UNITED STATES OF AMERICA

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

UNITED STATES COAST GUARD

Complainant

v.

JOHN ALLEN GOBERT

Respondent

Docket No: 2010-0309
CG Enforcement Activity No: 3773491

DECISION & ORDER

Date Issued: January 26, 2011

Issued by: Hon. Bruce Tucker Smith
Administrative Law Judge

Appearances:

For Complainant

LT Pedro Mendoza, IO
USCG Marine Safety Unit Morgan City
LT Jason Boyer, IO
USCG Marine Safety Unit Houma

For Respondent

Nicole Dufrene Streva, Esq.
Ramsey, Skiles & Streva

I. PRELIMINARY STATEMENT

The United States Coast Guard Marine Safety Unit Morgan City (Coast Guard) initiated the instant administrative action seeking revocation of Respondent John Allen Gobert's (Respondent) Coast Guard-issued Merchant Mariner's Credential (MMC). The instant action is brought pursuant to the legal authority codified at 46 U.S.C. §7703(1)(B) and the underlying regulations set forth in 46 C.F.R. Part 5.

On July 7, 2010, the Coast Guard filed an original Complaint alleging that on June 4, 2010, Respondent refused to submit to a random drug test while serving as Captain aboard the DELTA LADY. The Coast Guard further alleged that Respondent's purported refusal to submit to a random drug test was in wrongful contravention of his employer's policy. The Coast Guard alleged that such action or inaction by Respondent, while acting under the authority of his MMC, as required by his employer as a condition of employment, constituted Misconduct in violation of 46 U.S.C. §7703(1)(B) and 46 C.F.R. §5.27.

On July 23, 2010, Respondent was served with the original Complaint via U.S. Postal Service (USPS) Certified Mail, Return Receipt Requested.

On July 29, 2010, Respondent filed an Answer to the original Complaint.

On July 30, 2010, the instant matter was assigned by the Chief Administrative Law Judge (CALJ) to the undersigned Administrative Law Judge (ALJ) for adjudication.

On August 9, 2010, the court convened a telephonic pre-hearing conference with the parties to discuss scheduling and discovery.

On August 13, 2010, the Coast Guard filed a significantly-amended Complaint, newly alleging that on June 4, 2010, Respondent refused to submit to a reasonable suspicion drug test while serving as Captain aboard the DELTA LADY. The Coast Guard further alleged that Respondent's purported refusal to submit to a reasonable suspicion drug test was in wrongful contravention of his employer's policy. (At the hearing, the Coast Guard oddly explained that the change from an allegation of a "random" drug test in the original Complaint, to an allegation of a "reasonable suspicion" drug test in the Amended Complaint was only a matter of "semantics." (Tr. 29).)

The Coast Guard alleged such action or inaction by Respondent, while acting under the authority of his Merchant Mariner's Credential as required by law or regulation, constituted Misconduct in violation of 46 U.S.C. §7703(1)(B) and 46 C.F.R. §5.27.

On September 7, 2010, Respondent was served with the Amended Complaint via Certified Mail, Return Receipt Requested.

On September 8, 2010, Respondent, with the assistance of counsel, filed an Answer to the Amended Complaint admitting all jurisdictional allegations, denying the factual allegations set forth in paragraphs 5, 6 and 7 of the Amended Complaint and admitting all others.

On October 26, 2010, this matter came on for hearing at the U.S. Coast Guard Administrative Law Judge Courtroom, located in the Hale Boggs Federal Building, in 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 the Coast Guard procedural regulations set forth at 33 C.F.R. Part 20. Coast Guard Investigating Officers (IOs) LT Pedro L. Mendoza and LT Jason A. Boyer appeared on behalf of the Coast Guard; Respondent appeared through counsel, Nicole Dufrene Streva, Esq. and was present in court.

Both parties appeared, presented their respective cases, and rested. Two witnesses testified as part of the Coast Guard's case-in-chief and the Coast Guard offered two exhibits into evidence, both of which were admitted. Respondent testified on his own behalf and offered the testimony of two additional witnesses. Respondent offered two exhibits into evidence, both of which were admitted.[1]

After the hearing, the court afforded the parties an opportunity to submit briefs in support of their respective legal positions. Neither party took advantage of that opportunity.

The administrative record was closed on Monday, January 24, 2011.

II. FINDINGS OF FACT

The Findings of Fact are based on a thorough and careful analysis of the documentary evidence, testimony of witnesses and the entire record taken as a whole, including party stipulations.

1. At all relevant times mentioned herein Respondent John Allen Gobert was the holder of a Coast Guard-issued Merchant Mariner's Credential (MMC).

[1] Citations referencing the transcript are as follows: Transcript followed by the volume number and page number (Tr. at __). Citations referring to Coast Guard Exhibits are as follows: Coast Guard followed by the exhibit number (i.e., CG Ex. 1, etc.); Respondent's Exhibits are as follows: Respondent followed by the exhibit letter (Resp. Ex. A, etc.); ALJ Exhibits are as follows: ALJ followed by the exhibit Roman numeral (ALJ Ex. I, etc.).

2. On or about March 11, 2010, B.N. Barrios & Sons, LLC, hired Respondent John Allen Gobert.

3. B.N. Barrios & Sons, LLC, is a marine employer.

4. On or about March 11, 2010, Respondent John Allen Gobert signed and dated a document entitled "Policies and Practices Statement" as an acknowledgment of B.N. Barrios & Sons, LLC policies and practices. (Tr. at 53; CG Ex. 1).

5. Respondent John Allen Gobert acted under the authority of his license for jurisdictional purposes when he stepped aboard his employer's vessel for the purpose of assuming his duties as captain of the DELTA LADY on June 4, 2010. (Tr. at 53).

6. On the morning of June 4, 2010, Respondent John Allen Gobert was not involved in any maritime incident, casualty, accident or collision. (Tr. at 31 - 50).

7. On the morning of June 4, 2010, at approximately, six-thirty a.m., Benjamin Conner observed Respondent John Allen Gobert to appear "very groggy and sleepy like, you know… he had his glasses off…and just looked sleepy, tired." (Tr. at 33 – 35).

8. On the morning of June 4, 2010, Jennifer Maysonet, the former personnel manager with B.N. Barrios & Sons, personally observed and interacted with Respondent John Allen Gobert. Maysonet did not observe any impairment in Respondent John Allen Gobert's speech, appearance, ambulation, mobility. Nor did Maysonet note any contemporaneous physical, behavioral, or performance indicators of probable drug or alcohol use by Respondent on the morning of June 4, 2010. (Tr. at 49-79).

9. On the morning of June 4, 2010, Jennifer Maysonet told Respondent John Allen Gobert that he had to "take a drug screen" or words to that effect. (Tr. at 56 – 67).

10. On or about June 4, 2010, Respondent John Allen Gobert left the employ of B.N. Barrios & Sons, LLC.. (Tr. at. 119-120).

11. Respondent John Allen Gobert did not submit to a drug or alcohol screen. (Tr. at. 117-121)

III. SUMMARY OF DECISION

The Coast Guard did NOT PROVE by a preponderance of reliable, probative and credible evidence that Respondent John Allen Gobert wrongfully refused to submit to a reasonable suspicion drug test or that he wrongfully failed to follow his employer's company policy by refusing to submit to a reasonable suspicion drug test. The Coast Guard did NOT PROVE Respondent committed Misconduct as contemplated by 46 U.S.C. §7703(1)(B) and 46 C.F.R. §5.27.

IV. DISCUSSION

A. General

The purpose of Coast Guard suspension and revocation proceedings is to promote safety at sea. See 46 U.S.C. §7701. Pursuant to 46 C.F.R. §5.19, an ALJ holds the authority to suspend or revoke a license or certificate in a hearing for violations arising under 46 U.S.C. §7703.

Determining the weight of the evidence and making credibility determinations as to the evidence is within the sole purview of the ALJ. See Appeal Decision 2640 (PASSARO) (2003).[2] Additionally, the ALJ is vested with broad discretion in resolving inconsistencies in the evidence, and findings do not need to be consistent with all of the evidence in the record as long as there is sufficient evidence to reasonably justify the findings reached. Id.; Appeal Decision 2639 (HAUCK) (2003).

[2] Pursuant to 46 C.F.R. §5.65, "[t]he decisions of the Commandant in cases of appeal . . . are officially noticed and the principals and policies enunciated therein are binding upon all Administrative Law Judges."

B. Jurisdiction

"The jurisdiction of administrative bodies is dependent upon the validity and the terms of the statutes reposing power in them." Appeal Decision 2620 (COX) (2001) (quoting Appeal Decision 2025 (ARMSTRONG) (1975)). "Where an Administrative forum acts without jurisdiction its orders are void." Appeal Decision 2025 (Armstrong**)** (1975). Therefore, establishing jurisdiction is critical to the validity of a proceeding. Appeal Decisions 2677 (WALKER) (2008); 2656 (JORDAN) (2006). Jurisdiction is a question of fact that must be proven. Appeal Decisions 2620 (Cox) (2001); 2425 (BUTTNER) (1986); 2025 (ARMSTRONG) (1975) (stating "jurisdiction must be affirmatively shown and will not be presumed").

A review of the jurisdictional allegations contained within the Amended Complaint shows that the Coast Guard alleged that Respondent acted under the authority of his MMC by serving as Captain aboard a vessel as required by law or regulation. The record established at the hearing of this matter is conflicting whether Respondent was serving as Captain or as mate on June 4, 2010. (Tr. at 61, 64, 95, 117, 125, 127, 128). The court finds, from the totality of the evidence, that Respondent was acting under the authority of his license for jurisdictional purposes when he stepped aboard his employer's vessel for the purpose of assuming his duties as captain of the DELTA LADY on June 4, 2010. (Tr. at 53). See 46 C.F.R. §5.57.[3]

[3] This, despite the Despite the Coast Guard's admission that it failed to affirmatively establish, during its case-in-chief, that Respondent was acting under the authority of his Credential. (Tr. at 126)

C. Burden of Proof

In this case, like all Suspension and Revocation cases, the Coast Guard bears the burden of proof to establish the requisite facts mandated by the organic statute, 46 U.S.C. §7703, and the implementing regulations, 46 C.F.R. Part 5; Part 10, Subpart B; 33 C.F.R. Part 20. The Administrative Procedure Act, 5 U.S.C. §§551-559, applies to Coast Guard Suspension and Revocation hearings before United States ALJs. The APA authorizes imposition of sanctions if, upon consideration of the entire record as a whole, the charges are supported by reliable, probative and substantial evidence. See 5 U.S.C. §556(d). The Coast Guard bears the burden of proof to establish the charges are supported by a preponderance of the evidence. 33 C.F.R. §§20.701, 20.702(a). Similarly, a respondent bears the burden of proof in asserting his affirmative defense by a preponderance of the evidence. 33 C.F.R. §§20.701, 20.702; Appeal Decisions 2640 (PASSARO) (2003); 2637 (TURBEVILLE) (2003). "The term substantial evidence is synonymous with preponderance of the evidence as defined by the U.S. Supreme Court." Appeal Decision 2477 (TOMBARI) (1988)(citing Steadman v. SEC, 450 U.S. 91, 107 (1981). The burden of proving a fact by a preponderance of the evidence "simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence.'" Concrete Pipe & Products of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 622 (1993) (quoting In re Winship, 397 U.S. 358, 371-72 (1970) (Harlan, J., concurring) (brackets in original)).

Therefore, at hearing, the Coast Guard was obligated to prove by credible, reliable, probative and substantial evidence that Respondent more-likely-than-not committed the acts alleged in the Amended Complaint.

D. Sufficiency of the Amended Complaint; Adequacy of Notice

The Amended Complaint alleges Respondent failed to submit to a "reasonable suspicion drug test" and that he failed to "follow company policy by refusing a reasonable suspicion drug test." The Amended Complaint does not allege how or why either act constitutes Misconduct. Simply for the reason of ensuring that a complete administrative record of these proceedings is made, the court notes that such a pleading might be criticized on Constitutional grounds.[4]

More importantly, at hearing, the Coast Guard's representatives expanded the allegations in the Amended Complaint by orally contending anew that

[4] Respondent raised no objection to either the Amended Complaint nor to the Coast Guard's expansion of the allegations at the hearing. Procedural regulation 33 C.F.R. §20.307 requires a Complaint to allege both the statute or rule violated and the "pertinent" facts. 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. The Amended Complaint alleges that on June 04, 2010, Respondent refused to submit to a reasonable suspicion drug test, but does not identify how or why he was legally-bound to do so. The Amended Complaint further alleges that on June 04, 2010, the Respondent wrongfully failed to follow company policy by refusing a reasonable suspicion drug test, but does not plead why such a failure is "wrongful" or whether a company policy even exists or whether such a policy is among those sources of "rules" identified in 46 C.F.R. §5.27. Even more troubling is Factual Allegation 2, which alleges that the Barrois employment manual requires employees to "undergo pre-employment and an initial drug screen" – yet the manual is silent in regard to "reasonable suspicion" drug tests. Although "[d]etailed factual allegations" are not required in a complaint per Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007), the Supreme Court in Twombly requires the pleading party to allege factual matter sufficient to "state a claim to relief that is plausible on its face." Id. at 570. The Court in Twombly instructs that a claim has facial plausibility when the pleaded factual content allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged. Id. at 556. However, the Court specifically cautioned that a complaint must contain "more than labels and conclusions" or a "formulaic recitation of the elements of a cause of action. Id. at 555. At least one federal district court has applied the teachings of Twombly to administrative proceedings. See Federal Trade Commission v. Innovative Marketing, 654 F. Supp.2d 378 (2009). In the instant case, it is questionable whether the Amended Complaint comports with the requirement of "facial plausibility" because it pleads little more than labels and conclusions. Because Respondent did not raise this issue at the hearing, resolution of this case is not reliant upon the foregoing discussion.

Respondent failed to submit to both or either a drug and an alcohol screen." (Tr. at 26-27, 37). Respondent, however, did not object on the record to the Coast Guard's expansion of the allegations.

These are not insignificant matters; the Coast Guard's attempt at the hearing to orally amend the Complaint a second time raises fundamental questions of notice and procedural due process. Despite Respondent's apparent waiver of these issues, all issues were fully litigated on the record. Respondent and his counsel were apparently aware of the Government's case and were prepared to defend against it. Hence, no prejudice was manifest. Appeal Decisions 2578 (CALLAHAN) (1996); 2545 (JARDIN) (1992).

E. Misconduct

In the instant matter, the Amended Complaint seeks revocation of Respondent's MMC under the auspices of 46 U.S.C. §7703(1)(B) and 46 C.F.R. §5.27, Misconduct. Pursuant to 46 U.S.C. §7703(1)(B), a mariner's license may be suspended or revoked if the holder, when acting under the authority of that license, has committed an act of misconduct. (emphasis added). "Misconduct" is defined by 46 C.F.R. §5.27, and provides that:

> 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.

Id.

Although the Amended Complaint is silent on the matter, the Coast Guard contended, at the hearing, that both 46 C.F.R. Part 16 (with, ostensibly, 33 C.F.R. Part 95) and Respondent's employer's company policy manual (CG Ex. 1) are

sufficient sources of the "rules" referenced in 46 C.F.R. §5.27, which defines Misconduct. (Tr. at 12-13, 15). In this regard, the Coast Guard's position is problematic.

1. 46 C.F.R. Part 16 & 33 C.F.R. Part 95

The Coast Guard maintained that 46 C.F.R. Part 16 and 33 C.F.R. Part 95 put a mariner on appropriate legal notice that he is subject to reasonable suspicion chemical testing. (Tr. at 15, 87-88).[5] However, in Appeal Decision 2578 CALLAHAN (1996), the Commandant clearly held that a respondent cannot violate the provisions of either 33 C.F.R. Part 95 or 46 C.F.R. Part 16, because those regulations apply only to maritime employers and not to marine employees. Id. (Appeal Decision 2551 (LEVENE) (1993) (finding the plain language of 33 C.F.R. §95.040 to indicate "its provisions cannot be violated as it is evidentiary in nature and not proscriptive. One cannot violate a regulation which merely prescribes a rule of evidence."). Accordingly, a mariner, like Respondent herein, cannot be held accountable for a marine employer's compliance or non-compliance with the provisions of either 33 C.F.R. Part 95 or 46 C.F.R. Part 16. Therefore, it was inappropriate for the Coast Guard to rely upon either regulation, here, as the basis for a charge of Misconduct under 46 C.F.R. §5.27.

The court finds noteworthy the absence of a plainly-written regulation directing a mariner to submit to "reasonable suspicion" drug testing when such suspicion or cause is present. Certainly, the Coast Guard could write such a regulation, as it did in 46 C.F.R. §4.06-5, which clearly establishes the

[5] As discussed supra, the Coast Guard asserted at the hearing that Respondent was subject to either drug or alcohol testing – although the Amended Complaint only alleged drug testing.

"responsibility of individuals involved in serious marine incidents" to submit to chemical testing. Such a regulation would easily fit within the ambit of 46 C.F.R. §5.27.

2. Employer's Policy Manual

The Coast Guard next argued that a company policy or manual is comparable to that of a "ship's regulation" (Tr. at 15-16) and that a violation of a marine employer's company policy exposes the violator to charges of Misconduct under 46 C.F.R. §5.27.[6] Whether that position is correct as a matter of law remains an open question to be resolved by a higher appellate authority.

In this case, had the matter been properly pled, portions of this Respondent's employer's policy manual might have constituted a basis for a charge of Misconduct against this Respondent.

Coast Guard Exhibit 1 is Respondent's marine employer's "Policies and Practices Statement." The evidence is undisputed that on March 11, 2010, Respondent acknowledged he had received, read and understood that policy manual. (Tr. at 53; CG Ex. 1).

[6] A review of the Commandant's Decisions on Appeal reveals that it has been assumed that a violation of company policy can constitute actionable Misconduct. In Appeal Decision 2625 (ROBERTSON) (2002), for example, the Commandant affirmed the ALJ's finding that the marine employer's reasonable suspicion drug testing standards, as set forth in its handbook disseminated to employees, were consistent with the reasonable suspicion standards set forth at 46 C.F.R. §16.250. As such, marine employees were on sufficient notice that failure to abide by the terms of the policies set forth in the handbook could give rise to charges of Misconduct. However, the question whether an employer's manual is among those sources of "rules" contemplated by 46 C.F.R. §5.27 has not been, apparently, squarely addressed. The court notes that in the case at bar the employer's policy manual states, in part: "Our company reserves the right to request changes in attire that may be offensive to co-workers or patrons. Employees must also observe rules of good hygiene." (CG Ex.1 at 10.) Query: Would the Coast Guard charge a mariner with Misconduct for violations of these policies? Should there not be a requirement for a nexus between the "rule" in 46 C.F.R. §5.27 and maritime safety?

As discussed supra, the Amended Complaint alleges only that Respondent failed to submit to reasonable suspicion drug testing. At the hearing, however, the Coast Guard argued that Respondent failed to submit to either or both a "reasonable suspicion" drug and an alcohol test.

The employer's manual addresses both drug and alcohol testing – but does so distinctly and separately.[7]

i. "Substance Abuse"

With regard to drug testing, the marine employer's "Substance Abuse" provisions state, in part:

> Coast Guard regulations require that all seamen must undergo pre-employment . . . initial drug test (and pass) when hired and that random drug testing be performed thereafter . . .
> (CG Ex. 1 at 8).

Conspicuously absent from the marine employer's policy manual is any reference to either "probable cause" or "reasonable cause" or "reasonable suspicion" drug testing. See CG Ex. 1. The Coast Guard presented no evidence at the hearing of any "company policy" requiring "reasonable suspicion" drug testing as alleged in the Amended Complaint. Hence, the Coast Guard failed to prove that Respondent's employer had a policy pertaining to "reasonable suspicion" drug testing. Thus, the Coast Guard failed to prove that this portion of the marine employer's policy manual creates a "rule" sufficient for a charge of Misconduct under 46 C.F.R. §5.27.

[7] Respondent's employer's policy manual also contains a section entitled "Conduct at Work." That section notes that an employee may be terminated for, among other reasons, "Use of intoxicating liquors or substances or other substances" [sic] and "Reporting to work under the influence of intoxicating liquors or other substances." (CG Ex. 1 at 12-13).

ii. "Alcohol Policy"

Disregarding for a moment that the Amended Complaint makes no reference to alcohol testing, the court notes that the marine employer's policy manual does provide separate criteria for alcohol testing. The marine employer's "Alcohol Policy" provides:

> The company reserves the right to perform 'for-cause' alcohol tests on employees suspected of being under the influence of alcohol based on, but not limited to, the following reasons:
>
> 1) Unacceptable job performance and the odor of alcoholic beverage or other signs of intoxication.
>
> 2) Unusual job behavior and the odor of alcoholic beverage or other signs of intoxication.
>
> 3) Observable symptoms of intoxication and the odor of alcoholic beverages.
>
> 4) Accident or near miss and the odor of alcoholic beverages or other signs of intoxication.

(CG Ex. 1 at 15).

That section further provides that "[f]ailure of an employee to consent to an alcohol screen test, when probable cause exists for testing, will be considered to have tested positive and will be subject to immediate termination from the company." Id. (Emphasis added).

The court notes the internally inconsistent references to "for cause" testing and "probable cause" testing in the same section of the employer's policy. Therefore, for the purposes of this litigation only, the court reads the phrases "for cause" and "probable cause" as synonymous. (However, in American jurisprudence, the "probable cause" standard differs significantly from the

"reasonable cause" -- or from a "reasonable suspicion" -- standard as that term is employed in both 46 C.F.R. Part 16 and 33 C.F.R. Part 95.[8]

Assuming, arguendo, that this section of the employer's policy could serve as the basis for a charge of Misconduct, and further assuming that the case had been thusly pled, the requisite quantum of proof was wholly absent from the evidence adduced at the hearing.

In this case, the Coast Guard failed to present any evidence that would support a finding that Respondent had exhibited unacceptable or unusual job performance and the odor of alcoholic beverage or other signs of intoxication. The Coast Guard failed to present any evidence that Respondent demonstrated any observable symptoms of intoxication and the odor of alcoholic beverages. Likewise, the Coast Guard failed to present any evidence of an accident or near miss and the odor of alcoholic beverages or other signs of intoxication.

In short, assuming, arguendo, that the portion of the employer's policy pertaining to alcohol does constitute a "rule" for the purposes of 46 C.F.R. §5.27, and assuming arguendo the matter had been properly pled in the Amended Complaint, the Coast Guard offered virtually no proof of the criteria set forth in the policy.

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[8] Hence the question: Which standard applies: "probable cause" or "reasonable cause?" A detailed resolution of that intellectual inquiry is unnecessary because the quantum of proof adduced at trial raises to neither level. Even though these terms are not "readily, or even usefully, reduced to a neat set of legal rules," U.S. v. Sokolow, 490 U.S. 1, 7 (1989)(quoting Illinois v. Gates, 462 U.S. 213, 232 (1983)), it might be fairly said that reasonable suspicion is what a reasonable person would, under the circumstances, SUSPECT to be true. By contrast, probable cause is what a reasonable person would, under the circumstances, BELIEVE to be true. Reasonable suspicion is a different, lower standard of proof. In either situation, the court would examine the objective facts and how a reasonably prudent person would react. See Terry v. Ohio, 392 U.S.1, 27 (1968).

3. Reasonable Suspicion/Reasonable Cause

Assuming, arguendo, that Respondent's employer's policy manual provided proper legal notice of "probable cause" or "reasonable cause" or "reasonable suspicion" chemical testing, the issue before this court then becomes whether Respondent's marine employer had an objectively determinable factual basis to order Respondent to submit to chemical testing.

In Suspension and Revocation administrative matters, "the determination as to whether reasonable suspicion or reasonable cause exists to support a request for the administration of chemical testing [of a marine employee] is a factual determination [to be] made by the ALJ based upon all the evidence available." Appeal Decision 2672 MARSHALL (2007) (citing Appeal Decisions 2625 ROBERTSON (2002); 2624 DOWNS (2001)).

"Articulating precisely what 'reasonable suspicion' . . . mean[s] is not possible. [It is a] commonsense, nontechnical conception[] that deal[s] with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" Ornelas v. U.S., 517 U.S. 690, 696 (1996) (quoting Illinois v. Gates, 462 U.S. 213, 231(1983) (internal citations omitted)). Reasonable suspicion is a "fluid concept . . . that takes [its] substantive content from the particular context . . . in which [it is] being assessed. Id. (citing Gates, supra at 232.)

The court notes that the Amended Complaint only alleged Respondent's failure to submit to a "reasonable suspicion" drug test. However, because the Coast Guard's Investigating Officers contended at trial that Respondent had failed

to submit to both a drug and/or alcohol screen, it is worthwhile to examine the "probable cause," or "reasonable cause" or "reasonable suspicion" standards applicable to both drug and alcohol cases. (Tr. at 26, 27, 37).

Even if the standards of 46 C.F.R. Part 16 and 33 C.F.R. Part 95 apply, as the Coast Guard incorrectly asserts, the necessary quantum of proof applicable to either is still absent.

i. 46 C.F.R. Part 16 - Drugs

Forty-six C.F.R. §16.250, requires a maritime employer to chemically test a mariner if there is reasonable cause to believe the mariner is under the influence of dangerous drugs. Id. at (a). The regulation provides guidance regarding the establishment of "reasonable cause," stating that the:

> The decision to test must be based upon 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.
> Id. at (b).

Recall that the Amended Complaint alleges Respondent failed to submit to a "reasonable suspicion" drug test. (Query: The source of the phrase "reasonable suspicion" cited in the Amended Complaint? Neither 46 C.F.R. 16.250(a) nor the "Policy and Practices Statement" of Respondent's employer uses the term. The terms are distinct and have entirely different meanings.)

The only evidence in support of the alleged "reasonable suspicion" was the testimony of a single witness, Benjamin Conner, a former employee of the marine employer. Conner's testimony was limited to one observation that Respondent "looked very groggy and sleepy like, you know… he had his glasses

off and he was standing next to Wayne and just looked sleepy, tired, like this" at six-thirty on the morning of June 4, 2010. (Tr. at 33-35). Conspicuously, the Coast Guard did not offer the observations of "Wayne" or any other person. The court takes particular note of Conner's in-court demeanor as he testified. There was nothing in his voice, inflection, posture, etc. that supported a belief that he had observed Respondent in an intoxicated or drug-impaired state.

Moreover, at the hearing, the Coast Guard elicited testimony from Jennifer Maysonet, the former personnel manager with Respondent's marine employer. Although Maysonet personally observed and interacted with Respondent on the morning of June 4, 2010—the Coast Guard did not ask her one question regarding Respondent's speech, appearance, physical or mental articulation, ambulation, or mobility. Nor did the Coast Guard elicit any testimony from Maysonet concerning Respondent's contemporaneous physical, behavioral, or performance indicators of probable drug or alcohol use on the morning of June 4, 2010. (Tr. at 49-79).

In sum, the Coast Guard failed to offer any testimony or evidence from any person, "based upon direct observation of specific, contemporaneous physical, behavioral, or performance indicators of [Respondent's alleged] probable drug use." 46 C.F.R. §16.250.

ii. 33 C.F.R. Part 95 - Alcohol

The criteria for directing "reasonable cause" alcohol testing are contained in 33 C.F.R. Part 95. Pursuant to 33 C.F.R. §95.035, reasonable cause exists

when the individual was directly involved in the occurrence of a maritime casualty or the individual is suspected of being in violation of 33 C.F.R. §95.020.

Thirty-three C.F.R. §95.020 specifically provides that for testing to occur, the individual must be operating a vessel (other than a recreational vessel) and has an alcohol concentration of .04 percent by weight in their blood or the effect of the intoxicant consumed by the individual on the person's manner, disposition, speech, muscular movement, general appearance or behavior is apparent by observation.[9]

Here, the Coast Guard need not prove that the Respondent was actually, physically operating a vessel.[10] However, it was incumbent upon the Coast Guard to prove that Respondent's manner, disposition, speech, muscular movement, general appearance or behavior were impaired. In that regard, the Coast Guard failed to meet its burden. Beyond the testimony that he appeared sleepy (at six-thirty in the morning) there was no evidence or testimony that Respondent was impaired in any manner whatsoever.

In the case at bar, the Coast Guard relied upon the observations of a single witness who was wholly unable to provide any articulable basis for directing Respondent to submit to a reasonable cause chemical test. Conner, who was formerly employed by the marine employer, had known Respondent for only "a couple of weeks" prior to June 4, 2010. (Tr. at 34). Conner's personal

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[9] Although the observations of two witnesses are preferable under both 33 C.F.R. §90.020(c) and 46 C.F.R. §16.250(b), observation by one witness has been held to be sufficient to justify a marine employer's decision to test in Appeal Decisions 2625 ROBERTSON (2002) and 2624 (DOWNS) (2001).

[10] By his presence aboard the DELTA LADY alone, Respondent is deemed to have been operating same. He need not have been in actual control or even on duty to satisfy 33 C.F.R. §95.015. Appeal Decision 2624 (DOWNS) (2001).

observations of Respondent on the early morning of June 4, 2010, formed the sole basis for the marine employer to direct Respondent to submit to chemical testing. Conner testified that he observed Respondent as "look[ing] very groggy and sleepy like." (Tr. at 33). Upon cross-examination, Conner admitted that his observations of Respondent occurred at approximately 6:30 a.m. (Tr. at 40). Conner agreed that Respondent's behavior was comparable to someone "acting like he was sleepy" as opposed to someone behaving erratically. (Tr. at 42). Importantly, Conner testified he did not smell alcohol on Respondent's breath. (Tr. at 41).

Conner's testimony was of little value to the Coast Guard's case as he was unable to articulate any specific observations or concerns about Respondent's manner, disposition, speech, muscular movement, general appearance or behavior other than "he was acting like he was sleepy" at six-thirty in the morning. (Tr. at 42). Such a generalized accounting does not rise to the level of reasonable suspicion.

And, as indicated supra, the Coast Guard's other witness, Maysonet, offered no testimony in to support any conclusion that Respondent was impaired.

The Coast Guard did not provide any testimony or evidence regarding Respondent's manner, disposition, speech, muscular movement, general appearance or behavior that would suggest alcohol or drug use or abuse. The very best that can be said of the Coast Guard's evidence is that it suggested that Respondent was sleepy at six-thirty on the morning of June 4, 2010.

Reviewing all available evidence, the court finds that there existed no probable cause, reasonable cause, or reasonable suspicion to support the maritime employer's order for chemical testing.

F. Refusal

The alleged "reasonable suspicion" drug test was unreasonable because Respondent's employer had neither probable cause, nor reasonable cause nor reasonable suspicion of either drug or alcohol use.[11] Because the employer had no basis to order Respondent to submit to chemical testing, Respondent did not "refuse" to take a chemical test for either drugs or alcohol and therefore did not commit an act of Misconduct. See Appeal Decision 2672 MARSHALL (2007).

V. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following Findings of Fact and Conclusions of Law are based upon the court's careful observation of the testimony and demeanor of the witnesses, a thorough review of all of the admitted items of documentary evidence, an analysis of the logic and consistency of the testimony and the evidence, the probative weight and value of each and the law applicable to this case. To be clear: despite the presence of some interesting collateral legal issues discussed herein, it is the absence of proof in this case—particularly in regard to the alleged "reasonable suspicion" test-- that caused the Coast Guard's case to fail.

[11] The 4th Amendment mandates that a search or seizure is ordinarily unreasonable in the absence of individualized, objectively determined, suspicion of wrongdoing. City of Indianapolis v. Edmond, 531 U.S. 32, 37 (2000) (citing Chandler v. Miller, 520 U.S. 305, 308 (1997)); United States v. McCarthy, 38 M.J. 398, 402 (C.M.A. 1993) (citing United States v. Thatcher, 28 M.J. 20, 22 (C.M.A. 1989) and United States v. Middleton, 10 M.J. 123, 127 (C.M.A. 1981)).

1. At all relevant times herein, and specifically on June 4, 2010, Respondent John Allen Gobert was the holder of a Coast Guard-issued Merchant Mariner's Credential.

2. At all relevant times herein, and specifically on June 4, 2010, Respondent John Allen Gobert was acting under the authority of his Coast Guard-issued Merchant Mariner's Credential.

3. Respondent John Allen Gobert and the subject matter of this hearing are properly within the jurisdiction vested in the Coast Guard under 46 U.S.C. §7704(c); 46 C.F.R. Part 5; 33 C.F.R. Part 20; and the Administrative Procedures Act, as codified at 5 U.S.C. §§551-59.

4. Respondent John Allen Gobert was employed by B.N. Barrios & Sons, LLC from March 11, 2010, until June 4, 2010.

5. On the morning of June 4, 2010, Respondent John Allen Gobert was not involved in any maritime incident, casualty, accident or collision.

6. B.N. Barrios & Sons, LLC is a marine employer and therefore subject to abide by applicable drug and alcohol testing regulations contained at 33 C.F.R. Part 95 and 46 C.F.R. Part 16.

7. The regulations contained at 33 C.F.R. Part 95 and 46 C.F.R. Part 16 are binding upon maritime employers only; not mariners themselves. Respondent John Allen Gobert cannot be held accountable for adherence to the provisions of either. Thus, neither Part can be used as a standard of conduct to measure Respondent's behavior vis-a-vis 46 C.F.R. §5.27.

8. For the purposes of this case only, Respondent John Allen Gobert's employer's company policy manual could be regarded as a sufficient source of the "rules" referenced in 46 C.F.R. §5.27, which defines Misconduct.

9. At all relevant times herein and specifically on June 4, 2010, Respondent John Allen Gobert's employer had no "company policy" that required "reasonable suspicion" drug testing as alleged in the Amended Complaint. Hence, the Coast Guard failed to prove that Respondent John Allen Gobert's employer had a policy pertaining to "reasonable suspicion" drug testing.

10. The Coast Guard failed to prove that Respondent John Allen Gobert demonstrated either unacceptable job performance and the odor of alcoholic beverage or other signs of intoxication; unusual job behavior and the odor of alcoholic beverage or other signs of intoxication;

observable symptoms of intoxication and the odor of alcoholic beverages; or any accident or near miss and the odor of alcoholic beverages or other signs of intoxication on or about June 4, 2010.

11. Neither Benjamin Conner's nor Jennifer Maysonet's observations of Respondent John Allen Gobert on the morning of June 4, 2010 provide a sufficient quantum of evidence to support a finding of either probable cause, reasonable cause or reasonable suspicion of either drug or alcohol use by Respondent John Allen Gobert on or about June 4, 2010.

12. The Coast Guard failed to prove contemporaneous physical, behavioral, or performance indicators of probable drug use by Respondent John Allen Gobert on or about June 4, 2010.

13. On or about June 4, 2010, and at or before the time his employer requested Respondent John Allen Gobert to submit to chemical testing, no person had observed evidence that the Respondent's manner, disposition, speech, muscular movement, general appearance or behavior had been affected by an intoxicant so that it was apparent by observation.

14. The Coast Guard failed to prove Respondent John Allen Gobert's manner, disposition, speech, muscular movement, general appearance or behavior suggested any alcohol or drug use or abuse on or about June 4, 2010.

15. Respondent John Allen Gobert correctly "refused" to submit to the chemical test which was improperly ordered by his employer on or about June 4, 2010.

16. Respondent John Allen Gobert did not commit "Misconduct" as that term is defined in 46 C.F.R. §5.27 and as alleged in the Amended Complaint.

VI. CONCLUSION

For the foregoing reasons, the Court finds the Coast Guard has NOT PROVED its allegations that Respondent wrongfully failed to submit to a "reasonable suspicion" (or probable cause or reasonable cause) drug or alcohol test, nor did Respondent wrongfully fail to follow a company policy by refusing

to submit to a "reasonable suspicion" (or probable cause or reasonable cause) drug or alcohol test.

WHEREFORE,

VII. ORDER

IT IS HEREBY ORDERED, that the allegations as set forth in the Coast Guard's Amended Complaint issued on August 13, 2010, are **DISMISSED**.

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

Done and dated this the 26th day of January, 2011,
at New Orleans, Louisiana.

_____

HONORABLE BRUCE TUCKER SMITH
ADMINISTRATIVE LAW JUDGE
UNITED STATES COAST GUARD

ATTACHMENT A – EXHIBIT & WITNESS LIST

COAST GUARD EXHIBITS

1. Guide to Policies and Practices of B.N. Barrios & Sons (17 pages)
2. June 2010 work log for John Gobert (1 page)

COAST GUARD WITNESSES

1. Benjamin J. Conner
2. Jennifer Maysonet

RESPONDENT EXHIBITS

A. Captain's daily boat log (4 pages)

B. Letter dated August 30, 2010 signed by W. Gene Seaman (1 page)

RESPONDENT WITNESSES

1. Raymond Johnson
2. W. Gene Seaman
3. John A. Gobert

ALJ EXHIBITS

None

ALJ WITNESS LIST

None

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.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **DECISION & ORDER** was sent by the methods indicated to the following parties and entities:

LT Pedro Mendoza
USCG Marine Safety Unit Morgan City
800 David Drive
Morgan City, LA 70380
Via email: **pedro.l.mendoza@uscg.mil**

LT Jason Boyer
USCG Marine Safety Unit Houma
425 Lafayette Street
Houma, LA 70360
Via email: **jason.a.boyer@uscg.mil**

Nicole Dufrene Streva, Esq.
Ramsey, Skiles & Streva
1915 Highway 182
Morgan City, LA 70380
Via FedEx

ALJ Docketing Center
U.S. Coast Guard
U.S. Customs House
40 South Gay Street
Baltimore, MD 21202-4220
Via MISLE

Done and dated this 26th day of January, 2011,
at New Orleans, Louisiana.

KATY J.L. DUKE, ESQ.
ATTORNEY-ADVISOR