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

UNITED STATES COAST GUARD
Complainant

vs.

AUSTIN PETER PELUCHETTE

Respondent

Docket Number 2011-0219
Enforcement Activity No. 3980504

DECISION AND ORDER

Date Issued: December 29, 2011

Issued By: Honorable Bruce Tucker Smith
Administrative Law Judge

Appearances:

For the Complainant

LT Michael Novak
U.S. Coast Guard Marine Safety Detachment Fort Myers

For the Respondent

Michael J. Pascucci, Esq.
Hayes G. Wood, Esq.
Wood, Pascucci & Mordes

I. PRELIMINARY STATEMENT

The United States Coast Guard U.S. Coast Guard Marine Safety Detachment Fort Myers, Florida (Coast Guard) initiated the instant administrative action seeking revocation of Austin Peter Peluchette's (Respondent) Coast Guard-issued Merchant Mariner's License (credential). The instant action is brought pursuant to the legal authority codified in the Administrative Procedure Act (APA), 5 USC §§551-59, the Coast Guard procedural regulations codified at 33 CFR Part 20 and by the authority contained in 46 USC §7703(1)(B) and 46 CFR §5.27.

On May 13, 2011, the Coast Guard filed an original Complaint alleging that on or about March 3, 2011, Respondent committed Misconduct pursuant to 46 CFR §5.27 by wrongfully failing to submit to a chemical drug test following a Serious Marine Incident (SMI) in violation of 46 CFR §4.06-5.

On June 3, 2011, Respondent filed his Answer to the Complaint, denying paragraphs 4, 5 and 6 of the Complaint. Respondent denied that the vessel he commanded allided with a mangrove tree and denied that a passenger was injured as a result thereof. Moreover, Respondent denied that he was ordered to take a post accident chemical test and further denied that he wrongfully failed to submit to such a test.

On November 3, 2011, this matter came on for hearing in the United States Courtroom, Claude Pepper Federal Building in Miami, Florida. Coast Guard Investigating Officers (IO) LT Michael Novak, U.S. Coast Guard Marine Safety Detachment Fort Myers, and Mr. Brian Knapp from Coast Guard Sector St. Petersburg, Florida, represented the Coast Guard. Michael J. Pascucci, Esq. and Hayes G. Wood, Esq., of Wood, Pascucci & Mordes represented Respondent.

Both parties appeared, presented their respective cases, and rested. Three witnesses testified as part of the Coast Guard's case-in-chief. The Coast Guard offered four exhibits into evidence, all of which were admitted. Respondent testified on his own behalf and offered

thirteen exhibits into evidence, all of which were admitted.[1] Upon motion, the court took official notice of two pertinent provisions from the Code of Federal Regulations.

Prior to adjourning the hearing, the court asked the Coast Guard to obtain additional documentary evidence, specifically, a laboratory/litigation report from Respondent's drug test, and further announced that it would afford the parties an opportunity to submit briefs in support of their respective legal positions upon receipt of the lab report. The court received the laboratory/litigation report (ALJ Ex. III) and subsequently entered an Order setting deadlines for the submission of post-hearing arguments and briefs by the parties.

In its post-hearing submission, the Coast Guard submitted twenty-two proposed Findings of Fact (FoF) and Conclusions of Law (CoL), some of which are referenced, below. By referencing each such FoF or CoL, the court does not necessarily adopt the Coast Guard's entire reasoning or interpretation of the evidence described in the FoF or CoL.[2]

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 Austin Peter Peluchette was the holder of a Coast Guard-issued Merchant Mariner's License; specifically, an Operator of Uninspected Passenger Vessels License or "6-pack." (Credential)(CG FoF 1).

[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] The majority of the Coast Guard's proposed Findings of Fact and Conclusions of Law are actually neither. They are either in the form of argument or deal with matters which are legally irrelevant. For example, proposed FoF 5 says "Respondent failed to make contact with the Marine Employer to advise that the testing facility was not performing drug tests…" Even if true, that statement is irrelevant to Respondent's duty to comply with the employer' order. Likewise, proposed FoF 9 says "Cellular phones are not a reliable means of communicating in Everglades City due to poor service…" There was neither probative evidence in this regard nor is such a finding relevant to the legal issues before the court. Likewise, the Coast Guard's proposed Conclusions of Law are largely argumentative and not in a proper form to constitute cognizable CoL.

2. On March 3, 2011, between 12:15 p.m. and 12:45 p.m., Respondent Austin Peter Peluchette was in direct navigational control of an airboat when that vessel suffered a steering arm mechanical failure resulting in an allision between that vessel and a mangrove tree. (Tr. at 29-30, CG Ex. 6).

3. The March 3, 2011 allision resulted in property damage and personal injury; thus the incident was properly categorized as a Serious Marine Incident (SMI) per 46 CFR §4.03-2. (CG FoF 1).

4. Respondent Austin Peter Peluchette was "an individual directly involved in a serious marine incident" per 46 CFR §4.03-4.

5. On Thursday, March 3, 2011, Mr. Phillip Todd Johnson, Respondent's maritime employer, ordered Respondent Austin Peter Peluchette to submit to chemical drug testing. (Tr. at 83)(CG FoF 2,3).

6. As a maritime employer, Mr. Johnson was obliged to order Respondent Austin Peter Peluchette to submit a drug-test specimen within thirty-two hours of the SMI, per the provisions of 46 CFR §4.06-3(CG FoF 2,3).

7. At approximately 3:35 p.m., on Thursday, March 3, 2011, Respondent Austin Peter Peluchette presented himself for testing at the LabCorp DSI facility, 40 Heathwood Drive, Marco Island, Florida. (Tr. at 174-75).

8. LabCorp DSI is a certified drug testing facility appropriate for a mariner to submit a urine specimen for chemical drug testing. (Tr. at 127).

9. Between 3:30 – 3:35 p.m., on Thursday, March 3, 2011, personnel at the LabCorp DSI facility, 40 Heathwood Drive, Marco Island, Florida, refused to collect a urine specimen from Respondent Austin Peter Peluchette because the facility had ceased collecting specimens for the day. (Tr. at 177, 203-204, Resp. Ex. C-1, Resp. Ex. C-2)(CG FoF 4).

10. Thereafter, from March 3 to March 5, 2011, Respondent Austin Peter Peluchette unsuccessfully attempted to provide a urine specimen at a variety of times and locations. (Tr. at 179-194).

11. Respondent Austin Peter Peluchette ultimately submitted a urine specimen for testing at approximately 11:50 a.m. on Saturday, March 5, 2011, more than forty hours after the SMI. (Tr. at 215).

12. The LabCorp DSI facility located at 311 Ninth Street, near Tamiami Trail Road, Naples, Florida collected Respondent Austin Peter Peluchette's specimen. (Tr. at 196, CG Ex. 9, Resp. Ex. A, Resp. Ex. B).

13. Respondent Austin Peter Peluchette's urine specimen subsequently tested negative for nine selected illicit drugs, per Department of Transportation

(DOT) and Substance Abuse and Mental Health Services Administration protocols. (Resp. Ex. B).

14. On Friday, March 4, 2011, Respondent Austin Peter Peluchette could have returned to the LabCorp DSI facility, 40 Heathwood Drive, Marco Island, Florida, to provide a urine specimen for testing. However, he did not. (Tr. at 222)(CG FoF 6,7).

15. Respondent Austin Peter Peluchette's failure to return to the LabCorp DSI facility, 40 Heathwood Drive, Marco Island, Florida, on the morning of Friday, March 4, 2011 and his failure to provide a urine specimen for testing on that day and time constituted Misconduct in violation of 49 CFR §40.191(a)(1) and 46 CFR §5.27.

III. SUMMARY OF DECISION

For the reasons discussed herein, the Coast Guard **PROVED** by a preponderance of reliable, probative and credible evidence that Respondent failed to provide a urine specimen for chemical drug testing within a reasonable time, as required by 49 CFR §40.191(a)(1) and 46 CFR §5.27.

IV. DISCUSSION

A. General

The purpose of Coast Guard suspension and revocation proceedings is to promote safety at sea. See 46 USC §7701. Pursuant to 46 CFR §5.19, an ALJ holds the authority to suspend or revoke a license or certificate in a hearing for violations arising under 46 USC §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).[3] 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).

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").

In the instant case, the Respondent admitted the jurisdictional allegations contained in the Complaint; namely, that on or about March 3, 3011, he acted under the authority of his mariner's credential by serving as Master aboard vessel FL3859KB as required by law or regulation. (See Answer).

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 USC §7703, and the implementing regulations, 46 CFR Part 5; Part 10, Subpart B; 33 CFR Part 20. The Administrative Procedure Act, 5 USC §§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 USC §556(d). The Coast Guard bears the burden of proof to establish the charges are supported by a preponderance of the evidence. 33 CFR §§20.701, 20.702(a). Similarly, a respondent bears the burden of proof in asserting his

[3] Pursuant to 46 CFR §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."

affirmative defense by a preponderance of the evidence. 33 CFR §§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)).

In this case, the Coast Guard alleges Respondent committed "Misconduct," 46 CFR §5.27, by failing to submit to a post-SMI chemical drug test. Title 46 CFR §5.27 defines "misconduct" as:

> [H]uman 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.

Here, the requisite formal, duly established rule is contained in a reading of certain provisions of 46 CFR Subpart 4.06 and 49 CFR Part 40 which require a mariner to submit to a post-SMI drug test within a reasonable time. "Reasonableness" is determined by the facts and circumstances of a particular case. Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931); Appeal Decision 2098 (CORDISH)(1977). Accordingly, the Coast Guard must prove by a preponderance of the evidence that Respondent failed to submit to a post-SMI test within a reasonable period of time.

D. The Evidence

At the hearing, the parties orally stipulated to the underlying facts which gave rise to the instant Complaint. The parties stipulated that on March 3, 2011, between 12:15 p.m. and 12:45 p.m., Respondent was in direct navigational control of an airboat when that vessel suffered a steering arm malfunction, resulting in an allision between that vessel and a mangrove tree. (Tr. at 29-30, CG Ex. 6). The Coast Guard did not charge, nor was there any evidence to suggest, that Respondent was negligent in the operation of the vessel. However, because the allision resulted in property damage and personal injury, the incident was properly categorized as an SMI. 46 CFR §4.03-2. Thus, Respondent was "an individual directly involved in a serious marine incident" per 46 CFR §4.03-4.

The Coast Guard presented the testimony of Phillip Todd Johnson, President and part-owner of "Speedy's Airboat Tours" of Everglades City, Florida, Respondent's employer at the time of the Thursday, March 3, 2011 allision. Mr. Johnson testified that at approximately 2:30 – 3:00 p.m. on Thursday, March 3, 2011, he ordered Respondent to submit to chemical drug testing. (Tr. at 83, 89). As a maritime employer, per 46 CFR §4.06-3, Mr. Johnson was obliged to order Respondent to submit a drug-test specimen within thirty-two hours of the SMI.

The court notes that the Coast Guard's Complaint improperly alleged that Respondent "wrongfully failed to submit to a post accident chemical drug test within thirty-two hours of a serious marine incident, a direct violation of 46 CFR4.06-5." (Sic) Title 46 CFR 4.06-5, which governs the conduct of an "individual directly involved" in a SMI, required Respondent to "provide a blood, breath, saliva, or urine specimen for chemical testing when directed to do so by the marine employer." However, the regulation does NOT impose a thirty-two hour requirement upon a mariner. Rather, per 46 CFR §4.06-3(b), the thirty-two hour requirement is an obligation

imposed upon the maritime employer. As the Commandant has previously ruled, a mariner cannot violate a regulation which merely prescribes procedures for his employer to follow.[4]

At the hearing, the Coast Guard conceded that the Complaint was inartfully drafted and that 46 CFR §4.06-5 does not impose a thirty-two hour deadline upon a mariner after an SMI. (Tr. at 143).[5] Rather, the Coast Guard now contends that Respondent refused to take a DOT drug test within a "reasonable time as determined by the employer, consistent with applicable DOT agency regulations, after being directed to do so by the employer" per the dictates of 49 CFR §40.191(a)(1). It is upon that requirement that the Respondent's conduct is adjudicated.[6] For the purposes of this case, Respondent judged in light of the "reasonable time" standard set forth by 49 CFR §40.191(a)(1).

The parties agree, and there was no proof to the contrary, that Respondent submitted a urine specimen for testing at approximately 11:50 a.m. on March 5, 2011, more than forty hours after the SMI. (CG Ex. 9, Resp. Ex. A). Moreover, the parties agree, and there was no proof to the contrary, that Respondent's urine specimen tested negative for nine selected illicit drugs, per Department of Transportation (DOT) and Substance Abuse and Mental Health Services

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[4] Appeal Decision 2578 (CALLAHAN)(1996). There, the Commandant explained: "Appellant was charged with misconduct for 'wrongfully refus[ing] to provide a specimen for a required post accident chemical test ordered by your marine employer … in accordance with 33 CFR 95.035(a)(1).' This specification implies that the Appellant was in violation of 33 C.F.R. 95.035, a regulation that establishes guidelines and procedures for reasonable cause drug testing by marine employers. An employee cannot violate a regulation which merely prescribes procedures for his employer to follow. [emphasis added]. Cf. Appeal Decision 2551 (LEVENE) (mariner cannot violate 33 C.F.R. 95.040 which prescribes a rule of evidence). Therefore, a violation of 33 C.F.R. 95.035 cannot be the basis for Appellant's misconduct under the first specification."

[5] The court specifically finds that despite the inartful allegation in the Complaint, Respondent was not prejudiced thereby. He was substantially on notice of the facts and allegations against him; he had an ample time to engage in pre-trial discovery; he did not raise an objection based upon either notice or any other Constitutional infirmity; the court was not misled by the allegation and the resolution of this matter was not contingent upon a factual finding necessitated by the allegation contained in the Complaint. Appeal Decision 1792(PHILLIPS)(1970); Appeal Decision 2422 (GIBBONS)(1986).

[6] The court takes notice of the repeated confusion among both mariners and the Coast Guard regarding the time within which a mariner is to be chemically tested after a Serious Marine Incident. This case highlights the confusion created by the regulations. Indeed, 46 CFR §4.06-3(b) directs a marine employer to ensure that a specimen be collected within thirty-two hours after an SMI. By contrast, 46 CFR §4.05(a) vaguely requires the mariner to provide a specimen "when directed to do so." To further confuse the matter, 49 CFR §40.191(a)(1) tells the mariner he/she must appear for a test [not actually submit a sample] "within a reasonable time, as determined by the employer, consistent with applicable DOT agency regulations."

Administration protocols. (Resp. Ex. B). However, the issue herein is not whether Respondent was tested or the results of said test, but whether he provided a urine specimen within a "reasonable time."

The uncontroverted facts reveal that on Thursday, March 3, 2011, within four hours after the SMI, at approximately 2:30 – 3:00 p.m., Mr. Johnson directed Respondent to submit to a chemical drug test. (Tr. at 89).

The undisputed testimony further reveals that almost immediately thereafter, at approximately 3:30 – 3:35 p.m., on Thursday, March 3, 2011, Respondent presented himself for testing at the LabCorp DSI facility, 40 Heathwood Drive, Marco Island, Florida. LabCorp DSI is a certified drug testing facility appropriate for a mariner to submit a specimen for drug testing. (Tr. at 127).

The evidence also revealed that at approximately 3:30 – 3:35 p.m., on Thursday, March 3, 2011, personnel at the LabCorp DSI facility, 40 Heathwood Drive, Marco Island, Florida, refused to collect a urine specimen from Respondent because that facility had ceased collecting specimens for the day. (Tr. at 177, 203-204, Resp. Ex. C-1, Resp. Ex. C-2).

Clearly, Respondent presented himself in a timely manner for testing. However, the Coast Guard argued that because a specimen was not submitted in a timely manner, Respondent "refused" to take a DOT test per 49 CFR §40.191(a). The Coast Guard is only partially correct in that assertion, because 49 CFR §40.191(a) clearly states that a mariner has refused to take a drug test if [he/she] "fails to appear for any test within a reasonable time, as determined by the employer…". (emphasis added). Here, it is uncontroverted that the Respondent did appear at the time and location specified by his employer—but was turned away by personnel at the testing facility. (Tr. at 177, 203-204). Hence, at least insofar as the events of Thursday, March 3, 2011, are concerned, Respondent did exactly as he was ordered and exactly as the regulations require – he appeared at the testing facility for the ordered test within a reasonable time. However, since

the testing facility was closed, the question remains, as to whether Respondent had an affirmative duty to ensure a specimen was collected in a timely manner.

The evidence reveals that after his first attempt to provide a sample on March 3, 2011, Respondent attempted to provide a urine specimen at a variety of times and different locations before he successfully submitted a sample at approximately 11:50 a.m. on Saturday, March 5, 2011. Respondent testified that on Friday, March 4, 2011, at approximately 1:00 p.m., and at the guidance and direction of his maritime employer, Respondent attempted to submit a specimen at the Advanced Medical Center on Pine Ridge Road, Naples, Florida. (Tr. at 218). However, Respondent was unable to provide a specimen at that location because his employer's insurance was not accepted there. (Tr. at 183).

Respondent further testified that, later that same day, he departed the Advanced Medical Center location and proceeded to what he believed to be another LabCorp DSI facility on Immokalee Road in Naples, Florida. However, he arrived at that location at approximately 2:30 p.m. only to learn that the facility was an "NCH Healthcare" clinic, not a certified specimen-collection facility. Accordingly, he was also unable to submit a specimen at that facility. (Tr. at 186, Resp. Ex. D-3). Respondent departed the "NCH Healthcare" facility and went home. After doing some research on the Internet, Respondent drove to yet another LabCorp DSI facility, this one at 2330 Immokalee Road in Naples, Florida. He arrived there arrived at approximately 3:00 - 4:00 p.m., only to learn that he was, again, too late to submit a specimen. (Tr. at 186, 189-191).

The evidence reveals that the next day, Saturday, March 5, 2011, at approximately 10:00 a.m., Respondent presented himself at the LabCorp DSI facility located at 311 Ninth Street, (near Tamiami Trail Road) in Naples, Florida. (Tr. at 196). There, Respondent provided a urine specimen for testing, which subsequently tested "negative" for the presence of illicit drugs. (Tr. at 196, Resp. Ex. B).

While the record indicates that Respondent made efforts to be tested on March 3, 2011 and March 4, 2011, it is unclear why Respondent failed to simply present himself to the LapCorp DSI facility in Marco Island, Florida on the morning of Friday, March 4, 2011, the same location where he was unable to submit the sample one day prior.

Respondent testified that on the morning of Friday, March 4, 2011, from approximately 8:00 a.m. to 12:00 p.m., he made repeated efforts to contact and communicate with his marine employer, Mr. Johnson, to arrange for a specimen collection. (Tr. at 204-205). It was during this four-hour period that Respondent could have—and should have—returned to the LabCorp DSI facility, 40 Heathwood Drive, Marco Island, Florida for testing.

While it is true that 49 CFR §40.191(a)(1) does require a maritime employer to be directly involved in arranging the mariner's drug-testing, the mariner is not relieved of his independent obligation to be tested. In other words, the mariner cannot abandon his own judgment and resourcefulness in complying with a timely order to submit to a chemical drug test. Nor must the marine employer hold the employee's hand or coerce him to be tested. Per 46 CFR §4.06-3, an employer's obligation under the regulations is satisfied when he gives a timely order to the mariner that he be tested. Respondent's marine employer properly discharged his duty when he directed Respondent to be tested.

Here, Respondent admitted that he could have returned to the LabCorp DSI facility on Heathwood Drive for testing on the morning of Friday, March 4, 2011. (Tr. at 222). When time limits for compliance are not clearly specified, as is the case, here, an employee subject to DOT drug-testing protocols must make a good-faith, (i.e., a reasonable) effort to comply with the regulations. Melman v. Metropolitan Government of Nashville**,** 2010 WL 3063805 (M.D.Tenn.,2010).

Respondent admitted that on Friday, March 4, 2011, he could have gone to the same location where he had been the afternoon before; a properly-certified facility that he knew could

collect his specimen. Clearly, Respondent could have and should have presented himself for testing the morning of March 4, 2011, (i.e., within a "reasonable time") at the LabCorp DSI facility, 40 Heathwood Drive, Marco Island, Florida. His failure to do so constitutes misconduct pursuant to 49 CFR §40.191(a)(1).

V. SANCTION

The authority to impose sanctions at the conclusion of a case is exclusive to the Administrative Law Judge. 46 CFR §§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 USC §7701; 46 CFR §5.5; Appeal Decision 1106 (LABELLE) (1959).

The decision on an appropriate sanction is one of the most crucial aspects of a court's resolution of a Suspension and Revocation hearing. Too frequently, however, the parties fail to produce probative evidence in support of their respective positions on a sanction.

Guidance on whether a credential ought to be suspended or revoked is found in 46 CFR §5.569 and its attendant Table. The Table provides a "Suggested Range of Appropriate Orders" for various offenses. The purpose of the Table is to provide guidance to the Administrative Law Judge and promote uniformity in orders rendered. 46 CFR §5.569(d); Appeal Decision 2628 (VILAS) (2002), aff'd by NTSB Docket ME-174. In this case, the Coast Guard 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 CFR 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 CFR §5.569(d) also explains that "[the] 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 an evidentiary basis.

In this case, Table 5.569 does not specifically enumerate the offense of failing to submit to a post-SMI chemical drug test. The Table does list "Failure to obey a master's order" and "Failure to comply with U.S. law or regulation," for which an outright suspension of one to three months is recommended. Read broadly, Respondent's failure might be characterized as either of those listed offenses. For the reasons set forth below, the court will abide by the guidance contained in Table 5.569.

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 CFR §5.569(b)(1)-(3).

Remedial Action: Neither party offered any evidence pertaining to Respondent's efforts at remediation. However, Respondent did offer evidence of his public service as a trained, volunteer firefighter and as an emergency medical technician. (Tr. at 164 – 165). This evidence suggests Respondent is an otherwise responsible and law-abiding citizen.

Respondent's Prior Records: The court notes that the Respondent held an Operator of Uninspected Passenger Vessels License, or "6-pack," that has, apparently, never been the subject of any prior sanctions or disciplinary action.

Mitigation or Aggravation: The Coast Guard offered no evidence in aggravation and Respondent offered no evidence in mitigation. The Coast Guard's failure to substantiate its

demand for revocation with evidence in aggravation weighs heavily in the court's decision to deny the requested revocation.

Normally, the holdings of Appeal Decisions 2578 (CALLAHAN) (1996) and 2624(DOWNS) (2001), dictate that a person who evades a chemical drug test ought not suffer a lesser sanction than one who takes a chemical drug test and fails. The logic and import of CALLAHAN and DOWNS is that a lesser sanction for failure to submit to a chemical drug test would encourage offenders to evade testing.

Given the unique facts and circumstances of this case, however, the rationale of CALLAHAN and DOWNS is inapplicable. Here, given the unique facts of this case and the Coast Guard's failure to substantiate its demand for revocation, a lesser sanction is appropriate. This is not a "typical" refusal-to-test case. Respondent made one timely effort to be tested; he simply didn't make enough of a timely effort to be tested thereafter. Given that a Coast Guard-issued credential is a professional license, it is incumbent upon a professional mariner to comply with both the letter and spirit of the law. A mariner should be as interested in protecting his credential and his good name by a drug test as are his employers and the Coast Guard.

In affixing an appropriate sanction, this court focuses upon the fact that Respondent did promptly attempt to comply with his employer's initial order to be tested; that his failure to be tested immediately was occasioned by the personnel at the testing facility; and that he eventually tested negative. The court notes that there was no evidence or any inference that Respondent was purposefully avoiding the test. Rather, Respondent's chief offense was one of poor judgment, by his admitted failure to return to the LabCorp DSI facility, 40 Heathwood Drive, Marco Island, Florida on the morning of March 4, 2011 for testing.

Accordingly, a suspension of one month, in accord with Table 5.569, is appropriate in this case.

VI. CONCLUSION

For the reasons discussed above, the Court finds the Coast Guard has **PROVED** by a preponderance of reliable, probative and credible evidence that Respondent failed to provide a urine specimen for chemical drug testing within a reasonable time, as required by 49 CFR §40.191(a)(1) and 46 CFR §5.27.

WHEREFORE,

VII. ORDER

IT IS HEREBY ORDERED, that the allegations contained in the Coast Guard's Complaint were **PROVED** and that the Respondent's credential is hereby suspended outright for a period of one month.

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

Bruce Tucker Smith
US Coast Guard Administrative Law Judge

Date: December 29, 2011

ATTACHMENT A – EXHIBIT LIST

COAST GUARD EXHIBITS

CG Ex. 05 Witness Statement
CG Ex. 06 Coast Guard accident report form
CG Ex. 08 Drug testing consent form
CG Ex. 09 Drug testing custody and control form

RESPONDENT'S EXHIBITS

Resp. Ex. A Drug testing custody and control form
Resp. Ex. B MRO Letter
Resp. Ex. C1 – C2 Photos
Resp. Ex. D1 – D8 Photos
Resp. Ex. H Marine Employers Drug Testing Guidance

ALJ EXHIBITS

ALJ Ex. I 46 CFR §4.06
ALJ Ex. II 49 CFR §40.191
ALJ Ex. III Lab Corp "Litigation Package"

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.