, knows how or by what method Complete Occupational Health Services selected vessels for testing. However, International Marine, LLC relied upon Complete Occupational Health Services and RandomTesting.com to ensure that vessels (and, hence, employees) were selected at random by a scientifically or mathematically valid method. (Tr. Vol. I at 80-85).

22. After Complete Occupational Health Services provided International Marine, LLC with the names of the vessels to be tested in a given quarter, International Marine, LLC had, within its discretion, up to three months to test the crews on those identified vessels and discretion as to when and where those crews aboard the named vessels would be tested. (Tr. Vol. I at 85, 91).

23. International Marine, LLC does not historically maintain the lists of vessel names to be tested in any given quarter and specifically, did not maintain a copy of the list whereupon the INTERNATIONAL STORM would have been indicated for testing in October 2007. (Tr. Vol. I at 85-86).

24. On or before October 25, 2007, International Marine, LLC assigned Respondent Charles E. Shanks to serve a twenty-eight day "hitch" aboard the INTERNATIONAL STORM."(Tr. Vol. I at 40 – 136; CG Ex. 14).

25. The vessel INTERNATIONAL STORM is a 94 gross ton, inspected, steel-hulled, offshore supply vessel, powered by a 1,450 horsepower diesel reduction engine, 127 feet in length. (CG Ex. 2).

26. On October 25, 2007, at approximately 0600 hours, Respondent Charles E. Shanks reported to the INTERNATIONAL STORM in Intercoastal City near Abbeville, Louisiana. (Tr. Vol. I at 40-139).

27. On October 25, 2007, approximately between 1000 and 1100 hours, Mr. Tate Matherne, Safety Coordinator with International Marine, LLC, boarded the INTERNATIONAL STORM for the purpose of collecting random specimens for subsequent drug testing on the oncoming crew. Mr. Matherne was accompanied by Mr. Carrell J. Wilson of SECON, an outsourced, commercial urine collection/drug testing company. (Tr. Vol. I at 20-21, 117).

28. Upon Mr. Matherne's arrival aboard the INTERNATIONAL STORM, he informed Respondent Charles E. Shanks and the other crew members that they were to participate in a random drug test and directed each to complete the appropriate paperwork. At that time, Respondent Charles E. Shanks went to the captain's quarters to begin packing his bag. Mr. Matherne followed and confronted Respondent and asked why he was packing. (Tr. Vol. I at 21-22.)

29. On or about October 25, 2007, Mr. Matherne and Respondent exchanged words in the captain's cabin. Thereafter, Respondent finished packing his bags, refused to provide a urine specimen for drug testing, and immediately departed the INTERNATIONAL

STORM without providing a specimen or participating in the random drug test. (Tr. Vol. I at 22, 141; CG Ex. 11).

30. At the time Mr. Matherne and Respondent exchanged words in Respondent's cabin, Respondent communicated to Mr. Matherne his unwillingness to provide a urine specimen. (Tr. Vol. I at 22, 26,141).
31. Respondent admitted that he knew he had violated a company policy when he refused to submit to a random drug test. (Tr. Vol. I at 153).

III. DISCUSSION

The facts of this case are generally straightforward and uncontested.

On or about March 15, 2006, Respondent was hired by the business entity known as International Marine, LLC. (International Marine) to serve as a captain of one of its offshore utility boats. (Tr. Vol. I at 134-135). International Marine is a wholly owned subsidiary of the business entity known as International Boat Rentals, Inc. (International Boat) (Tr. Vol. I at 74).

On the date Respondent was hired, he signed several documents provided to him by International Boat including documents entitled: "Substance Abuse Policy," "Alcohol and Controlled Substance Test Consent," "Acknowledgement Form," "Employee Certificate of Understanding and Agreement," "Acknowledgement USCG and NOT-DOT Policy," "International Boat Rentals, Inc.," and "Acknowledgement & Consent." (CG Ex. 10). All of the documents contained in Coast Guard Exhibit 10 were either part of or generated pursuant to a jumble of International Marine's Corporate policies offered into evidence by the Coast Guard.[4]

[4] The "Substance Abuse Policy" forbids "the use of mood altering substances by [all] employees while on the job." The policy does not, apparently, forbid such use when an employee is not "on the job."

The "Alcohol and Controlled Substance Test Consent" says that "the presence of one or more such drugs/alcohol may be cause for disciplinary action…" Interestingly, the term "such drugs" is not defined in the document.

The "Acknowledgement" indicates Respondent's understanding of the "guidelines" contained in 46 C.F.R. Parts 4, 5 and 16 and 41 U.S.C. §701.

The most relevant of these documents is a statement of corporate policy wherein Respondent agreed "I will be subject to random [drug] testing."

Prior to October 25, 2007, the date at issue herein, International Marine hired the business entity known as Complete Occupational Health Services (Complete) to conduct drug testing on International Marine's employees. Complete, in turn, subcontracted the on-site urine collection operations with a business entity known as SECON. (Tr. Vol. I at 27 – 28, 30 – 31).

In October 2007, International Marine anticipated that Complete would test approximately one-quarter of its 40 vessel fleet each calendar quarter. (Tr. Vol. I at 33).

Prior to October 2007, International Marine provided Complete with an alphabetical list of the vessels owned/operated by International so that Complete could select vessels for random testing. International Marine presumed that Complete would randomly select vessels, rather than individual mariners and that the persons aboard a selected vessel would be tested by Complete. (Tr. Vol. I at 33-34, 57-58, 61, 88-89).

Immediately on or before October 25, 2007, Respondent was assigned by International Marine to serve a twenty-eight day "hitch" aboard its vessel the INTERNATIONAL STORM (Tr. Vol. I at 40-136; CG Ex. 14). Thereafter, on October 25, 2007, at approximately 0600 hours, Respondent reported to the INTERNATIONAL STORM in Intercoastal City near Abbeville, Louisiana. (Tr. Vol. I at 40-139).

On October 25, 2007, sometime between 1000 and 1100 hours, Mr. Tate Matherne, International Marine's Safety Coordinator, boarded the INTERNATIONAL STORM to conduct a random urine specimen collection process upon the oncoming crew. Mr. Matherne was accompanied by Carrell J. Wilson of SECON, an outsourced commercial specimen collection/drug testing company. (Tr. Vol. I at 20-21, 117).

"The International Boat Rentals, Inc." document includes, among other mandates, a "No Fishing" policy, which says that "…no fishing is allowed on any vessels."

Upon Mr. Matherne's arrival aboard the INTERNATIONAL STORM, he informed Respondent and the other crew members that they were to participate in a random drug test and directed each was to complete the appropriate paperwork and provide a urine specimen. Immediately thereafter, Respondent went to the captain's quarters to begin packing his bag. Mr. Matherne followed and confronted Respondent and asked why he was packing. (Tr. Vol. I at 21-22). Mr. Matherne and Respondent exchanged words, at which time Respondent finished packing his bags and refused to take a drug test. Respondent thereupon departed the INTERNATIONAL STORM without providing the requested urine specimen. (Tr. Vol. I at 22, 141;CG Ex. 11).

The exact nature of the exchange between Mr. Matherne and Respondent in the captain's cabin is in some dispute. At the hearing, Respondent testified that he told Mr. Matherne, "I'm not taking the drug test." (Tr. Vol. I at 141). By contrast, Mr. Matherne testified that Respondent stated that he "could not pass a drug test." (Tr. Vol. I at 22, 26). Despite the varying accounts of the exact words spoken, it is undisputed that immediately after the discussion, Respondent departed the INTERNATIONAL STORM without providing a urine specimen or otherwise participating in his employer's drug test.

At the hearing, Respondent admitted that he knew he had violated a company policy when he refused to submit to a random drug test. (Tr. Vol. I at 153).

The evidence further revealed that Respondent failed a pre-employment urinalysis (marijuana) in 2004, at which time his Coast Guard-issued license was suspended for one year, and then reinstated following Respondent's completion of a settlement agreement with the Coast Guard. (Tr. Vol. I at 146-147, 150). The terms of Respondent's prior settlement agreement included attendance at a drug rehabilitation facility for twenty-eight days, submission to six random drug tests, and consultation with a substance abuse professional. (Tr. Vol. I at 147).

It is upon these facts, the Coast Guard asked that Respondent's Merchant Mariner's License be revoked.

The facts of this case, although not complex, give rise to some perplexing legal questions.

A. Whether, in this case, Respondent can be properly charged with "Misconduct" under 46 C.F.R. §5.27

Respondent was charged with committing "Misconduct," in violation of 46 C.F.R. §5.27. "Misconduct," as that term is defined in 46 C.F.R. §5.27. is "behavior which violates some formal, duly established rule."[5] Although neither Complaint specifically alleges, the Coast Guard essentially asserts that Respondent's refusal to submit to his employer's "random" drug test (CG Ex. 10, p. 7) constitutes a wrongful failure to follow "company policy" and, thus, constitutes Misconduct.

Thus the inquiry: Whether violation of a corporate policy or employment manual constitutes violation of "some formal, duly established rule" per 46 C.F.R. §5.27, even though that regulation does not list or identify corporate policies or manuals as bases or sources for allegations of "Misconduct." Respondent's post-hearing brief correctly notes that "[n]othing in the plain language of Section 5.27 defines misconduct as a violation of a company policy applicable to all employees of a company."

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[5] Per Ashcroft v. Iqbal, 556 U.S. __, 129 S.Ct. 1937 (2009), F.R.C.P. 8(a)(2) is read to require that a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." "[D]etailed factual allegations" are not required, Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), at 555, but the Rule does call for sufficient factual matter to "state a claim to relief that is plausible on its face," id., at 570. A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Id., at 556. Here, the Coast Guard did plead a litany of facts related to Respondent's alleged failure to submit to a drug test. However, the Coast Guard did not plead why or how such failure constituted Misconduct, as that term is defined in 46 C.F.R. §5.27. Nothing in either Complaint draws a nexus between the facts alleged and an allegation of Misconduct. In short, both Complaints, here, might be criticized on Constitutional grounds for its failure to state a claim to relief.

A reading of 46 C.F.R. §5.27 defines "Misconduct" as "human behavior which violates some formal, duly established rule." Although the regulation does not define what "duly established" means, the regulation explains that "such rules are found in, among other places" the following:

Statutes – that which is created by an appropriate legislative body pursuant to its legislative authority;

Regulations – directives promulgated by an appropriate administrative or regulatory body pursuant to its statutory authority;

The Common Law – that body of law derived from decisions of courts and similar tribunals rather than through legislative statutes or executive branch action.

The General Maritime Law -- is a complete system of law, both public and private, substantive and procedural, national and international, with its own courts and jurisdiction which pre-dates both the civil and common law. For centuries maritime law has had its own law of contract - of sale of ships, of towage, of chartering, of carriage, of insurance, of agency, of hire of masters and seamen, of compensation for sickness and personal injury, and risk distribution. Maritime law is composed of two main parts - national maritime statutes and international maritime conventions and the general maritime law which evolved from various maritime codes, including Roodian law (circa 800 B.C.), Roman law, the Roles of Oleron (circa 1190), the Ordonnance de la Marine (1781), all of which were relied on in the English Admiralty Court, and the maritime courts of Europe.

A Ship's Regulation or Order – those lawful directives given by the Master or Captain pertaining to the operational command or control of a vessel or the conduct of her crew afloat;

Shipping Articles and similar sources – the contract between the Captain and the crew of the vessel.[6]

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[6] An Act of Congress of July 20, 1790, provided the original definition of "Shipping articles." The Act:

1. Directs that a master of any vessel bound from a port in the United States to any foreign port, or of any vessel of fifty tons or upwards, bound from a port in one state to a port in any other than at adjoining state, shall, before he proceed on such voyage, make an agreement in writing or in print, with every seaman or mariner on board such vessel, (except such as shall be apprenticed or servant to himself or owners) declaring the voyage or voyages, term or terms of time, for which such seaman or mariner shall be shipped.

2. And by sect. 2, it is required that at the foot of every such contract, there shall be a memorandum in writing, of the day and the hour on which such seaman or mariner who shall so ship and subscribe, shall render himself on board to begin the voyage agreed upon.

3. This instrument is called the shipping articles. For want of which, the seaman is entitled to the highest wages which have been given at the port or place where such seaman or mariner shall have been shipped for a similar voyage within three months next before the time of such shipping, on his performing the service, or during the time he shall continue to do duty on board such vessel, without being bound by the regulations, nor subject to the penalties and forfeitures contained in the said act of congress; and the master is further liable to a penalty of twenty dollars.

4. The shipping articles ought not to contain any clause which derogates from the general rights and privileges of seamen, and if they do, such clause will be declared void. 2 Sumner, 443; 2 Mason, 541.

None of these referenced sources contain or reasonably contemplate a corporate employment manual. However, the closest possible category for a corporate manual or policy might be "a ship's regulation of order." Thus, resort may be had to prior Commandant's decisions.

In Appeal Decision 2640 (PASSARO) (2003), the Commandant elaborated that:

> Pursuant to 46 C.F.R. § 5.27, "misconduct" is "human behavior which violates some formal, duly established rule." The regulation makes clear that such "established rule(s)" may be found in a variety of sources including "among other places, statutes, regulations, the common law, the general maritime law, a ship's regulation or order, or shipping articles and similar sources." 46 C.F.R. §5.27. The Coast Guard's complaint stated that the misconduct charge resulted from the fact that "[e]ach of the two overboard discharges was a direct violation of Liberty Maritime Corporation's company restrictions on pumping bilges as set forth in the Vessel Instruction Manual and the Chief Engineer's Standing Order 11." Therefore, whether the discharges were "illegal" is of no relevance to this case. Instead, to effectively prove the misconduct alleged, the Coast Guard must show that Respondent violated Liberty Maritime's Company policy, without justification.

(Emphasis added)

In the instant matter, the relevant question is whether a maritime employer's employment/drug policies constitute an "established rule…[which] may be found in a variety of sources including among other places, statutes, regulations, the common law, the general maritime law, a ship's regulation or order, or shipping articles and similar sources." To restate: in the instant case, a corporate manual or policy does not constitute a statute, regulation, the common or general maritime law. Similarly, the company policy described in PASSARO pertained to the operational command and control of a vessel. Documents such as those might be properly regarded as part of a "ship's regulation or order."

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5. A seaman who signs shipping articles, is bound to perform the voyage, and he has no right to elect to pay damages for non-performance of the contract.

Contrast those kinds of materials the contents of Respondent's employer's corporate policy or manual that govern a variety of general administrative, non-operational matters and apply to all employees, non-licensed shore personnel and mariners alike (i.e., the "no fishing" policy).[7] Hence, PASSARO is of little guidance in this case, as it describes the kinds of company regulations that govern a ship's operation or the crew's conduct while afloat.

An early decision, Appeal Decision 1567 (CASTRO) (1966) construes a R.S. 4450, which, ostensibly, defined "Misconduct." [8] Assuming, for the purposes of this discussion, that the language of R.S. 4450 and the present 46 C.F.R. §5.27 are similar, CASTRO is of little value, here. Pertinent portions of that decision provide:

> A private steamship company's policy for maintenance of order and good safety conditions aboard a vessel, governing the conduct of the crew, is precisely the kind of rule that does establish standards for the invocation of the "misconduct" provision of R.S. 4450. A company policy as to conduct of the crew, relative to matters of safety aboard the ship, is a good norm for judging misconduct. A company policy with regard to whether a crewmember could act in certain ways or wear certain clothing while ashore, absent some other considerations, could have no connection with safety aboard the ship…. To pursue this question further, it can be said that a "company policy" designed to achieve safety at sea can, when so treated by the master of the vessel, become a lawful order of the master.

(Emphasis added)

Like PASSARO, CASTRO dealt with company policies which concerned the maintenance of good order and discipline at sea aboard a vessel at sea. They were documents which might be properly viewed as part of the "ship's regulation or order." The company policies in both of these cases were construed to mean lawful orders of the ship's master, and thus, logically, clearly within the ambit of 46 C.F.R. §5.27. (Or, as Respondent's brief artfully describes such orders as "a uniquely maritime flavor.") In fact, CASTRO specifically says that a

[7] Interestingly, Respondent's employer's "Substance Abuse Policy" only forbids the use of "mood altering substances by [all] employees while on the job." Logically, (but absurdly) then, off-duty use of illicit drugs is permissible under this policy--thus vitiating the importance of random or pre-employment drug testing.
[8] R.S. 4450 is the forty-four year predecessor of today's 5.27.

company policy that attempted to govern behavior ashore could have "no connection with safety aboard the ship" and, hence, could not form the basis for a charge of Misconduct.

The Coast Guard's post-hearing brief cites Appeal Decision 2352 (IAUKEA) (1984). There, sanctions were imposed upon a respondent's license for failing to perform assigned duties on a vessel's car deck, in violation of two of his employer's policies. Again, IAUKEA is another in the line of cases that deal with the operational control of a crew and vessel afloat, not, as here, a corporate policy that applies to shore-bound personnel as well as mariners.

Two other Commandant's Decisions on Appeal, 2675 MILLS (2002), and 2625 ROBERTSON (2002) presume, in dicta, that a company policy can form the basis for "Misconduct" under 46 C.F.R. §5.27—but in neither case was that question raised before the presiding Administrative Law Judges, nor was the question squarely addressed as an issue on appeal.

Thus, no prior Commandant's Decision on Appeal provides substantive guidance.

Certainly, if the Coast Guard intended its "Misconduct" regulation to include company policies or corporate manuals that include the governance of conduct ashore, as well as afloat, then the regulation would have been so written.

That the drafters of §5.27 intended "Misconduct" to be exclusively concerned with operational, command and control of vessels and crews at sea is plainly seen in a reading of 46 C.F.R. §5.569 and its attendant Table 5.569. The Table, which is a Suggested Range of an Appropriate Order, lists under the offense of "Misconduct" the following:

> Failure to obey master's/ship officer's order; failure to comply with U.S. law or regulations; possession of intoxicating liquor; failure to obey master's written instruction; improper performance of duties related to vessel safety; failure to join vessel (required crew member); violent acts against other persons (without injury); failure to perform duties related to vessel safety; theft; violent acts against other persons (injury); and use, possession, or sale of dangerous drugs.

These are all acts that directly relate to the operation, command and control of a vessel and her crew at sea.

The legal question whether violation of a company manual or policy, which governs non-operational matters and which applies to shore personnel as well as mariners, constitutes "Misconduct," remains unanswered by any competent appellate authority. Neither the extant appellate decisions nor a liberal interpretation of the regulation allows for a decision to the contrary.

Thus, for the purposes the instant matter only, absent proof from the Coast Guard, an allegation of a violation of a company policy, which does not specifically govern the command, control and/or operation of a vessel at sea, cannot form the basis of a charge of "Misconduct" under 46 C.F.R. §5.27. Broad-based, generic, non-operational "company policies" and forms are neither specifically listed in 46 C.F.R. §5.27 nor are they fairly contemplated by a liberal reading of any extant appellate authority.

Consequently, a new question arises for consideration: Does Respondent's conduct fall within another, more clearly-defined basis listed in 46 C.F.R. §5.27, even if not so alleged by the Coast Guard, of which Respondent had notice?

The Department of Transportation's (DOT) drug-testing program is imposed upon maritime employers (and, by extension, upon employee/mariners) by "regulation" namely, 46 C.F.R. Part 16, subpart B and 49 C.F.R. Part 40. Accordingly, maritime employers implement those federal drug-testing regulations and give notice to their employees via corporate manuals, policies, circulars, etc. While it is true that 46 C.F.R. Part 16, subpart B and 49 C.F.R. Part 40 provide direct regulatory guidance to maritime employers (i.e.,"legal notice"), it is equally true that, as a practical matter, maritime employees are universally affected and involved in the process, (i.e., "actual notice").

Therefore, it is arguable that 46 C.F.R. Part 16, subpart B and 49 C.F.R. Part 40 constitute a "regulation" under 46 C.F.R. §5.27 sufficient "actual notice" to mariners of an obligation to be drug tested.

Here, in response to direct inquiry by the court, Respondent admitted that he knew he had an obligation to submit to random drug testing:

> Q. But to be fair…as you were standing on the dock or walked away from the vessel,…you knew you had broken a company policy?
>
> A. Yes, sir.

(Tr. Vol. I at 151, 153).

Although 46 C.F.R. Part 16, subpart B and 49 C.F.R. Part 40 are specifically directed toward maritime employers (not mariners themselves), the regulations generally operate to put the maritime employee population on "actual notice" of an obligation to be tested. This conclusion is buttressed by Respondent's admission that he knew his company required him to be tested. His signature on Coast Guard Exhibit 10, p 6, further indicates Respondent's knowledge of the requirements of 46 C.F.R. Part 16.

Thus, for the purposes of the instant matter only, 46 C.F.R. Part 16, subpart B and 49 C.F.R. Part 40 may be viewed as one of those "regulations" referenced in 46 C.F.R. §5.27; the violation of which can be construed as a violation of "some formal, duly established rule," of which Respondent had prior actual, if not legal, notice.[9]

In sum, a properly pled Complaint ought to have alleged a violation of a regulation, rather than a violation of a corporate policy, in support of the charge of "Misconduct" under 46 C.F.R. §5.27.

B. Whether the test at issue was "random."

[9] It is the task of a superior appellate authority to determine whether, in an adverse administrative proceeding such as this, actual notice (vice legal notice) of a duty, to potential respondents meet the requirements of due process.

As discussed, supra, drug testing for maritime personnel is mandated and defined in 46 C.F.R. Part 16, subpart B and 49 C.F.R. Part 40. In this specific instance, Respondent's employer had a written policy informing its employees that "[R]andom drug testing has been implemented." (CG Ex. 10).[10]

It is noteworthy that, 46 C.F.R. Subpart B specifies five clearly-defined circumstances under which a maritime employee is subject to drug testing:

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.[11]

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. 46 C.F.R. §16.101(a).

Here, the Coast Guard's Amended Complaint alleges that on or about October 25, 2007, Respondent was chosen for his employer's "random" drug test and that he refused the same.

Respondent's post-trial brief suggests that the Coast Guard did not meet its burden to establish that Respondent's selection was "random." Curiously, the Coast Guard's post-hearing brief is silent on the issue of whether the test at issue was, in fact, random.

Whether an employer's test is, in fact, "random," is determined by a reading of 46 C.F.R. §16.230, which provides:

> 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-

[10] The court presumes that a maritime employer's drug-testing policies must be read in light of controlling DOT and/or Coast Guard regulations—and that any such policy must be consistent with those controlling regulations or they are void. Likewise, the undersigned interprets any maritime employer's drug-testing policies to be read in a manner that is consistent with controlling statutes and regulations.

[11] The court notes with particularity that 46 C.F.R. Subpart B makes no provision for a "voluntary" urinalysis test.)

> 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).

Here, 46 C.F.R. §16.230(c) requires that the means by which random selections or mariners or vessels 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 testing regimen is 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.

The Coast Guard pled "randomness" as an essential element of the Amended Complaint. Thus, it was incumbent upon the Coast Guard to establish an appropriate foundation that the vessels chosen, and, hence the mariners aboard, were selected by a scientifically or mathematically valid method, generally free of human intervention or discretion.

Testimony and evidence adduced at the hearing of this matter reveal that Complete employed a commercially-available software called the "Randomizer." That software was produced by RandomTesting.com, a business located in Toledo, Ohio. (Tr. Vol. II at 87-88). In this case, the "Randomizer" software was loaded onto a private computer used by Complete and utilized by Joey Fullilove. ((Tr. Vol. II at 40-44, 52-56).

Daniel French, a mathematician and employee of RandomTesting.com, explained that the "Randomizer" software creates a sequence of random numbers based upon the time displayed by the internal processer clock inside of a personal computer when the software is activated. When the software is activated, the software picks one of between eight and ten digits displayed by the internal processor, which counts time by tenths of a second. Once the first digit (or seed number) is selected, the program starts a numerical sequence based upon the initial time displayed when the program was activated. Thereafter, the initially-generated random seed number is used to generate a second algorithm-based number, and so forth, until the requested number of items from a previously-loaded list are provided. Each generated number corresponds with the number assigned to a list of names, etc. previously loaded into the computer. (Tr. Vol. II at 90-93).

Respondent did not contest that the "Randomizer" software is a scientifically or mathematically valid method of selecting crewmembers.

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, 615-17 (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.

Obviously, 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. Thus, the selection process at bar must be measured against the Constitutional dictates of Skinner, supra, and its progeny.

Based upon a thorough review of the selection method used by Respondent's employer, the court specifically finds that the selection methods employed by International Marine, LLC, through its subcontracted testing agent, Complete (utilizing the "Randomizer" software), were scientifically or mathematically valid. Each vessel in the International fleet was equally subject to selection. Accordingly, the court further finds that International Marine crewmembers did have an equal, random chance of being tested each time selections were made. Thus, Respondent's employer did not violate the clear requirements of 46 C.F.R. §16.230, or the "reasonableness" requirement imposed by the Fourth Amendment.

The court is mindful of the serious consequences to employees precipitated by random drug testing. Independent Oil Workers Union v. Mobil Oil Corp., 777 F. Supp. 391 (D. N.J. 1991). Certainly, in the instant case, there was much opportunity or latitude for human intervention or mischief which might have spoiled the "randomness" of the selection procedure. For instance, Mr. Fullilove at Complete did not know whether the list of vessels he was given by International Marine was a complete or current list. (Tr. Vol. II at 53). Hence, the information he put into his computer was only as valid as the list he was provided.

After Mr. Fullilove received the "Randomizer"- generated list of vessels to be tested, he provided that list to Kathy Dufrene at International Marine. Ms. Dufrene testified that she did not keep or maintain a copy of that list. (Tr. Vol. II at 18). Thus there is no "hard copy" proof of a list that might have contained Respondent's vessel, the INTERNTIONAL STORM, in October 2007.

Ms. Dufrene also admitted that when a given vessel was selected for testing, the determination of whether an on-loading or the off-loading crew was tested was entirely dependent upon when the urine-collection personnel arrived at the vessel. (Tr. Vol. II at 33-35).

Ms. Dufrene further admitted that International might take up to three months to test the crewmembers aboard a randomly-selected vessel. (Tr. Vol. I at 94-95).

Additionally troubling is the fact that International Marine knew the names of the personnel scheduled to board the randomly chosen vessel when it made port. (Tr. Vol. I at 96, Vol. II at 25). Thus, someone in the company could have pre-selected an individual or an on-loading crew, as opposed to the off-loading crew, even though the vessel had been properly chosen. (Tr. Vol. II at 25-28). But speculation alone is insufficient to negate the procedure at bar.

Admittedly, there was much latitude for human intervention or mischief in the process used by Respondent's employer. However, whether anyone within International Marine actually manipulated the selection or implementation process to single Respondent out for individual testing is a matter of pure conjecture.

The court is satisfied that, here, the proof establishes that the random selection process was mathematically and scientifically valid. Absent some proof that human intervention actually spoiled the random nature of the selection and testing process, it cannot be said that the mathematical or scientific basis for selection, here, was offended.

Beyond the legal issues discussed supra, it is undisputed that Respondent was properly directed to participate in his employer's random drug testing program. It is further undisputed that Respondent did not comply with those orders.

IV. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At all relevant times herein, Respondent Charles E. Shanks was the holder of a United States Coast Guard-issued Mariner's License, issue number 5, for 100 tons in and near Coastal Waters.
2. At all relevant times herein, and particularly on or about October 25, 2007, Respondent Charles E. Shanks acted under the authority of his United States Coast Guard-issued Merchant Mariner's License.

3. On October 25, 2007, Respondent Charles E. Shanks was in the employ of International Marine, LLC as a captain of offshore vessels.
4. On or before October 25, 2007, Respondent Charles E. Shanks was assigned to duty aboard a vessel owned/operated by his employer, International Marine, LLC.
5. On or before October 25, 2007, Respondent Charles E. Shanks had actual notice of the Department of Transportation drug-testing regulations and procedures; including the actual knowledge of his obligation to submit to random drug testing if he or his vessel were selected for testing.
6. On or before October 25, 2007, International Marine, LLC selected one of its vessels, the INTERNATIONAL STORM for random crew drug testing.
7. The method by which International Marine, LLC selected the vessel the INTERNATIONAL STORM, and thus Respondent Charles E. Shanks and the crew then aboard, for testing was random. That is to say, the method employed by his employer, International Marine, LLC, to make random selections of vessels was scientifically and mathematically valid.
8. On or about October 25, 2007, Respondent Charles E. Shanks refused to provide a urine specimen for drug testing despite having been properly directed to do so by his employer.
9. Prior to October 25, 2007, Respondent Charles E. Shanks had failed a Department of Transportation/United States Coast Guard-mandated pre-employment drug test, for which his Merchant Mariner's License was suspended, and because of which, Respondent Charles E. Shanks participated in a United States Coast Guard-approved "settlement agreement" which resulted in the return of his Merchant Mariner's License.

V. SANCTION

The authority to impose sanctions at the conclusion of a case is exclusive to the Administrative Law Judge. 46 C.F.R. §§5.567; 5.569(a); Appeal Decision 2362 (ARNOLD)

(1984). The nature of this non-penal administrative proceeding is to "promote, foster, and maintain the safety of life and property at sea." 46 U.S.C. §7701; 46 C.F.R. §5.5; Appeal Decision 1106 (LABELLE) (1959). As discussed supra, Respondent committed "Misconduct" while acting under the authority of his license by refusing to submit to a random drug test. The Amended Complaint seeks revocation of Respondent's Coast Guard-issued license in accordance with 46 U.S.C. §7703.

Title 46 C.F.R. §5.569 provides a Table of Suggested Range of Appropriate Orders (Table) for various offenses. The purpose of this Table is to provide guidance to the Administrative Law Judge and promote uniformity in orders rendered. 46 C.F.R. §5.569(d); Appeal Decision 2628 (VILAS) (2002), aff'd by NTSB Docket ME-174.

Here, both the original and Amended Complaints alleged "Misconduct" and sought revocation of Respondent's Merchant Mariner's License.

In Coast Guard v. Moore, NTSB Order No. EM-201 (2005), an action was brought against a mariner for Misconduct, alleging his refusal to submit to a drug test. The NTSB disapproved of a license revocation order because the Coast Guard neither proved, nor did the Administrative Law Judge find, specific factors in aggravation sufficient to depart from the guidance provided in 46 C.F.R. Table 5.569. The NTSB explained that the guidance contained in the Table is "for the information and guidance of Administrative Law Judges and is intended to promote uniformity in orders rendered."

While it is true that 46 C.F.R. §5.569(d) also says: **This table should not affect the fair and impartial adjudication of each case on its individual facts and merits**, it is not for the undersigned to speculate what those individual aggravating facts and merits are relative to **this** Respondent, absent some proof.

In determining an appropriate sanction for offenses for which revocation is not mandatory, an Administrative Law Judge should consider: any remedial actions undertaken by a

respondent; a respondent's prior records; and evidence of mitigation or aggravation. See 46 C.F.R. §5.569(b)(1)-(3).

Remedial Action: Here, Respondent did not provide any evidence of any independent, remedial action undertaken by him which might mitigate the sanction here imposed. See 33 C.F.R. §5.569(b)(1).

Respondent's Prior Records: The undersigned does note that the Respondent did lawfully have a 100-ton license, Issue No. 5, which had been the subject of previous disciplinary action. In 2004, Respondent failed a pre-employment urinalysis test. At that time, Respondent entered into a settlement agreement with the Coast Guard and participated in the "cure" process. (Tr. Vol. I at 146 - 147). See also 33 C.F.R. §5.569(b)(2).

Mitigation or Aggravation: Respondent offered no affirmative proof in mitigation of any potential sanction. He did, however, produce the testimony of two witnesses, who described him as an outstanding and safe mariner. Robert Charpentier, an experienced mariner and personnel manager for a business entity known as Odyssey Marine, testified that Odyssey Marine has employed Respondent for the past two and a half years. (Tr. Vol. I at 159; Resp. Ex. C). Mr. Charpentier described Respondent's extensive "sea time" with the company and termed Respondent "a good company captain….a very safe captain" who had never failed a drug test during his employment with Odyssey Marine. (Tr. Vol. I at 160-170).

Likewise, Roger Brown, Vice President of Odyssey Marine's offshore vessel division, testified on Respondent's behalf. Mr. Brown provided a detailed and frank accounting of his personal knowledge of Respondent's history and character. (Tr. Vol. I at 177-179). Mr. Brown described Respondent's service and reputation for safety, and characterized Respondent as ranking in "the top percent of [Brown's] employees." (Vol. I Vol. I at 180-185).

While Mr. Charpentier's and Mr. Brown's testimony carry some weight in determining an appropriate sanction, the court must balance their present commercial interest (i.e., keeping an employee) with the greater risk to maritime safety.

As indicated, supra, the Coast Guard elicited an important matter that constitutes aggravation of the present offense; specifically, Respondent's prior failure of a drug test and his participation in the "cure" settlement process. In fact, Respondent described in some detail his involvement in the year-and-a-half "cure" and license reinstatement process. (Tr. Vol. I at 146-147).

Respondent's recent failure to submit to a random drug test flaunts the very purpose of the prior accommodation he was shown by the Coast Guard when his license was returned after a positive drug test and after participation in the "cure" process. Respondent's behavior suggests that he did not learn from his prior experience and, hence, is not a mariner possessed of sound judgment on the waterways. Indeed, his behavior on October 25, 2007, might reasonably suggest an admission of recent drug use.

Hence, given the totality of the circumstances, it is possible that had Respondent's employer not requested he provide a sample as part of a random drug test, Respondent would have taken control of his vessel, perhaps with illegal substances in his body.[12]

Title 46 C.F.R. Table 5.569 provides a range of months wherein a mariner's license might be suspended in cases such as these. The Table suggests a suspension of between 12 and 24 months for refusal to take a chemical drug test. As the Moore, decision, supra, requires,

[12] Yet the undersigned questions the logic of the Coast Guard's argument that Respondent poses an immediate threat to safety on the waterways. Query: Why did the Coast Guard wait two years and two months to institute the instant charges if Respondent posed such an imminent threat to safety? Certainly, the Coast Guard was provided timely notice of Respondent's alleged violation. (Resp. Ex. A). Excessive and unexplained delay in Suspension & Revocation proceedings can be grounds for dismissal. Appeal Decision 2064 (WOOD) (1976). However, delay in and of itself is not per se a grounds for such a sanction. Appeal Decision 1972 (SIBLEY) (1973). Before making such a determination of excessive delay, a judge would have to make a factual determination whether there was any resulting prejudice to the respondent. Since Respondent, here, did not raise this as an affirmative defense, no such finding was necessitated.

departure from the suggested range must be justified by proof of aggravation, mitigation, rehabilitation.

It is incumbent upon the Coast Guard to substantiate the basis for its proposed sanction. Here, the Coast Guard's proof of Respondent's previous failure of a drug test, coupled with his refusal to be tested, amply demonstrates that he poses a threat to safety at sea or on the waterways.

The Coast Guard's proof of aggravating matters justifies the court's finding that departure from 46 C.F.R. §5.569 and its attendant Table is warranted. The Coast Guard has proved that Respondent failed to submit to a random drug test, in violation of 46 C.F.R. §5.27. Respondent's prior disciplinary record reflects his knowledge of the maritime drug safety program and his failures to adhere to its requirements. Based upon the record as a whole, the appropriate sanction is **REVOCATION** of Respondent's Merchant Mariner's License.

WHEREFORE,

ORDER

IT IS HEREBY ORDERED, that all allegations of the Complaint filed against Respondent Charles E. Shanks are found **PROVED.**

IT IS FURTHER ORDERED, that Respondent Charles E. Shanks' Coast Guard-issued Merchant Mariner's License is **REVOKED** and he is hereby barred from acting under the authority of his Merchant Mariner's License.

IT IS FURTHER ORDERED, that Respondent Charles E. Shanks shall immediately tender his Coast Guard-issued Merchant Mariner's License to the nearest United States Coast Guard office or to United States Coast Guard, Marine Safety Unit Morgan City, Investigations Division, 800 David Drive, Morgan City, Louisiana 70380.

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.

Bruce Tucker Smith
US Coast Guard Administrative Law Judge

Date: November 22, 2010

ATTACHMENT A – EXHIBIT & WITNESS LIST

COAST GUARD EXHIBITS

Ex. 2: Certificate of Inspection
Ex. 6: Certificate of Training
Ex. 10: Substance Abuse Policy
Ex. 11: Witness statement
Ex. 14: Runner's Itinerary
Ex. 15: Randomizer web page
Ex. 16: Randomizer methodology
Ex. 8 and Ex. 12: offered but not admitted

COAST GUARD WITNESSES

Tate M. Matherne
Misty Rose
Kathy M. Dufrene
Carrell J. Wilson
Joey J. Fullilove
Daniel A. French

RESPONDENT EXHIBITS

Ex. A: Letter of notification
Ex. B: "Types of Drug Testing"
Ex. C: Odyssea Marine, Inc.
Ex. D: Fax cover sheet

RESPONDENT WITNESSES

Charles E. Shanks
Robert Charpentier
Roger Brown

I. ATTACHMENT B—NOTICE OF ADMINISTRATIVE 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.