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

UNITED STATES COAST GUARD
Complainant

vs.

RONALD LEWIS THIERFELDER

Respondent

Docket Number 2010-0567
Enforcement Activity No. 3896926

DECISION AND ORDER
Issued: June 11, 2012

By Administrative Law Judge:
Honorable George J. Jordan

Appearances:

LT Anthony S. Hillenbrand
Sector Honolulu
For the Coast Guard

RONALD LEWIS THIERFELDER, Pro se
For the Respondent

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PRELIMINARY STATEMENT

This is an administrative proceeding under the Administrative Procedure Act (5 U.S.C. § 551 *et seq*.) concerning the suspension or revocation of a merchant mariner's credential pursuant to 46 U.S.C. § 7701 *et seq*. and its underlying regulations found at 33 C.F.R. Part 20 and 46 C.F.R. Part 5. The Coast Guard initiated this proceeding by filing a Complaint seeking to revoke Ronald Lewis Thierfelder's (Respondent) Coast Guard-issued Credentials for disobeying a lawful order and refusing an order to take a drug test.

PROCEDURAL HISTORY

1. The Coast Guard initiated this administrative proceeding seeking revocation of Respondent's Merchant Mariner Credentials by filing a Complaint on December 9, 2010.

2. The Complaint alleged two (2) separate allegations of Misconduct: (1) Disobedience of a lawful order and (2) refusal to submit to a reasonable cause drug test. The Complaint also alleged two (2) separate sets of jurisdictional allegations. The first juristictional basis was that Respondent acted under the authority of his Merchant Mariners License on 07/18/2010 by "serving as Chief Mate aboard the vessel BLUEFIN as required by law or regulation." The Complaint further alleged that "Respondent acted under the authority of [his MML], on 07/13/2010 by:engaging in official matters regarding that license, certificate or document by other: Subject of Investigation/Resonable Suspicion Drug Testing."

3. The Complaint included the following factual allegations for the first charge of Misconduct:

> 1. On or about July 6, 2010 the vessel's Master ordered the Respondent to not involve himself in the medical matters on board the vessel.

2. On July 8, 2010 the Respondent failed to obey the vessel's Master's orders.

4. The Complaint included the following factual allegations as to the second charge of Misconduct:

1. On July 13, 2010 Respondent was directed to submit a reasonable cause drug test.
2. On July 13, 2010 the Respondent refused to provide a urine sample.
3. The Respondent's refusal to test was recorded by collector Freida Taumua.
4. The Respondent's refusal to test was verified by Medical Review Officer Patrick J. Lam, M.D.

5. On January 18, 2011, Respondent's Counsel filed a Notice of Appearance, and on January 19, 2011, Respondent's Counsel filed a Request for Extension to Answer. An extension was granted by the Docketing Center on the same date.

6. A subsequent request for further extension was filed on February 2, 2011. The Docketing Center issued a Notice of Assignment to the undersigned Administrative Law Judge (ALJ) on February 3, 2011.

7. On February 4, 2011, Respondent, through counsel, filed an Answer denying paragraph 3 of the juridictional allegations which alleged that he "acted under the authority of [his MML], on 07/13/2010 by:engaging in official matters regarding that license, certificate or document by other: Subject of Investigation/Resonable [sic] Suspicion Drug Testing." Respondent denied the factual allegations and admitted paragraphs one (1) and two (2) of the jurisdictional allegations, as to holding a Coast Guard-issued credential and serving under the authority of that credential as Chief Mate on the date of the first allegation.

8. The Coast Guard filed an Amended Complaint on February 4, 2011. The Amended Complaint listed the changes to the Original Complaint as follows:

(a). It amended the date in Jurisdictional Allegations from 07/18/2010 to 07/06/2010.
(b). It amended the Jurisdictional Allegations from "Subject of Investigation/Reasonable Suspicion Drug Testing" to "Reasonable Cause Drug Testing."
(c). It amended the first set of factual allegations from:

1. On or about July 6, 2010 the vessel's Master ordered the Respondent to not involve himself in the medical matters on board the vessel.
2. On July 8, 2010 the Respondent failed to obey the vessel's Master's orders.

to:

1. On or about July 6, 2010 the M/V BLUEFIN's Master, Capt. Mark C. Fenner, ordered the Respondent to not involve himself or interfere with medical matters onboard the vessel.
2. On July 8, 2010 the Respondent disobeyed the Master's Order.
3. On July 8, 2010 the Respondent was relieved of duty by the Master for disobedience.

(d). It amended the second set of factual allegations from:

1. On July 13, 2010 Respondent was directed to submit a reasonable cause drug test.
2. On July 13, 2010 the Respondent refused to provide a urine sample.
3. The Respondent's refusal to test was recorded by collector Freida Taumua.
4. The Respondent's refusal to test was verified by Medical Review Officer Patrick J. Lam, M.D.

to:

1. On July 13, 2010 Respondent was directed to submit to a Reasonable Cause drug test.
2. On July 13, 2010 at 1005 hrs. the Respondent refused to provide a urine sample.
3. The Respondent's refusal to test was recorded by collector Freida Taumua.
4. The Respondent's refusal to test was verified by Medical Review Officer Patrick J. Lam, M.D.
5. Refusing to take a DOT drug test is a violation of 49CFR40.191.

9. Respondent's Counsel withdrew on February 10, 2011. Since then, Respondent has filed various documents in this matter on his own behalf. I have considered Respondent's filings attempts to submit evidence in this matter. The filings also conveyed Respondent's desire not to attend the hearing.

10. A Prehearing Conference was held in this matter on March 31, 2011. Respondent did not participate. The conference was transcribed and a copy of the transcript was provided to the parties. A Conference Memorandum and Scheduling Order was issued on April 12, 2011.

11. A hearing on the matter was held in Seattle, Washington on May 11-12, 2011 and in Honolulu, Hawaii on May 25, 2011. Copies of the hearing transcripts were provided to the parties.

12. A post-hearing Order was issued on July 6, 2011, providing the parties with the opportunity to file proposed findings of fact and conclusions of law pursuant to 33 C.F.R. § 20.710(b). Both parties declined.

Appearances

Lieutenant (LT) Anthony Hillenbrand, Lieutenant Junior Grade (LTJG) James Zorn, and Lieutenant Commander (LCDR) Darwin Jensen represented the Coast Guard. Respondent was initially represented by Attorney Gordon T. Carey Jr. of Portland, Oregon. Mr. Carey filed a Notice of Appearance on January 18, 2011 and the Answer to the original Complaint; however, Attorney Carey withdrew on February 10, 2011. Respondent represented himself thereafter. Respondent did not appear at the Prehearing Conference or the hearing.

Respondent's Participation

As noted, the Respondent did not appear at the Prehearing Conference or the hearing, and did not submit any post-hearing filings. In the Prehearing Conference Memorandum of April 12, 2011, and based on his filings prior to the Prehearing Conference, I determined that Respondent wanted to be heard but not attend any hearings in this matter. Respondent's filings precluded a

finding that Respondent had abandoned his defense and precluded a finding of default. Failure to appear at a prehearing conference does not necessarily give rise to a default in these proceedings[1]. However, if a party does not participate, then pursuant to 33 C.F.R. § 20.501(f), that party waives objection to any agreements reached at the conference. Likewise, any sanction for failure to participate in discovery is limited to those set out in 33 C.F.R. § 20.607. See Appeal Decision 2568 (ELSIK) (2006).

At the start of the Seattle hearing, the Coast Guard moved for default for failure to appear. (Seattle Tr. 7). I denied the motion at that time, held it under advisement, and directed the Agency to go forward and present evidence. (Seattle Tr. 7-8). I have subsequently reconsidered the motion based on the whole record, and, for the reasons set forth below, again deny the motion.

Coast Guard suspension and revocation procedures are formal adjudications conducted under the Administrative Procedure Act (APA). 46 U.S.C. § 7702(a). Such formal adjudications are conducted "pursuant to the trial-type procedures set forth in §§ 5, 7 and 8 of the APA, 5 U.S.C. §§ 554, 556-557, which include requirements that parties be given notice of 'the matters of fact and law asserted,'§ 554(b)(3), an opportunity for 'the submission and consideration of facts [and] arguments,'§ 554(c)(1), and an opportunity to submit 'proposed findings and conclusions' or 'exceptions,' § 557(c)(1), (2)." Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 655 (1990).

The Rules of Practice, Procedure, and Evidence for Formal Administrative Proceedings of the Coast Guard give a respondent an opportunity to be heard, present witnesses, cross-examine witnesses, and present exhibits and argument. See 33 C.F.R. Part 20. Any party may file post-hearing briefs, proposed findings of fact and conclusions of law, or both. See 33 C.F.R. § 20.710.

[1] Pursuant to 33 CF.R. § 20.310(a), upon motion, an ALJ may find a respondent in default for failure to appear at a conference or hearing without good cause shown. However, no motion was filed as to the failure to attend the pre-hearing conference and the Coast Guard was aware of the likely non-appearance.

Witnesses may testify by telephone. 33 C.F.R. § 20.707. Witnesses may also testify by deposition or video tape deposition if a motion is approved under 33 C.F.R. § 20.605. Written testimony may be submitted if the witness is available for at least telephonic cross-examination or cross-examination by deposition. See 33 C.F.R. § 20.808.

The Administrative Procedure Act provides that an agency must "give all interested parties opportunity for - (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and (2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title." 5 U.S.C. § 554(c).

A respondent has the opportunity to be heard at the hearing, to present oral and documentary evidence and cross-examine witnesses. In Appeal Decision 2391 (STUMES) (1985), the Commandant noted that "the Administrative Law Judge offered [the Respondent] the opportunity to testify by deposition or video tape deposition should he choose not to appear in person." Subsequent to STUMES, new administrative procedural rules (33 C.F.R. Part 20) and the Federal Rules of Civil Procedure have offered even more ways to participate.

In the instant case, Respondent's filings made it clear that he wished to participate in the proceeding in some fashion. Respondent filed a timely answer denying jurisdiction as to the second allegation and denying generally the facts as to both allegations. Respondent subsequently filed a wide-ranging statement on February 21, 2011 that denied the allegations in this matter. However, Respondent also made clear that he did not want to appear in person. On April 13, 2011, he filed a letter stating his responses to the allegations.

While Coast Guard regulations have provisions allowing a respondent to be found in default for failing to answer or not appearing at a hearing, they do not address this circumstance

directly. Here, the Respondent did not ignore or abandon the process. He filed an answer and submitted detailed argument on his behalf.

"*Pro se* plaintiffs enjoy the benefit of a liberal construction of their pleadings and filings." Boswell v. Mayer, 169 F.3d 384, 387 (6th Cir.1999); Haines v. Kerner, 404 U.S. 519, 520 (1972) (explaining that allegations in a *pro se* complaint are held "to less stringent standards than formal pleadings drafted by lawyers"). "The federal courts grant wide latitude in construing the pleadings and papers of *pro se* litigants. SEC v. Elliott, 953 F.2d 1560, 1582 (11th Cir. 1992) (citing Maldonado v. Garza, 579 F.2d 338, 340 (5th Cir. 1978))." Appeal Decision 2697 (GREEN) (2011). In GREEN, the Commandant held that an ALJ has an obligation to make "reasonable allowances to protect *pro se* litigants from inadvertent forfeiture of important rights because of their lack of legal training" (citing Draught v. Zuck, 710 F.2d 90, 95 (2d Cir. 1983)).

However, even "*pro se* litigants must still comply with all procedural rules." Sizemore v. Commr. of Soc. Sec., 2008 WL 4404597 (S.D. Ohio 2008). Thus, since Respondent limited his participation, he limited his opportunity to be heard. The APA states that a "party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." 5 U.S.C. § 556(d).

In his February 21, 2011 letter, Respondent set out his version of the events. These materials were not accompanied by a sworn affidavit. Accordingly, the ALJ cannot treat Respondent's statements as written testimony, as they were not subscribed to under oath and Respondent did not make himself available to cross-examination.

However, Respondent's February 21, 2011 and April 13, 2011 filings also include reasons as to why the testimony of government witnesses should be disregarded and why Respondent's credentials should not be revoked. Black's Law Dictionary (9th ed. 2009) defines "argument" as follows: "1. A statement that attempts to persuade; esp., the remarks of counsel in analyzing and

pointing out or repudiating a desired inference, for the assistance of a decision-maker. 2. The act or process of attempting to persuade." Accordingly, Respondent has submitted argument in support of his positions for consideration by the Administrative Law Judge under 5 U.S.C. § 554(c), and, as such, has availed himself of his opportunity to be heard in this proceeding. This decision will consider Respondent's arguments. However, by not attending the hearing, Respondent limited his participation to this argument as he was unable to cross-examine government witnesses or present evidence.

A number of emails and other correspondence from Respondent to his employer were entered into the record by the Coast Guard as Exhibit 25. As such, I will also consider these as documentary evidence. On July 7, 2011, Respondent sent an email regarding the Post-Hearing Order. That email did not appear to copy the Coast Guard, to cure any possible issue of ex-parte communication, a copy was forwarded to the Coast Guard on July 12, 2011 and it has been included in the record pursuant to 33 C.F.R. § 20.205 and 5 U.S.C. § 557(d).

ADMINISTRATIVE RECORD

Witnesses and Exhibits

The Coast Guard presented the testimony of ten (10) witnesses at the hearing and offered twenty-seven (27) exhibits, all of which were admitted into the record. Respondent offered no exhibits, however, as discussed above, Respondent made numerous filings which have been accepted as argument.

The list of witnesses and exhibits is contained in **APPENDIX II.**

Pleading, Motions, Orders and other Filings

A list of the filings in this matter is contained in **APPENDIX III.**

FINDINGS OF FACT

The following Findings of Fact and Conclusions of Law are based on the observations of the appearance and demeanor of the witnesses who testified at the hearing and upon analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. Each exhibit entered, although perhaps not specifically mentioned in this decision, has been carefully reviewed and given thoughtful consideration. The matters before me are (1) whether a lawful order was given and whether Respondent failed to obey said order while acting under the authority of his credential, and (2) whether a lawful order to take a reasonable cause drug test was given, and whether Respondent refused to take such a test while acting under the authority of his credential. If either allegation is found proved, the ALJ must then decide an appropriate sanction under the circumstances. 46 C.F.R. §§ 5.567-5.569.

1. At all relevant times herein, Respondent was the holder of Merchant Mariner's License 1532026 and Merchant Mariners Documents numbered 153257 and 184668. (Complaint; Amended Complaint; CG Ex.1; Seattle Tr. 14-16).
2. The M/V BLUEFIN, Official Number 620431, is an inspected vessel in the service of Freight Ship. (CG Ex. 27).
3. The Certificate of Inspection for the BLUEFIN states that when operating on an international voyage, that the vessel's crew must include a master and two mates. (CG Ex. 27).
4. On April 25, 2010, the BLUEFIN departed Seattle, WA on a voyage to service tsunami warning buoys pursuant to a contract with the National Oceanic and Atmospheric Administration (NOAA). (Seattle Tr. at 47, 49, 62, 85, 132, 134-135, 180).
5. Respondent signed a crew agreement to serve as Chief Mate on April 23, 2010. The agreement was also signed by the vessel's owner, Peter Kelly, on April 25, 2010. (CG Ex. 23).
6. Respondent embarked on the April 25, 2010 voyage as Chief Mate. (CG Ex. 23; Seattle Tr. at 9, 20-21, 50).
7. The Master of the BLUEFIN was Captain Mark Fenner. (CG Ex. 9; Seattle Tr. at 20).
8. The Second Mate on the BLUEFIN was Michelle Jimenez. (CG Ex. 9; Seattle Tr. at 56).
9. The BLUEFIN had two Medical Officers aboard, Michelle Jimenez and Mark Fenner. (Seattle Tr. at 30, 107, 177).

10. The Certified Medical Officers were authorized to dispense drugs in consultation with a medical hotline believed to be operating out of George Washington University in Washington, D.C. (Seattle Tr. at 93, 105, 107).
11. During the course of the first leg of the voyage in Alaskan waters, the Ship's Cook, Jeno Koch, developed a serious toothache from a cracked tooth and resultant pain and swelling. (Seattle Tr. at 37, 104, 142, 151, 166, 180; CG Ex. 10).
12. After consultation with the medical hotline, the Master provided the cook with antibiotics and hydrocodone for pain relief. (Seattle Tr. at 29, 31, 105, 108).
13. Mr. Koch's tooth was removed in Kodiak, AK in early May 2010. (Seattle Tr. at 104-105).
14. The BLUEFIN continued its voyage and, after port calls in Japan, proceeded into the Pacific Islands. (Seattle Tr. 133-135).
15. Following the extraction, Mr. Koch took hydrocodone and two types of antibiotics. (Seattle Tr. at 104-105).
16. In early July, the BLUEFIN stopped in Guam to change some of the contract personnel servicing the tsunami buoys. Mr. Leo Tretbar joined the vessel as lead engineer. (Seattle Tr. at 133-134).
17. On July 3, 2010, Mr. Koch experienced further pain and swelling. (CG Ex. 10).
18. After medical consultation, the Master gave Mr. Koch additional antibiotics on July 3, 2010, and additional hydrocodone on July 4, 2010. (CG Ex. 10).
19. On or about July 4, 2010, Respondent began to believe that Mr. Koch was overusing painkillers. (Seattle Tr. 54-55, 108-111; CG Ex. 25 (e-mail dated July 7, 2010 9:52pm and e-mail dated July 7, 2010 9:50pm)).
20. Respondent began to question Mr. Koch regarding his pain level and drug usage. (Seattle Tr. 108-111; CG Ex. 6).
21. On July 6, 2010, Respondent collected Mr. Koch's unused drugs and prepared a receipt for purposes of returning the medication back into the medical chest inventory. (Seattle Tr. at 56-57, 112-114; CG Ex. 6).
22. On or about July 6, 2010, the M/V BLUEFIN's Master, Mark Fenner, ordered Respondent not to involve himself or interfere with medical matters onboard the vessel. (Seattle Tr. at 57).
23. On July 8, 2010, Respondent asked Mr. Koch about his medicial conditions, inquiring as to whether he was still taking pain medication, and asking him to describe his pain level on a scale of one to ten. (Seattle Tr. at 58, 108-09; CG Ex. 6).
24. On July 8, 2010, Respondent was relieved of duty by the Master for disobedience. Shortly after being relieved of his duties, Respondent stated "Just you try and make me" to Captain Fenner. (Seattle Tr. at 25, 41-42, 60; CG Ex. 8).
25. After he was relieved of his duties, Respondent sent two emails to the vessel's owner concering his dismissal and explaining that he had simply asked the cook how he was feeling. Respondent conveyed to the owner that the incident occurred because of irregularities he had found in the distribution of pain

medications aboard the vessel. (Seattle Tr. at 25; CG Ex. 25 (e-mail dated July 7, 2010 9:52pm and e-mail dated July 7, 2010 9:50pm[2])).

26. After Respondent was relieved of his duties, he had free run of the vessel, but no responsibilities. (Seattle Tr. at 42, 59-60).
27. The BLUEFIN subsequently diverted to Pago Pago, American Samoa to seek medical attention for Mr. Koch and to let Respondent off the vessel. (Seattle Tr. at 150-151).
28. During the voyage to American Samoa, the Master emailed the owner concerning when to date the Certificate of Discharge to Merchant Seaman. The Master inquired whether he should date the discharge based on the arrival in Pago Pago or based on the date of termination on the boat. (CG Ex. 25 (email dated July 10, 2010 @ 22:47:30)).
29. Respondent was not paid after July 8, 2010. (Seattle Tr. at 80; CG Ex. 25 (fax dated 7/22/10)).
30. Respondent told lead engineer Leo Tretbar that he believed drugs were unaccounted for in the ship's drug cabinent and accused the Master of handing out pills to the crew "like candy." (Seattle Tr. at 23, 34, 62, CG Ex. 8, CG Ex. 14)).
31. Mr. Tretbar reported this concern to Captain Fenner. (Seattle Tr. at 62).
32. The Master, Second Mate Jimenez, and Mr. Tretbar examined the contents of the Ship's Medical Chest and found all drugs accounted for. (Seattle Tr. at 63, 143-144, CG Ex. 14).
33. Mr. Tretbar told Respondent that the drugs were accounted for. (Seattle Tr. at 144, CG Ex. 14).
34. Respondent told Mr. Tretbar that the morphine in the vessel's medical chest could be tampered with, and that he should examine the bottles in the medical chest. (Seattle Tr. at 23, 62-63, 145-147, CG Ex. 14).
35. The Master refused to examine the medical chest further. (Seattle Tr. at 23, 62-63, 145-147, CG Ex. 14).
36. After Mr. Tretbar told Respondent that the Master would not investigate further, Respondent advised Mr. Tretbar that he had discovered drugs on board the vessel and showed Mr. Tretbar a bag which Respondent indicated contained drugs. (Seattle Tr. at 23, 34, 147-148, CG Ex. 14).
37. Mr. Tretbar advised Respondent to get rid of the drugs. (Seattle Tr. at 149, CG Ex. 14).
38. Respondent made similar claims to the vessel's owner, Peter Kelly. (CG Ex. 8, CG Ex. 25 (e-mail dated July 9, 2010 @ 2141 hrs and e-mail dated July 11, 2010 @ 2334 hrs), Seattle Tr. at 88-89).
39. In an email sent on July 9, 2010 at 2141, Respondent requested that $57,000 be wired to his account for lost wages as a result of being terminated. Respondent stated that if the money was not sent he would contact the authorities and demand that his agreement with the owner be satisfied before

[2] The emails sent from BLUEFIN on July 8, 2010 appear as received on July 7, 2010 due to the International Date Line.

the vessel left port in Pago Pago. (Seattle Tr. at 92, CG Ex. 25 (e-mail dated July 9, 2010 @ 2141 hrs)).

40. Respondent contacted Coast Guard District 14 in Honolulu and advised the Coast Guard about the presence of illegal drugs onboard the vessel. (Seattle Tr. at 153-154, Honolulu Tr. at 10, CG Ex. 15, CG Ex. 16).
41. The BLUEFIN arrived at Pago Pago, American Samoa on July 12, 2010. (CG Ex. 8).
42. At 1030 on July 12, 2010, the BLUEFIN received an email stating that USCG and Public Safety would meet the vessel at the dock. (CG Ex. 8).
43. At 1550, the Master issued Respondent a discharge certificate. (CG Ex. 8, CG Ex. 22).
44. At 1640, the BLUEFIN docked at the Main Wharf at Pago Pago, American Samoa. (CG Ex. 8).
45. At 1700, USCG and law enforcement from several agencies boarded the vessel and commenced a search. (CG Ex. 8, Honolulu Tr. at 11-12, CG Ex.16).
46. Respondent directed the boarding team to the location of the drugs; however, the team had already found them. (Honolulu Tr. at 12).
47. The USCG presence on the vessel included LT Trevor Parra, Supervisor of Marine Safety Detachment Pago Pago, American Samoa. (Honolulu Tr. at 9, CG Ex 15, CG Ex. 16).
48. LT Parra directed Captain Fenner to order the crew to be tested for drugs. (Honolulu Tr. at 16-17).
49. The reason for the testing of the entire crew was the presence of drugs on the vessel. (Honolulu Tr. at 16).
50. While Respondent was still aboard the vessel, LT Parra directed Respondent to be tested for drugs. (Honolulu Tr. at 21).
51. At 1800, Respondent was taken from the vessel in an ambulance due to complaints of abdominal pain. (CG Ex. 8, See Seattle Tr. at 43-44).
52. At 2015, Samoan Narcotics Officers began interviewing the crew. (CG Ex. 8).
53. Captain Fenner directed the entire crew to be tested the next morning. (Honolulu Tr. at 16-17, See Seattle Tr. at 65-66, 73-74).
54. Hospital staff collected a urine sample from Respondent upon his admission to the E.R.; the sample was marked for both drug testing and a standard urinalysis. (Honolulu Tr. at 34).
55. The DOT-certified collector at the hospital was Freida Taumua. (CG Ex. 2, Honolulu Tr. at 28, 32-33, CG Ex. 17, CG Ex. 18).
56. On the morning of July 13, 2010, Ms. Taumua was provided a list of fourteen individuals for drug testing by the ship's agent for the BLUEFIN. (Honolulu Tr. at 33-34).
57. A hospital staff member advised Ms. Taumua that the Respondent was already in the E.R. (Honolulu Tr. at 33).
58. Ms. Taumua advised hospital E.R. staff that only a DOT sample was adequate for drug testing purposes. (Honolulu Tr. at 33).

59. Respondent was brought from the E.R. to the laboratory at 1000, and Ms. Taumua directed Respondent to provide a sample. (Honolulu Tr. at 33, 36).
60. Respondent stated that he had already given a sample, and that the sample provided was good enough. (Honolulu Tr. at 36, 45).
61. Ms. Taumua notified the ship's agent and the Coast Guard of the refusal. (Honolulu Tr. at 39).
62. Ms. Taumua noted on the Custody and Control Form under remarks: "Refused and notified agent and Coast Guard. Reschedule @ 2." (CG Ex. 19).
63. LT Parra discussed the ramifications of refusal with the Respondent. (Honolulu Tr. at 18, 22 CG Ex 15, CG Ex.16).
64. Respondent's initial refusal to provide a DOT sample occurred at 1005 on July 13, 2010. (Honolulu Tr. at 36, 43).
65. Ms. Taumua attempted a second collection at 1400, at which point Respondent stated that he wanted his lawyer. Subsequently, "[s]ome kind of attorney" came in, and Respondent ultimately provided a sample around 1435. (Honolulu Tr. at 33, 35, 42, 46-47).
66. The Custody and Control Form indicates that Respondent provided a split sample within normal temperature range. (CG Ex. 19, See Honolulu Tr. at 50).
67. The DOT-certified Medical Review Officer (MRO) was Patrick J. Lam M.D. (CG Ex. 19, CG Ex. 21, See Honolulu Tr. at 55-57).
68. The MRO determined that the sample was negative dilute. (CG Ex. 19).
69. The MRO subsequently submitted a letter stating that the classification of the sample as negative dilute was incorrect. Based on the remarks section, he classified the test as refusal to test. In a letter dated November 9, 2010 the MRO explained that the sample ultimately collected on "7/19/10" should not have been allowed. (CG Ex. 20, See Honolulu Tr. at 57, 61).
70. At the hearing, the MRO provided a corrected copy of CG Ex. 20 dated November 9, 2010, changing the collection date from "7/19/10" to "7/13/10". (See Honolulu Tr. at 70).

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent and the subject matter of this hearing are properly within the jurisdiction of the United States Coast Guard and the undersigned in accordance with 46 U.S.C. § 7703, 46 C.F.R. Part 5, and 33 C.F.R. Part 20.

2. Respondent is the holder of a United States Coast Guard Merchant Mariner's License and a Merchant Mariner Document.

3. On July 6-8, 2010, Respondent was serving under the authority of a United States Coast Guard Merchant Mariner's License as Chief Mate of an inspected vessel, the M/V BLUEFIN.

4. On July 6, 2010, the Master gave Repondent a lawful order not to involve himself with or to interfere with the medical care aboard the M/V BLUEFIN.

5. On or about July 8, 2010, Respondent questioned the ship's cook about his medical condition in violation of the Master's order.

6. The factual allegation of "Misconduct" against Respondent for failing to obey a lawful order is found PROVED by a preponderance of the evidence.

7. On July 8, 2010, Respondent was relieved of his duties as Chief Mate of the M/V BLUEFIN.

8. On July 12, 2010, Respondent received a discharge certificate and was officially terminated from service on the M/V BLUEFIN.

9. On July 12, 2010, after Respondent had been officially terminated from service but while he was still aboard the vessel, the Coast Guard directed Respondent to take a Reasonable Cause Chemical Test.

10. On July 12, 2010, Respondent was not serving under the authority of a United States Coast Guard Merchant Mariner's License but was nonetheless required to carry a Merchant Mariner Document while still on board the M/V BLUEFIN.

11. The Coast Guard had jurisdiction at the time LT Parra ordered Respondent to submit to a drug test.

12. On July 12, 2010, Respondent was not an individual "operating a vessel."

13. The Respondent did not appear to be under the influence of drugs on July 12, 2010.

14. There were no grounds for the Coast Guard to order a Reasonable Cause Chemical Test.

15. The Master directed the entire crew to take Reasonable Cause Chemical Tests on July 12, 2010, after the Respondent had left the vessel.

16. The collector informed Respondent of the Reasonable Cause test on July 13, 2010.

17. On July 13, 2010, Respondent was not serving under the authority of a United States Coast Guard Merchant Mariner's License or a Merchant Mariner Document.

18. The factual allegation of "Misconduct" for Refusal to Take a Chemical Test" against Respondent is found NOT PROVED.

DISCUSSION

PRINCIPLES OF LAW

The purpose of Coast Guard suspension and revocation proceedings is to promote safety at sea. 46 U.S.C. § 7701(a). In furtherance of this goal, Administrative Law Judges have the authority to revoke a merchant mariner's license for violations arising under 46 U.S.C. § 7703. See 46 C.F.R. § 5.19(b). Under Coast Guard procedural rules and regulations, the Coast Guard bears the burden of proof and must prove the violations by a preponderance of the evidence to prevail. 33 C.F.R. §§ 20.701, 20.702(a). In this case, the Coast Guard alleges that (1) Respondent refused to obey a lawful order of the Master and that (2) Respondent refused a lawful order to take a drug test. The Coast Guard seeks to revoke Respondent's Merchant Mariner's Credentials.

"Federal agencies are not bound by the strict rules of evidence that govern jury trials." Gallagher v. National Transportation Safety Board, 953 F.2d 1214, 1218 (10th Cir. 1992) (citing Sorenson v. National Transportation Safety Board, 684 F.2d 683, 688 (10th Cir. 1982)). Instead, the admissibility of evidence before executive agencies is governed by the Administrative Procedure Act, which allows any documentary or oral evidence to be received. See 5 U.S.C. § 556(d), Gallagher and Sorenson. Only irrelevant, immaterial or unduly repetitious evidence need be excluded. Id. "Under this standard, in order to be admissible for consideration in an administrative proceeding, the evidence need not be authenticated with the precision demanded by the Federal Rules of Evidence." Gallagher at 1218; see also Appeal Decision 2664 (SHEA) (2007). However, evidence admissible under the Federal Rules of Evidence is generally admissible in these proceedings if it is relevant.

JURISDISCTION

46 U.S.C. § 7703 makes it clear that, to establish jurisdiction in a Misconduct case, the misconduct must have occurred while the mariner was acting under the authority of his merchant mariner credential. 46 C.F.R. § 5.57 sets out conditions under which a mariner is acting under authority of Coast Guard credential or endorsement.

A mariner is considered to be acting under the authority of a credential or endorsement when the holding of such credential or endorsement is: (1) Required by law or regulation; or (2) Required by an employer as a condition for employment. 46 C.F.R. § 5.57(a).

Additionally, a mariner may be considered to be acting under the authority of the credential or endorsement while engaged in official matters regarding the credential or endorsement. This includes, but is not limited to, such acts as applying for renewal, taking examinations for raises of grade, requesting duplicate or replacement credentials, or when appearing at a suspension or revocation hearing. 46 C.F.R. § 5.57(b).

MISCONDUCT

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

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

I. REFUSAL TO OBEY LAWFUL ORDER

A refusal to follow a lawful order of a vessel's master constitutes Misconduct. Appeal Decision 1857 (POUTER) (1971) (disobedience to a lawful order is an offense in any kind of jurisprudence). The orders of the Master of a vessel are given special recognition and protection by the laws of both the United States and the international community. See Appeal Decision 2616 (BYRNES) (2000). The Master has a great responsibility for ensuring the safety of his

vessel and crew. This responsibility was confirmed in the case of The Styria, 186 U.S. 1 (1901), where the Court explained:

> The master of a ship is the person who is entrusted with the care and management of it, and the great trust reposed in him by the owners and the great authority which the law has vested in him require on his part and for his own sake, no less than for the interest of his employers, the utmost fidelity and attention. (citing Abbott, Shipping, 7th Am. Ed. 167).

Jurisdiction

While jurisdiction as to this allegation in the Complaint was admitted, the burden of establishing jurisdiction nonetheless remains. See 33 C.F.R. § 20.310(c); see also Appeal Decision 2656 (JORDAN) (stating that, irrespective of Respondent's admission of charged offense, appeal must be granted where jurisdiction is not established). The record clearly establishes that Respondent was the holder of a United States Coast Guard Merchant Mariner's License and a Merchant Mariner Document and that he was serving as Chief Mate at all times relevant to this allegation. The evidence establishes that the M/V BLUEFIN is an inspected vessel in the service of Freight Ship and that its Certificate of Inspection requires that, when operating on an international voyage, the vessel's crew include a Master and two mates. 46 C.F.R. § 15.415 requires that vessels subject to inspection under 46 U.S.C. § 3301 must, while on a voyage, be under the direction and control of an individual who holds an appropriate license or appropriate officer endorsement on their MMC and that no vessel may be operated unless it has in its service and on board, the complement required by the certificate of inspection. An "individual may not serve, in a position in which an individual is required by law or regulation to hold a license, certificate of registry, merchant mariner's document, transportation worker identification credential, and/or merchant mariner credential, unless the individual holds all credentials required …" 46 C.F.R. § 15.401. Respondent's license was required by law and regulation for his service

as Chief Mate. Accordingly, as to the charge of refusal to obey a lawful order, jurisdiction is clearly established.

Elements of Refusal to Obey a Lawful Order

The Commandant has held that there are four elements of the offense of refusal to obey a lawful order: (1) whether a lawful order was issued, (2) whether Respondent had a duty to obey the order, (3) whether Respondent had knowledge of the order, and (4) whether Respondent failed to obey said order. See Appeal Decision 2056 (JOHNSON) (1976).

1. Was a lawful order issued?

It is clear that Captain Fenner gave an order to Respondent not to involve himself further in the medical affairs of the vessel. This order was given after Respondent utilized a self-generated form to collect and return Mr. Koch's unused drugs to the medical chest. This finding is based on the witness statements and credible testimony of Captain Fenner, Second Mate Jimenez and SAIC lead engineer Leo Tretbar. This is also collaborated by the testimony of Mr. Koch, the ship's cook, who testified that he was told not to discuss his medical condition with Respondent. As stated before, the Master has a great responsibility in ensuring the safety of his vessel and crew. An order concerning the medical affairs of the vessel is lawful, and interference in the treatment of a crewmember has a potentially harmful effect on the safety of the crew.

2. Did Respondent have a Duty to Obey the Order?

As Chief Mate, Respondent was a member of the crew of the BLUEFIN and had a duty to obey all lawful orders of the Master. Appeal Decision 1857 (POUTER) (1971).

3. Did Respondent have Knowledge of the Order?

Captain Fenner testified that he "told [Respondent] not to interfere in any way, shape or form with the medical procedures or anything to do with medical issues aboard the vessel." (Seattle Tr. at 57). The Second Mate testified that the Master ordered Respondent to stop "meddling in the medical information, in people's medical information and Jeno's medical information" and also "Captain Mark Fenner did order Ron Thierfelder to not meddle in any medical issues." (Seattle Tr. at 26-27).

One particular email written by Respondent further evidences Respondent's awareness of the order, as Respondent acknowledges that the Master "thought he made it abundantly clear that I [Respondent] was not to talk to Jeno [the cook, Mr. Koch] about any medical matters." (CG Ex. 25). The testimony of Mr. Koch that he was told by the Master not to discuss his medical condition with Respondent further buttresses the notion that any discussion between Mr. Koch and Respondent regarding Mr. Koch's medical treatment was considered to be improper.

4. Did Respondent fail to obey that order?

After the order not to interfere was given, Respondent asked Mr. Koch about his condition. Respondent admits that he talked to Mr. Koch. In his email to Mr. Kelly, Respondent states he only asked the cook how he was feeling. (CG Ex. 25 (e-mail dated July 7, 2010 9:52pm from Ron to Peter Kelly Subj: Ron … Start with this one please)). Respondent proffers that he "simply said 'good morning' to him at breakfast and asked how he was feeling. If this is seen as interfering with his medical treatment then I am guilty… as are at least half the crew who asked him the same question that morning. In my opinion, Mark Fenner was looking for any reason to fire me and that was the best he could come up with. The State of Washington is obviously of the same opinion." (Letter from Respondent dated 4/13/2011).

The evidence in the record supports the Master's testimony that the order was for the Chief Mate not to involve himself with the medical affairs of the vessel and not to interfere with medical treatment. In fact, Respondent states in the February 21, 2011 letter that the Master had indicated to him that the medical chest and medications were none of his [the Chief Mate's] business. However, it is clear from the emails sent to Mr. Kelly that Respondent nonetheless believed the medications were, in fact, his business. (CG Ex. 25). The evidence also indicates that the scope of the Master's order entailed discussing medical issues with the crew and, in particular, the cook.

According to the testimony of Mr. Koch, Respondent's questions were more detailed than just how Mr. Koch was feeling. Mr. Koch testified that Respondent approached him and inquired about his condition, asking him whether he was still taking medication and how much pain he was in, on more than one occasion. Mr. Koch testified that he was advised and had been reprimanded for discussing his medical condition with Respondent; only the medical officers were to provide medical advice. (Seattle Tr. at 108-09, 114, CG Ex. 6).

Conclusion: Respondent Violated the Master's Order

While it is clear that Respondent greatly involved himself with the cook's medical treatment prior to the Master's order, the key inquiry is whether Respondent violated the order by his continued questioning of Mr. Koch once the order had been issued. Notably, the Master's order was broad and generally instructed Respondent not to involve himself with the medical treatment of crewmembers. However, Respondent's questions to Mr. Koch were clearly more than a casual greeting and thus constituted an inquiry into his condition in direct violation of the Master's order.

At the same time, it is clear that Respondent did not contradict or give alternative advice or interfere with the any treatment directed by ship's medical officer. Therefore, although a violation, it was not a grave or egregious violation of orders.

Accordingly, the first allegation of Misconduct is **PROVED**.

II. REFUSAL TO SUBMIT TO A FEDERAL DRUG TEST IN VIOLATION OF 49 C.F.R. § 40.191

In the second allegation, Respondent is charged with Misconduct for refusal to submit to a federal drug test. "There are numerous Coast Guard drug testing requirements for merchant mariners in 46 C.F.R. Part 16, including pre-employment, post-casualty, random, and reasonable cause drug testing. These types of testing represent the 'minimum standards, procedures, and means to be used to test for the use of dangerous drugs.' 46 C.F.R. § 16.101(b)." Appeal Decision 2679 (MILLS) (2007). Additionally there are provisions for USCG mandated testing under 33 C.F.R. § 95.035

The regulations in 46 C.F.R. Part 16 and 33 C.F.R. § 95.035 apply to employers or law enforcement officers and cannot be the basis for a charge of Misconduct. However the "failure to follow an order of his employer [or a law enforcement officer] to undergo a chemical test" can be the basis of such an allegation. Appeal Decision 2578 (CALLAHAN) (1996). A failure to comply with company-directed testing may be considered misconduct as being a violation of "a formal duly established rule." MILLS supra.

Additionally, a Master also has authority to order drug testing. While the allegation charges a violation of a Federal Drug Test, each of these scenarios must be analyzed in accordance with Coast Guard precedent. This case presents for the first time the issue of how a respondent's being both relieved from his duties/responsibilities and altogether terminated impacts both the authority to order testing and jurisdiction for purposes of Misconduct.

Jurisdiction

As noted above, in order to establish jurisdiction in a Misconduct case, the mariner must be both a holder of a Coast Guard-issued credential and acting under the authority of a Coast

Guard-issued credential. 46 U.S.C. § 7703. The Complaint alleges, and Respondent has admitted, that he is such a holder of such a credential. The Complaint further alleges that Respondent acted under the authority of his mechant mariners license "on 07/13/2010 by:engaging in official matters regarding that license, certificate or document by other: [sic] Reasonable Cause Drug Testing." Respondent denied this allegation.

1. Was Respondent acting under the authority of his credential by engaging in official matters regarding that credential?

Coast Guard regulations set out the agency's interpretation of "acting under the authority" in 46 C.F.R. § 5.57. In particular, paragraph (b) of 46 C.F.R. § 5.57 states as follows:

> (b) A person is considered to be acting under the authority of the credential or endorsement while engaged in official matters regarding the credential or endorsement. This includes, but is not limited to, such acts as applying for renewal, taking examinations for raises of grade, requesting duplicate or replacement credentials, or when appearing at a hearing under this part.

Reasonable cause drug testing is not among the enumerated official matters regarding the credential or endorsement. While the list is not limited solely to the examples given, an examination of the case law interpreting this section does not reveal any cases that would add mandatory drug testing as an official matter.

The official matters paragraph has been a long-standing rule. This provision was added in 1985. In the preamble, responding to comments, the Coast Guard stated that the "Coast Guard position is that since the possession of a license, document or certificate is necessary to conduct such official matters, [i.e. actions governing the renewal or issuing of licenses or documents] a person is considered to be acting under the authority of that license, document or certificate when engaged in those matters." 50 Fed. Reg. 32179 (Aug. 9, 1985). The Coast Guard last amended

this paragraph in 2009.[3] The sections of the rules relating to drug test refusal were added in 1988.[4] There is no evidence that the Coast Guard intended to expand official matters to include drug testing generally.

Only a few cases interpret this section pertaining to official matters. In Appeal Decision 2610 (BENNETT)(1999), the appellant contended that submitting an application for an upgrade to a license did not constitute action under the authority of his license. The Commandant stated that the "regulation is clearly to the contrary [citing 46 C.F.R. 5.57(b)] This provision has been interpreted to include that application for a license upgrade constitutes acting under the authority of the underlying license. See Appeal Decision 2433 (BARNABY)." See also Appeal Decision 2663 (LAW) (2007) (misconduct charge alleged that while performing official matters associated with his mariner credentials (applying for renewal of his merchant mariner license, issuance of a duplicate merchant mariner document and issuance of an original Seafarer's Training, Certification and Watchkeeping certificate), Respondent failed to disclose a criminal conviction in his application.).

The chemical testing rules apply to anyone employed aboard a vessel including personnel not required to carry credentials. Since the possession of a credential is not necessary to be subject to such testing, a mariner is not engaged in official matters regarding the credential when taking most drug tests. I note that testing mandated as part of the renewal, upgrade or issuing of a credential would be such an official matter. See 46 C.F.R. § 16.220. Because reasonable cause testing can be directed to non-credentialed personnel, I find that Respondent was not engaged in official matters regarding his credential or endorsement and 46 C.F.R. § 5.57(b) does not provide a basis for jurisdiction in this matter.

[3] 74 Fed. Reg. 11215 (Mar. 16, 2009).

[4] The last significant modification was in 2001 to conform to the changes in 49 C.F.R. Part 40. It specifically modified the references to drug and alcohol test refusals. See 66 Fed. Reg. 42964, 42967.

2. Was the Respondent otherwise acting under the authority of his credentials?

While the Complaint's jurisdictional allegation was premised on official matters regarding the credential or endorsement, the record contains evidence concerning other criteria for jurisdiction.

> … The jurisdiction of administrative bodies is dependent upon the validity and the terms of the statutes reposing power in them. Appeal Decision 2025 (ARMSTRONG) . In this case, the applicable federal statute states, "A license … may be suspended or revoked if the holder (1) when acting under the authority of that license, certificate or document (B) has committed … misconduct …." 46 U.S.C. § 7703(1)(b). The Coast Guard regulation interpreting this statute states: "A person employed in the service of a vessel is considered to be acting under authority of a license, certificate or document when the holding of such a license, certificate or document is: (1) Required by law or regulation; or (2) Required by an employer as a condition for employment." 46 C.F.R. § 5.57….
> Appeal Decision 2620 (COX) (2001).

Thus, the ALJ must still examine whether Respondent was acting under authority of a license, certificate or document because the holding of such a license, certificate or document was required by law or regulation; or required as a condition for employment at the time of the offense. The pertinent regulation, 46 C.F.R. § 5.57(a), states as follows:

> (a) A person employed in the service of a vessel is considered to be acting under the authority of a credential or endorsement when the holding of such credential or endorsement is:
>
> (1) Required by law or regulation; or
>
> (2) Required by an employer as a condition for employment.

This regulation was amended in 2009; the terminology change to "credential" and "endorsement" from the statutory language stems from this rulemaking. Previously, the Coast Guard could issue up to four credentials to a mariner: a Merchant Mariner's Document (MMD), Merchant Mariner's License (License), Certificate of Registry (COR), and an International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW) Endorsement. Each credential serves a separate purpose, thus creating the possibility that a

mariner might need all four. In the rulemaking entitled "Consolidation of Merchant Mariner Qualification Credentials," 74 Fed. Reg. 11196, March 16, 2009, the agency stated that "This rule will minimize these redundant credentialing requirements, and ease the burden on merchant mariners. The Coast Guard is streamlining its mariner regulations and consolidating the four separate credentialing documents into one Merchant Mariner Credential (MMC)."

This rulemaking also amended 46 C.F.R. § 15.401 to read:

> A person may not employ or engage an individual, and an individual may not serve, in a position in which an individual is required by law or regulation to hold a license, certificate of registry, merchant mariner's document, transportation worker identification credential, and/or merchant mariner credential, unless the individual holds all credentials required, as appropriate, authorizing service in the capacity in which the individual is engaged or employed and the individual serves within any restrictions placed on the credential. Beginning April 15, 2009, all mariners holding an active license, certificate of registry, MMD, or MMC issued by the Coast Guard must also hold a valid transportation worker identification credential (TWIC) issued by the Transportation Security Administration under 49 CFR part 1572.

The rulemaking further amended 46 C.F.R. § 15.415 to read:

> (a) Except as provided by § 15.725, no vessel may be operated unless it has in its service and on board, the complement required by the certificate of inspection.
>
> (b) Any vessel subject to inspection under 46 U.S.C. 3301 must, while on a voyage be under the direction and control of an individual who holds an appropriate license or appropriate officer endorsement on their MMC. For the purposes of this paragraph:
>
> (1) A voyage is the period of time necessary to transit from the port of departure to the final port of arrival.
>
> (2) A port does not include an Outer Continental Shelf (OCS) facility as defined in 33 CFR Part 140.

Respondent's credentials were issued just prior to this rulemaking. He still holds a Merchant Mariners Document with an endorsement and a License. The Rulemaking states that an

"MMC with an officer endorsement will carry the same weight as a license." 74 Fed. Reg. 11196, 11201.

It is clear from the record that Respondent was relieved as Chief Mate on July 8, 2010 and was therefore not serving in that capacity on July 12, 2012. Thus, the inquiry as to in what capacity Respondent was, in fact, serving is of particular importance.

Under 46 U.S.C. § 8701(b) "…an individual may not serve, on board a vessel to which this section applies if the individual does not have a merchant mariner's document …". The BLUEFIN is an inspected freight vessel over 100 gross tons and 46 U.S.C. § 8701 applies to such vessels. 46 U.S.C. § 8701(a).

Normally, for vessels in international trade over 75 tons, shipping articles would provide evidence that an individual was in service. While the BLUEFIN did not have formal articles, it did have an employment agreement. (CG Ex. 23). That agreement contains a discharge section that was not filled out.

The record also contains reference to a continuous discharge certificate. The Master requested advice on what date to use to indicate discharge (date of relief or date of departure from the vessel). There is no testimony or evidence regarding whether a continuous discharge certificate was issued or what date was used or would have been used. However, there is a termination certificate that was issued on July 12, 2010 (CG Ex. 22) and a log entry stating that it was issued at 1550. (CG. Ex. 8). The log also indicates that Respondent left the vessel at 1800. Id.

While shipping articles are a means to establish jurisdiction, they are not the only means. "Consequently, although it is usually true that the person charged is proven to have been acting under the authority of his license as a corollary of being under articles for a voyage, it is not necessarily true that a person must be under articles in order to be acting under the authority of his license. It is the position of the Coast Guard that the paramount factor in determining whether a

person is serving under authority of a license or certificate is that of the employment status." Appeal Decision 389 (VENTOLA) (1949).

In Appeal Decision 2384 (WILLIAMS) (1985), the Commandant held that a mariner who had bordered the vessel but not yet signed articles was under Coast Guard jurisdiction because a Merchant Mariner Document was required for a seaman aboard an inspected vessel. In so deciding, the Commandant cited the predecessor statute to 46 U.S.C. § 8701 (46 U.S.C. § 643). Here, even though Respondent had been terminated, he was still aboard the BLUEFIN and was in possession of an MMD.

Pursuant to Appeal Decision 2620 (COX), a misconduct charge related to a license requires a determination "whether the character of his employment at the time of the offense is that involving the scope of the license or document issued." In the instant case, Respondent was terminated and was not serving as an officer aboard the BLUEFIN after July 8, 2010. However, he still held an MMD and was aboard.

Another factor to consider is whether Respondent was being paid. In Appeal Decision 1233 (MACMURRY) (1961), the Commandant held because a respondent was paid wages for an additional day, his service did not terminate when he signed off Shipping Articles and went ashore. He was still "'in the service of the ship' and 'acting under authority of his document' the same as would have been true if no Shipping Articles had been involved at any time." Here, the evidence shows that Respondent's pay was terminated on July 8, 2010, prior to any drug testing.

It is clear that jurisdiction continues when a mariner is on shore leave from the vessel. 46 C.F.R. § 5.57(c). However, when Respondent left the vessel, he had been terminated, was not on shore leave, and was in a non-pay status.

In at least two decisions, mariners were considered to be acting under the authority during repatriation after discharge or failure to join. I have considered Appeal Decision 1894 (SCULLY) (1972), where the Commandant held that "if a seaman is considered 'in the service of a ship' for

maintenance and cure[5], or 'in the course of employment' for the Jones Act, while ashore from a vessel on which he may serve only if licensed or certificated by the Coast Guard he will be subject to disciplinary proceedings under 46 U.S.C. 239[predecessor to 46 U.S.C. 7703]." I have also considered the similar case in Appeal Decision 1890 (BAYLESS) (1972) where a mariner caused disruptions at a consulate and airport while being repatriated from a vessel subject to shipping articles. Both cases involved shipping articles, and SCULLY clearly involved a mariner in pay status.

> The employment relationship and the status of being in the service of the ship are what the document authorizes. If a seaman has the status of being in the service of the ship, he is acting under authority of his document. The test is not the place where the misconduct occurred, but is the seaman's status or relationship to the service of the ship at the time the misconduct occurred. If he has the right to maintenance and cure while in such status, he is also subject to amenability to discipline.
> Appeal Decision 765 (ELLEBY) (1955).

There are no facts in this record that clearly establish that this Respondent was subject to maintenance and cure. Further, the evidence indicates that he was not in a pay status and had been terminated and discharged from the vessel. For me to consider "maintenance and cure" as a basis for jurisdiction, the Coast Guard would have to present evidence in the record to support such a claim. Here, the Coast Guard has not argued jurisdiction on the basis of maintenance and cure or provided evidence to support such a jurisdictional basis.

[5] "Unlike men employed in service on land, the seaman, when he finishes his day's work, is neither relieved of obligations to his employer nor wholly free to dispose of his leisure as he sees fit. Of necessity, during the voyage he must eat, drink, lodge and divert himself within the confines of the ship. In short, during the period of his tenure the vessel is not merely his place of employment; it is the frame-work of his existence. For that reason among others his employer's responsibility for maintenance and cure extends beyond injuries sustained because of, or while engaged in, activities required by his employment. In this respect it is a broader liability than that imposed by modern workmen's compensation statutes." Aguilar v. Standard Oil Co. of N.J., 318 U.S. 724, 731-32 (1943).

Conclusion as to Jurisdiction

Thus, based on the weight of the precedent discussed above, I find that, based on COX, supra, Respondent ceased acting under the authority of his License as soon as he was relieved of his duties. The Coast Guard has failed to prove jurisdiction based on maintenance and cure, and the BLUEFIN lacked formal articles with which to establish jurisdiction; nevertheless, based on the precedent of WILLIAMS, supra, I find that Respondent was acting under the authority of his Merchant Mariners Document until he actually left the BLUEFIN, even though he was in a non-pay status prior to his departure. Accordingly, the evidence is sufficient to establish that there was Coast Guard jurisdiction while Respondent was aboard the BLUEFIN under his Merchant Mariners Document. Accordingly, the Coast Guard had jurisdiction at the time Respondent was ordered to submit to the drug test by LT Parra.

Did the Respondent Refuse to Submit to a Federal Drug Test?

The Complaint alleges that the refused test was a Federal Drug Test and the refusal was in violation of 49 C.F.R. § 40.191. Part 40 of Title 49, Code of Federal Regulations, contains the Department of Transportation's Procedures for Transportation Workplace Drug and Alcohol Testing Programs.

Structure of DOT Transportation Workplace Drug and Alcohol Testing Programs.

49 CFR Part 40 (commonly referred to as "Part 40") states:

- how drug and alcohol testing is conducted,
- who is authorized to participate in the drug and alcohol testing program, and
- what employees must do before they may return-to-duty following a drug and/or alcohol violation.

The DOT Agency and the USCG specific regulations state:

- the agency's prohibitions on drug and alcohol use,
- who is subject to the regulations,
- what testing is authorized,
- when testing is authorized, and
- the consequences of non-compliance.

The DOT Agencies and the USCG incorporate Part 40 into their regulations and enforce compliance of its provisions in all their respective regulations.

To what tests does 49 C.F.R. § 40.191 apply?

The section cited in the allegations is entitled: "What is a refusal to take a DOT drug test, and what are the consequences?" and describes the various ways an employee can refuse to take a drug test. However, throughout this section are references that the test must be "consistent with applicable DOT agency regulations" and/or limiting the scope of a DOT-refusal to test only "for any drug test required by this part or DOT agency regulations." In particular, paragraph (e) of Section 40.191 reads as follows (emphasis added):

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

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

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

There are additional rules for reasonable cause chemical tests at 33 C.F.R. § 95.035. A review of the allegations shows that the only federal drug tests that Respondent's requested test

would fall under is a Reasonable Cause or Reasonable Suspicion test under 46 C.F.R. § 16.250 or 33 C.F.R. § 95.035.

What is a refusal to take a DOT drug test?

The DOT rules in 49 C.F.R § 40.191 define what constitutes a refusal to take a DOT drug test, and what the consequences are for refusal.[6] They state in pertinent part:

> (a) As an employee, you have refused to take a drug test if you:
>
> (1) Fail to appear for any test (except a pre-employment 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. This includes the failure of an employee (including an owner-operator) to appear for a test when called by a C/TPA (see § 40.61(a));
>
> (2) *Fail to remain at the testing site until the testing process is complete*; *Provided*, That an employee who leaves the testing site before the testing process commences (see § 40.63 (c)) for a pre-employment test is not deemed to have refused to test;
>
> (3) Fail to provide a urine specimen for any drug test required by this part or DOT agency regulations; *Provided*, That an employee who does not provide a urine specimen because he or she has left the testing site before the testing process commences (see § 40.63 (c)) for a pre-employment test is not deemed to have refused to test;
>
> (4) In the case of a directly observed or monitored collection in a drug test, fail to permit the observation or monitoring of your provision of a specimen (see §§ 40.67(l) and 40.69(g));
>
> (5) Fail to provide a sufficient amount of urine when directed, and it has been determined, through a required medical evaluation, that there was no adequate medical explanation for the failure (see § 40.193(d)(2));
>
> (6) Fail or decline to take an additional drug test the employer or collector has directed you to take (see, for instance, § 40.197(b));
>
> (7) Fail to undergo a medical examination or evaluation, as directed by the MRO as part of the verification process, or as directed by the DER under § 40.193(d). In the case of a pre-employment drug test, the

[6] Similar rules are found in the Substance Abuse and Mental Health Services Administration's Mandatory Guidelines for Federal Workplace Drug Testing Programs. See Guidelines at Subpart A Section 1.7.

employee is deemed to have refused to test on this basis only if the pre-employment test is conducted following a contingent offer of employment. If there was no contingent offer of employment, the MRO will cancel the test; or

(8) Fail to cooperate with any part of the testing process (e.g., refuse to empty pockets when directed by the collector, behave in a confrontational way that disrupts the collection process, fail to wash hands after being directed to do so by the collector).

(9) For an observed collection, fail to follow the observer's instructions to raise your clothing above the waist, lower clothing and underpants, and to turn around to permit the observer to determine if you have any type of prosthetic or other device that could be used to interfere with the collection process.

(10) Possess or wear a prosthetic or other device that could be used to interfere with the collection process.

(11) Admit to the collector or MRO that you adulterated or substituted the specimen.

(b) As an employee, if the MRO reports that you have a verified adulterated or substituted test result, you have refused to take a drug test.

(c) As an employee, if you refuse to take a drug test, you incur the consequences specified under DOT agency regulations for a violation of those DOT agency regulations.

The allegations specifically asserted violation of subparagraph (a)(3), failing to provide a urine specimen for any drug test required by this part or DOT agency regulations. Arguably, the evidence could also support violations of subparagraphs (a)(2), failing to remain at the testing site until the testing process is complete; (or (a)(8), failing to cooperate with any part of the testing process by behaving in a confrontational way that disrupts the collection process.

Reasonable Cause Testing under 46 C.F.R. § 16.250

The specific USCG reasonable cause rule is found at 46 C.F.R. § 16.250

§ 16.250 Reasonable cause testing requirements.

(a) The marine employer shall require any crewmember engaged or employed on board a vessel owned in the United States that is

> required by law or regulation to engage, employ or be operated by an individual holding a credential issued under this subchapter, who is reasonably suspected of using a dangerous drug to be chemically tested for dangerous drugs.
>
> (b) The marine employer's decision to test must be based on a reasonable and articulable belief that the individual has used a dangerous drug based on direct observation of specific, contemporaneous physical, behavioral, or performance indicators of probable use. Where practicable, this belief should be based on the observation of the individual by two persons in supervisory positions.
>
> (c) When the marine employer requires testing of an individual under the provisions of this section, the individual must be informed of that fact and directed to provide a urine specimen as soon as practicable. This fact shall be entered in the vessel's official log book, if one is required.
>
> (d) If an individual refuses to provide a urine specimen when directed to do so by the employer under the provisions of this section, this fact shall be entered in the vessel's official log book, if one is required.

Only a few Coast Guard Commandant Decisions provide guidance on reasonable cause testing, and no decision involves the precise factual scenario presented here. However, the most pertinent discussion is found in Appeal Decision 2625 (ROBERTSON) (2002). There, the respondent argued that because there was no particularized reasonable suspicion that he was using drugs, his act of providing an adulterated urine sample when tested should not have be considered by the ALJ and that "a reasonable basis for believing one person aboard a vessel was using drugs does not automatically extend to the entire crew." The respondent further argued that because all crewmembers on the vessel were drug tested, if the Master's reasonable suspicion analysis did not apply to all of them, then all the results must be ignored by the ALJ. The Commandant held that "the more rational approach is to ask whether the marine employer properly found reasonable suspicion to drug test the Respondent."

However, a number of facts distinguish ROBERTSON from the case at hand. First, there was a casualty in ROBERTSON. Further, the employer testified that he concluded that the

respondent was experiencing a diminution in performance (a factor noted as a justification for testing in the employee handbook) and determined that he had a duty to drug test the respondent. Last, ROBERTSON involved an adulterated sample and not a refusal to test. Thus, ROBERTSON is factually distinct from the instant case, and does not mandate a finding of reasonable cause.

Does the Presence of Drugs on a vessel create grounds for a Reasonable Suspicion Drug Test?

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

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

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

provided that such testing is based upon reasonable suspicion of on-duty drug use or on-duty drug-related job impairment). The Court further notes that the diminished privacy interests of employees by virtue of their employment in a highly regulated industry also comes into play in the context of reasonable suspicion testing**.** Id. at 660.

1. Regulatory History of 46 CFR Part 16

In the final rule for 46 C.F.R. Part 16, the Coast Guard stated at 53 Fed.Reg. 47064, 47065-66:

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

2. Coast Guard Guidance to Employers

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

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

3. Commandant Appeal Decisions

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

Based on a review of the record and the regulations, the employer must have a reasonable and articulable belief that the individual has used a dangerous drug in order to require a reasonable suspicion drug test under DOT rules. There must be some evidence amounting to reasonable suspicion concerning the charged mariner. See ROBERTSON, supra. Here, there is only evidence of the presence of drugs on the vessel. This fact alone does not create a sufficient basis to allow a federal drug test of each crewmember under 46 C.F.R. Part 16.[7]

Was the Respondent a Crewmember for the purposes of 46 C.F.R. Part 16?

A further issue that must be discussed is whether a terminated employee is subject to drug testing under 46 C.F.R. Part 16. Pursuant to 46 C.F.R. Part 16, employers are directed to order testing of crewmembers under certain circumstances. 46 C.F.R § 16.105 defines crewmember.

[7] In this case, the drug testing went beyond testing the crew. All crewmembers and contract personnel aboard the BLUEFIN were tested. Reasonable Cause testing under 46 C.F.R. § 16.250 is limited to crewmembers; under the definition of "crewmember" in 46 C.F.R. § 16.105, individuals not required pursuant to 49 CFR Part 15 and who have no duties that directly affect the safe operation of the vessel are not subject to testing. In the instant case, some of the personnel tested were not even employees of the BLUEFIN.

The Commandant has held that an "individual need only be 'engaged or employed' aboard a vessel, and not be physically onboard, to be considered a crewmember and subject to testing." Appeal Decision 2624 (DOWNS) (2001)). Respondent was employed aboard the BLUEFIN from April 24, 2010 until he was terminated on July 12, 2010. Accordingly, the evidence establishes that Respondent was neither engaged nor employed aboard the BLUEFIN at the time he was directed to test by his former employer on July 13, 2010.

Reasonable Cause Testing under 33 C.F.R. § 95.035

In the instant case, the Coast Guard's evidence establishes that LT Parra told Respondent that the Coast Guard was going to direct a drug test. (See Honolulu Tr. at 21). The Part 16 rules are directed to marine employers. However, 33 C.F.R. Part 95 contains separate regulations concerning law enforcement officials, and 46 U.S.C. § 2302 provides for penalties for all marine personnel who operate a vessel in a negligent manner or while intoxicated. The purpose of Part 95 "is to establish under the influence of alcohol or a dangerous drug standards under 46 U.S.C. § 2302 and to prescribe restrictions and responsibilities for personnel on vessels inspected, or subject to inspection, under Chapter 33 of Title 46 United States Code." 33 C.F.R. § 95.001(a).

The regulations concerning directing reasonable cause chemical tests state as follows:

> 33 C.F.R. § 95.035 Reasonable cause for directing a chemical test.
>
> (a) Only a law enforcement officer or a marine employer may direct an individual operating a vessel to undergo a chemical test when reasonable cause exists. Reasonable cause exists when:
>
> (1) The individual was directly involved in the occurrence of a marine casualty as defined in Chapter 61 of Title 46, United States Code, or
>
> (2) The individual is suspected of being in violation of the standards in §§ 95.020 or 95.025.
>
> (b) When an individual is directed to undergo a chemical test, the individual to be tested must be informed of that fact and directed to undergo a test as soon as is practicable.

> (c) When practicable, a marine employer should base a determination of the existence of reasonable cause, under paragraph (a)(2) of this section, on observation by two persons.

The definition of "law enforcement officer" is found in 33 C.F.R § 95.010 and includes a Coast Guard commissioned, warrant, or petty officer. LT Parra is a commissioned officer of the Coast Guard and was therefore authorized to direct a chemical test, if reasonable cause existed. However, absent reasonable cause, such an order would not have been lawful. In the instant case, the record does not support a finding of reasonable cause.

1. Standards for 33 C.F.R. Part 95

The standard for such tests applicable to this case is found at 33 C.F.R. § 95.020 and provides as follows:

> 33 C.F.R. § 95.020 Standard for under the influence of alcohol or a dangerous drug.
>
> An individual is under the influence of alcohol or a dangerous drug when:
>
> (a) The individual is operating a recreational vessel and has a Blood Alcohol Concentration (BAC) level of .08 percent or more, by weight, in their blood;
>
> (b) The individual is operating a vessel other than a recreational vessel and has an alcohol concentration of .04 percent by weight or more in their blood; or,
>
> (c) The individual is operating any vessel and the effect of the intoxicant(s) consumed by the individual on the person's manner, disposition, speech, muscular movement, general appearance or behavior is apparent by observation.

First, the record does not contain any observations on the part of LT Parra indicating why Respondent's manner, disposition, speech, muscular movement, general appearance or behavior indicted that Respondent was under the influence of drugs or alcohol. Rather, the record reflects that the suspicion of drug use and possession of drugs on board the vessel was the reason for all crew members to be tested. (See Honolulu Tr. at 16-17).

The standard in 33 C.F.R. Part 95 is a stricter standard than in 46 C.F.R. Part 16. "In the Final Rule concerning Operating a Vessel While Intoxicated (CGD 84-099, 52 FR 47526, December 14, 1987), the Coast Guard included a section, 33 CFR 95.035, concerning reasonable cause for testing to determine whether an individual is intoxicated. These proposals [Part 16] would go a step further by requiring testing based on a reasonable and articulable belief that an employee is using drugs, but is not necessarily intoxicated. Even if no mistakes are made at work, the employee may demonstrate a change in character or behavior that is symptomatic of drug use or alcohol abuse. Such changes are normally characterized by mood swings and changes in appearance, attitude, and speech." Notice of Proposed Rulemaking; Programs for Chemical Drug and Alcohol Testing of Commercial Vessel Personnel, 53 Fed. Reg. 25926, 25932 (July 8, 1988).

The Final Rule preamble for Part 95 states as follows:

> The Coast Guard has retained both BAC and behavioral standards, including their independent usage. Although BAC testing and behavioral observation can be used in combination to support the overall determination of intoxication, it must be stressed that the BAC and behavioral standards are independent of each other….
>
> The behavioral standard is based upon the definition in Section 4-2(14), Code of Virginia. This particular definition has been upheld by both the Virginia courts and Federal courts. … The behavioral standard may also be used as a measure of what constitutes reasonable cause to test a person for drugs or alcohol.
>
> Final Rule: Operating a Vessel While Intoxicated 52 Fed. Reg. 47526, 47527 (December 14, 1987).

2. Applicability of 33 C.F.R. Part 95 to Crewmembers and Individuals Operating a Vessel

Further, pursuant to 33 C.F.R. § 95.035(a), in order for a law enforcement officer to direct reasonable cause testing, the individual must also be "operating a vessel." 33 C.F.R. § 95.015(b)

states that an individual operating a vessel includes "…a crewmember (including a licensed individual), pilot or watchstander not a regular member of the crew, of a vessel other than a recreational vessel."

Part 95 does not define "crewmember". The preamble to the final rule states:

> …It is the position of the Coast Guard that all crewmembers on board a vessel contribute to the function of the vessel or the accomplishment of its mission. In addition to their regularly assigned duties, each crewmember has additional safety related responsibilities, including emergency duties. All of these duties are inherently associated with the vessel's operation and the effects of intoxicants upon an individual's performance of these duties could pose a threat to the safety of the individual as well as to the vessel, its equipment, passengers, or crew. For these reasons, all crewmembers of a commercial vessel are considered to be "operating a vessel" and, as such, will be limited in their use of intoxicants.
>
> Final Rule - Operating a Vessel While Intoxicated (33 CFR Part 95), 52 Fed Reg. 47526, 47529 (December 14, 1987).

At the time of LT Parra's order, Respondent had been terminated and had no assigned duties or safety-related responsibilities and was therefore no longer a member of the crew. Further, at the time of the order, Respondent was not engaged as a pilot or watchstander, a condition predicate for the Coast Guard to properly direct chemical testing for non-crewmembers of a vessel.[8]

The "Coast Guard IO has the burden of proving all elements of the charge and specification in issue. Appeal Decisions 2598 (CATTON); 2583 (WRIGHT)" Appeal Decision 2633 (MERRILL) (2002). While the Respondent was acting under the authority when directed to test by LT Parra, he was no longer a "crewmember" or other individual subject to testing at that time. Further, the record does not identify sufficient behavioral observations to support testing

[8] As with the 46 C.F.R. § 16.250 testing, there is no authority under 33 C.F.R. § 95.035 for the Coast Guard to direct the testing of non-crewmember contract personnel unless they have responsibility for navigational duties or serve as

under Part 95. The evidence adduced does not support the issuance of an order to direct the chemical test under 33 C.F.R. § 95.035(a), and, accordingly, the order was not lawful and Respondent therefore did not have a duty to obey.

Did the collector and MRO follow DOT procedures for refusal and was the alleged refusal documented in accordance with the DOT Drug Testing Regulations?

Assuming, *arguendo,* that Respondent had a duty to obey, the evidence of record still does not support a finding of refusal of a DOT test. First, as noted above, there was no basis for a DOT test under 46 C.F.R. § 16.250 or 33 C.F.R. § 95.035. Second, "Commandant Decisions on Appeal have stated that '[i]n the interest of justice and the integrity of the entire drug testing system, it is important that the procedures outlined in 49 C.F.R. Part 40…[be]…followed to maintain the [drug testing] system.' … However, minor technical infractions of the regulations do not violate due process unless the infraction breaches the chain of custody or violates the specimen's integrity." Appeal Decision 2688 (HENSLEY) (2010). In the instant case, significant, non-technical provisions of 49 C.F.R. Part 40 were violated, and, as a result, there is insufficient evidence to support the charge that Respondent refused the drug test.

The DOT rules concerning refusal to test are found at 49 C.F.R. § 40.191 and state as follows:

> (d) As a collector or an MRO, when an employee refuses to participate in the part of the testing process in which you are involved, you must terminate the portion of the testing process in which you are involved, document the refusal on the CCF [DOT Custody and Control Form] (including, in the case of the collector, printing the employee's name on Copy 2 of the CCF), immediately notify the DER by any means (e.g., telephone or secure fax machine) that ensures that the refusal notification is immediately received. …

---

watchstanders. 33 C.F.R. § 95.015. Thus, if the Coast Guard directed these tests, it was outside of its authority pursuant to 33 C.F.R. Part 95.

> (1) As the collector, you must note the refusal in the "Remarks" line (Step 2), and sign and date the CCF.
>
> (2) As the MRO, you must note the refusal by checking the "Refusal to Test" box in Step 6 on Copy 2 of the CCF, checking whether the specimen was adulterated or substituted and, if adulterated, noting the adulterant/reason. If there was another reason for the refusal, check "Other" in Step 6 on Copy 2 of the CCF, and note the reason next to the "Other" box and on the "Remarks" lines, as needed. You must then sign and date the CCF.

As found above, the CCF in this case indicates a sample was collected, but also contains a notation of a refusal. (CG Ex. 19). The MRO initially found the sample to be dilute, then subsequently issued a letter dated November 9, 2010 classifying the test as a refusal. (CG Ex. 20). Notably, the letter was issued at the behest of the Coast Guard and was not prepared in the ordinary course of business. Further, the letter erroneously stated the refusal occurred on July 19, 2010.

At the hearing, a corrected version, still dated November 9, 2010, was proffered for the original. (CG Ex. 20A). The second letter corrected the date of the "refusal." These letters are included in the record, however, given that they were not prepared in the ordinary course of business, but merely for purposes of the hearing, they will be afforded little weight. While the MRO, Dr. Lam, testified that, in his opinion, Respondent refused the test, neither the MRO nor the collector correctly documented the refusal. The collector used the form to collect a sample and the MRO found that collected sample to be dilute. The procedures for refusal tests as enumerated under 49 C.F.R. 40.191(d) were clearly violated.

These errors in documenting the refusal do not constitute minor technical infractions of the regulations. The Custody and Control Form is the primary mechanism for documenting the drug collection process under 49 C.F.R. Part 40.[9] The form in this case, CG Ex. 19, contains

[9] See 49 C.F.R. § 40.45(a) ("The Federal Drug Testing Custody and Control Form (CCF) must be used to document every urine collection required by the DOT drug testing program.").

significant errors, to include indicating both that Respondent refused to test and that Respondent did test, but that the specimen tested dilute negative at the laboratory. Accordingly, I afford little weight to CG Ex. 19 as to Respondent's refusal, given the fact that Respondent did provide two samples on July 13, 2010 (one to the ER and the tested sample). See Appeal Decision 2685 (MATT) (2010) (ALJ found the reliability of the CCF to be in doubt due to errors contained within the form).

Conclusion: The evidence does not support that Respondent refused to submit to a Federal Drug Test

The evidence establishes that Respondent did not appear to be under the influence of alcohol or drugs when he met with LT Parra. Accordingly, there was no reasonable cause for direct a chemical test under 33 C.F.R. § 95.035. Likewise, in the absence of a reasonable and articulable belief that the Respondent used a dangerous drug, there was no basis for the employer to direct a reasonable cause test under 46 C.F.R. § 16.250. Additionally, when that test was ordered, Respondent was no longer a crewmember and jurisdiction fails. Finally, the documentary evidence that Respondent refused to test contains significant errors and is unreliable. Therefore, there the agency has not established that Respondent refused a Federal Chemical Test under 49 C.F.R. § 40.191.

Precedent requires the ALJ to Examine whether the Respondent Refused to Submit to a non-DOT test

Having found that there was no basis for USCG mandated reasonable cause testing, the Coast Guard has not proved what was alleged in the Complaint. However, long-standing Coast Guard precedent requires a further examination. In Appeal Decision 2633 (MERRILL) (2002) the ALJ had concluded that because the injury which resulted in the drug testing of Respondent could

not properly be categorized as either a “marine casualty” or a “serious marine incident,” Respondent's drug testing was “not in accord with U.S. Coast Guard regulations for chemical testing of mariners as set forth in 46 Code of Federal Regulations, Part 16.” The ALJ also concluded that Respondent's employer lacked the authority to require Respondent to submit to a drug test.

Recognizing the dangers created by drug use aboard ships, the Commandant vacated the ALJ’s order and remanded the matter to determine whether Respondent had voluntarily submitted to the drug test at issue. “That decision was based upon a conclusion that, irrespective of the requirements set forth in 46 C.F.R. Part 16, the Coast Guard could properly rely on the results of a voluntary drug test as the basis for suspension and revocation proceedings.” Appeal Decision 2668(MERRILL II) (2007).

The essence of the allegations is that Respondent refused to submit to a drug test. As such, if the evidence supports a finding that Respondent’s behavior violated a formal, duly established rule concerning drug testing then a finding of Misconduct can still be found proved. “Findings to support revocation of a seaman's document need not depend upon the original specification, so long as Appellant had actual notice and the appropriate questions were litigated. Kuhn v. Civil Aeronautics Board, 183 F.2d 839 (D.C. Cir.1950); Appeal Decisions 2422 (GIBBONS); 2416 (MOORE); 2166 (REGISTER); 1792 (PHILLIPS).” Appeal Decision 2545 (JARDIN) (1992). See also Appeal Decision 2585 (COULON) (1997) (“The purpose of pleadings is to provide notice and not to make a ritualistic recitation of the details”).

> Suspension and revocation proceedings are intended to be remedial in nature. They affix neither criminal nor civil liability. These proceedings are intended to help maintain standards for competence and conduct essential to the promotion of safety at sea. See 46 C.F.R. § 5.5. Administrative pleadings in these matters are not rigidly bound by the procedural rules governing criminal and civil

> trials. Kuhn v. CAB , 183 F.2d 839 (D.C. Cir. 1950). "It is sufficient if the [Appellant] 'understood the issue' and 'was afforded full opportunity' to justify [his] conduct." Citizens State Bank of Marshfield, MO v. FDIC , 752 F.2d 209 (8th Cir. 1984); NLRB v. MacKay Radio & Telegraph Co., 304 U.S. 333, 58 S. Ct. 904, 82 L.Ed. 1381 (1938); Aloha Airlines v. CAB , 598 F.2d 250 (D.C. Cir. 1979). I find that in this case, the specification set forth the facts that formed the basis of the charge and enabled the Respondent to identify the act or offense so that a defense could be prepared.

Appeal Decision 2639 (HAUCK)(2003).

Here, the record establishes that Respondent was aware that the Coast Guard was alleging a refusal to take a drug test. His arguments generally address drug testing and his provided samples, and not merely issues related to federal drug tests. The issues related to non-DOT testing were fully litigated on the record and Respondent was given the opportunity to be heard and respond. Accordingly, based on the facts of this case and the arguments presented by the respective parties, it is appropriate to consider whether Respondent refused a non-DOT test. Appeal Decision 2691 (JORY) (2010).

1. Non-DOT Testing

Appeal Decision 2545 (JARDIN) (1992) found that results of tests other than DOT tests under Part 16 were admissible. "The Coast Guard … may offer evidence from any source, not only a drug test carried out pursuant to Part 16, to establish drug use in violation of 46 U.S.C. § 7704." Appeal Decision 2542 (DEFORGE) (1992).

Accordingly, federal drug tests are not the only tests permitted. The DOT rules do not prevent non-DOT drug tests. See 49 C.F.R. § 40.13 (outlining the relationship between DOT and non-DOT tests). Importantly, while the language of 49 C.F.R. § 4.191(e) makes it clear that refusal to take a non-DOT test will not result in consequences under the DOT-testing regime (i.e. for drug tests required by DOT agency regulations), it does not absolve one from any and all

consequences whatsoever for such a refusal. The scope of Misconduct under 46 C.F.R. § 5.27 is broader than sanctions for violations of DOT agency regulations.

Company Testing

A marine employer has authority to order tests outside the DOT procedures. The Marine Employers Drug Testing Guidebook - September 2009 clearly allows for non-DOT testing. "A marine employer may conduct other types of tests, but the DOT 5-panel test, using a Federal CCF, is the only test that will be accepted for showing compliance with the regulations. If a marine employer conducts testing for more drugs than is permitted by Coast Guard regulations, that testing shall be separate from any Coast Guard mandated program, including specimen collection." Guidebook at 5. "If a marine employer elects to do testing in the event of an accident that does not rise to the level of a Coast Guard mandated SMI or marine casualty, the marine employer is not eligible to use a Federal CCF for the drug test, but can do a non-DOT drug test." Guidebook at 29.

The Marine Employers Drug Testing Guidebook September 2009 also provides the following guidance concerning reasonable cause testing at p. 32:

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

The BLUEFIN had a company drug and alcohol policy. (CG Ex. 24.) That policy contained reasonable cause testing that did not expand the basis for such testing; rather, the policy mirrored the DOT standard and required that there be 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. Accordingly, the drug test was not premised on a duly established rule of the company. See MILLS, supra.

Master's Authority to Order Drug Testing

The Commandant has held that the Master may direct drug tests and conduct searches for drugs. Given this broad authority under general maritime law, a Master's order to the crew to submit to a drug test can be lawful even though it was not a federal drug test. A mariner's failure to obey the vessel's Master is the issue in a Misconduct case, not whether the Master's order regarding the drug test falls within the realm of those tests required by DOT-regulations.

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

In Appeal Decision 2616 (BYRNES) (2000), the Commandant concluded, citing POUTER, CORDISH and The Styria, supra, that giving an order to a mariner to sit for a chemical test is within the powers given to the Master by maritime law. The facts of this case are consistent with the reasoning of these earlier cases. Here, it is clear from the record that after learning of the presence of drugs aboard the vessel, Captain Fenner ordered the crew to be tested. It is also clear that management concurred with this assessment and contacted its agent in American Samoa to arrange for testing. It was within Captain Fenner's authority as Master and, for the reasons given above, his order to test was a lawful order.

This authority of the Master to search for drugs or even test for drugs or alcohol pre-exists and is separate from the Federal mandate to employers to test under certain circumstances. See CORDISH and BLAKE, supra; see also Appeal Decision 2518 (HENNARD) (1989) (drug test

predated federal chemical test rules). "Additionally, it must be stressed that a ship's master cannot violate the Fourth Amendment to the U.S. Constitution by conducting a warrantless search, since he conducts that search in his capacity as a private citizen, not as a Federal or State official. Appeal Decision 2115 (CHRISTEN), affirmed sub nom. Commandant v. Christen, NTSB Order EM-71 (1978)." BLAKE, supra.

Jurisdiction for refusing to obey the Master's Order.

As noted, to establish jurisdiction for Misconduct for refusal to obey a lawful order, the Respondent had to be acting under authority of a license, certificate or document because the holding of such a license, certificate or document was required by law or regulation; or required as a condition for employment at the time of the offense.

The Master issued his order to the crew to be tested after the Samoan officials had finished interviewing the crew. While the exact time is not clear, the log indicates the interviews concluded at 2230 on July 12, 2010. (CG Ex. 8). Respondent was relieved of his duties on July 8, 2010. (CG Ex. 8). While not confirmed by the owner, both the Master and Respondent indicated that Respondent's pay was terminated on July 8, 2010. (Seattle Tr. 80 and CG Ex. 25). On July 12, 2010, Respondent was given his termination papers at 1550 and departed the vessel at 1800. (CG Ex. 8, CG Ex. 22). Therefore, Respondent was no longer acting under his license after July 8, 2010 and ceased acting under his MMD when he was discharged from the vessel and left the vessel at 1800 on July 12, 2010. Thus, Respondent was not aboard when the Master gave the order and did not have knowledge of the Master's order prior to his discharge.

Respondent was advised that the Company and Coast Guard required a test by the collector at the hospital. Further, it is clear that the collector believed that the test was a DOT test; this was at approximately 1000 on July 13, 2010. When Respondent refused the test at 1000 on July 13, 2010, he was no longer acting under the authority of a Coast Guard issued credential,

as he had already been terminated. Accordingly, there is no jurisdiction under Misconduct for Respondent's refusal to obey his Master's orders to test.

2. Did Respondent fail to submit to a non-DOT drug test?

Even though the evidence reveals there was a lack of jurisdiction as to the Master's authority to order Respondent to test, for the sake of completeness, the undersigned also notes that the evidence fails to establish that Respondent refused a non-DOT test. It is clear that Respondent provided a sample in the emergency room that was marked for drug testing. (Honolulu Tr. 34). It is also clear that Respondent provided a sample that was tested using DOT standards and found negative dilute. Notably, a negative dilute result does not constitute a failure to test or a positive drug test.

Here, Respondent left the laboratory without providing a sample after the collector began the testing process. Those actions did not conform to the requirements of 49 C.F.R. § 40.191 and could constitute a refusal under DOT regulations. However, the standards of 49 C.F.R. § 40.191 apply solely to DOT tests. 49 C.F.R. § 40.191(e). 49 C.F.R. § 40.13. Thus, if his test is treated as a non-DOT test, these standards would be only persuasive on a determination of refusal.

When the collector requested the sample, the Respondent had already provided a sample in the emergency room; this sample could have been used for non-DOT drug testing. Notably, Respondent did not simply refuse to give a sample; instead, Respondent conditioned his refusal on the fact that he had already provided a prior sample. Since Respondent provided that sample, as well as the eventual sample collected by Ms. Taumua, even if there was jurisdiction for a non-DOT test, the undersigned still cannot find that Respondent refused to test.

Conclusion: The evidence does not support that Respondent refused to submit to a Non-DOT Drug Test

Refusals to test are premised on Misconduct; when an order to test is given or when a mariner violates company drug testing policy, the Respondent must be acting under the authority of a credential. The Respondent was no longer employed when directed to submit to a chemical test by his employer. The test was not authorized by company policy. While the Master has authority to direct testing of crewmembers, by the time he issued the order Respondent was no longer acting under the authority of any Merchant Mariner Credential. Also, Respondent did, in fact, provide two urine samples (one that was not accepted by the collector and one that was found dilute).

For all the the reasons set forth above in Section II, the second allegation of Misconduct is **NOT PROVED**.

SANCTION

In issuing a decision, the ALJ must include the disposition of the case, including any appropriate order. 33 C.F.R. § 20.902(a)(2). Here, the Coast Guard has proposed an order of revocation. "The selection of an appropriate order is the responsibility of the Administrative Law Judge, subject to appeal and review. The investigating officer and the respondent may suggest an order and present argument in support of this suggestion during the presentation of aggravating or mitigating evidence." 46 C.F.R. § 5.569(a).

Suggested Range of an Appropriate Order

The proposed sanction was premised on two separate allegations: the refusal to obey a master's order and the refusal to submit to a chemical test. In the Table entitled "Suggested Range of an Appropriate Order," codified at 46 C.F.R. § 5.569, the suggested range for

Misconduct for "Failure to obey master's/ship's officer's order" is 1-3 months suspension. The suggested range for chemical test refusal is 12-24 months suspension; however, the Coast Guard has recognized that revocation may be appropriate for chemical test refusals. However, as noted above, the refusal allegation has been found not proved and will not be considered for purposes of sanction.

46 C.F.R. § 5.569(d) explains how an ALJ may apply the "Suggested Range of an Appropriate Order" Table, noting that:

> The orders are expressed by a range, in months of outright suspension, considered appropriate for the particular act or offense prior to considering matters in mitigation or aggravation. For instance, without considering other factors, a period of two to four months outright suspension is considered appropriate for *failure to obey a master's written instructions.* An order within the range would not be considered excessive. Mitigating or aggravating factors may make an order greater or less than the given range appropriate. Orders for repeat offenders will ordinarily be greater than those specified.

Longstanding Coast Guard law in the area of appropriate orders states that the order is in the discretion of the ALJ and the ALJ is not bound by the table. See 46 C.F.R. § 5.569(d). Other factors may be considered in fashioning an appropriate order. "An Administrative Law Judge has wide discretion to formulate an order adequate to deter the [a mariner's] repetition of the violations he was found to have committed." Appeal Decision 2475 (BOURDO) (1988).

Factors Considered in Determining an Appropriate Order

In determining an appropriate sanction, an ALJ may also consider the following factors: (1) Remedial actions which have been undertaken independently by Respondent; (2) The prior record of Respondent, considering the period of time between prior acts and the act or offense for which presently charged is relevant; and (3) Evidence of mitigation or aggravation. See 46 C.F.R. § 5.569(b).

In Appeal Decision 1914 (ESPERANZA) (1973), the Commandant considered a case where the mariner overtook to repair the main valve on a tank which he had previously noticed to be in need of repair. He was under no specific orders to repair the valve, but considered it his responsibility to do so in the interest of the safety of the vessel. The mariner utilized a welding torch to repair the valve even though the engineering watch officer had ordered him not to do so. The mariner continued the work and was charged with refusing to obey an order. At hearing and on appeal, the mariner asserted that he was justified in not obeying the directives of the watch officer because he had previously been allowed to work with the torch by the former Chief Engineer, and that the repair work was necessary to the continued safety of the ship.

The Commandant held that "[d]iscipline must be maintained on merchant vessels in order to insure safe and efficient operation; disobedience to lawful orders cannot be tolerated." The Commandant affirmed the ALJ's admonishment of the mariner, noting that appellant's "intentions in repairing the broken valve on his responsibility [were] laudable and it is unfortunate that so much has been made of an insignificant incident."

Here, Respondent believed that he was assisting in the care of the crew as the Chief Mate. However, the Master was concerned (1) with the need for discipline, (2) that only certified medical officers treat crewmembers, and (3) that other members of the crew not interfere with that treatment. Respondent was the Chief Mate, and, even if he thought his actions were laudable, he nonetheless undermined the authority of the Master and caused the vessel to divert from its mission. On the other hand, the interference in the ship's medical affairs was not outrageous or egregious in nature. Respondent merely probed into the cook's condition. There is no evidence that he suggested changes to the master's treatment plan or prescribed medications after the order was issued.

Respondent has been a licensed mariner for many years, and there is no evidence Respondent has any prior record. Respondent was relieved of duty and terminated from his position. Accordingly, considering both the aggravating and mitigating factors, a sanction within the range is appropriate. Given his position aboard the BLUEFIN, an admonishment is inappropriate. Likewise a full three (3) month outright suspension is also inappropriate. An outright suspension of one (1) month plus an additional two months suspension on twelve months probation is appropriate to support the mandate that disobedience to lawful orders cannot be tolerated and to deter a repetition of these violations.

ORDER

WHEREFORE:

IT IS HEREBY ORDERED that the Allegations in the Amended Complaint as to Misconduct in Refusing to Obey a Lawful Order are found **PROVED**; and

IT IS HEREBY ORDERED that the Allegations in the Amended Complaint as to Misconduct in Refusing Submit to a Reasonable Cause Drug Test are found **NOT PROVED**; and

IT IS HEREBY FURTHER ORDERED that Respondent's Mariner's credentials are **SUSPENDED** for **ONE (1) MONTH** from the date the credentials are surrendered to the Coast Guard. The Respondent's credentials are further **SUSPENDED ON PROBATION** for an additional **TWO (2) MONTHS** for a **TWELVE (12) MONTH PERIOD OF PROBATION** beginning at the end of the period of outright suspension.

IT IS SO ORDERED.

George J. Jordan
US Coast Guard Administrative Law Judge

Date: June 11, 2012

APPENDIX I Notice of Appeal Rights

33 C.F.R. § 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 C.F.R. § 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 C.F.R. § 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 C.F.R. § 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.

APPENDIX II List of Witnesses and Exhibits

LIST OF WITNESSES AND EXHIBITS

Witnesses

Seattle Hearing
ERIKA JANZEN (Telephonic Testimony)
MICHELLE MARIE JIMENEZ (Telephonic Testimony)
MARK CHRISTOPHER FENNER
JENO KARL KOCH (Telephonic Testimony)
ERIC ALAN DUNN (Telephonic Testimony)
LEE PAUL TRETBAR, (Telephonic Testimony)
JAMES RICHARD KELLY

Honolulu Hearing
LT TREVOR PARRA (Telephonic Testimony)
FREIDA TAUMUA (Telephonic Testimony)
DR. PATRICK LAM

Exhibits

The Coast introduced the following exhibits:

Exhibit	Description
CG Exhibit-01	Coast Guard Regional Exam Center Honolulu Licensing Database Screenshots
CG Exhibit-02	Second Mate Michelle Jimenez Statement Signed July 12, 2010
CG Exhibit-03	Second Mate Michelle Jimenez Statement to the Coast Guard July 12 2010
CG Exhibit-04	Second Mate Michelle Jimenez Statement to Capt Fenner July 8, 2010
CG Exhibit-05	Captain Mark Fenner Statement to Coast Guard July 12, 2010
CG Exhibit-06	Captain Mark Fenner Statement to Coast Guard November 10, 2010
CG Exhibit-07	Captain Mark Fenner Statement to Coast Guard February 8, 2011
CG Exhibit-08	M/V Bluefin Deck Logs
CG Exhibit-09	M/V Bluefin Crew List
CG Exhibit-10	Jeno Koch Statement to Coast Guard July 12 2010

Exhibit	Description
CG Exhibit-11	Jeno Koch Statement to Capt Fenner July 7, 2010
CG Exhibit-12	Eric Dunn Statement to Coast Guard July 12, 2010
CG Exhibit-13	Eric Dunn Statement to Capt Fenner July 8, 2010
CG Exhibit-14	Lee Tretbar Statement to Coast Guard Bebruary 25, 20111
CG Exhibit-15	LT Trevor Parra, U. S. Coast Guard Statement November 1, 2010
CG Exhibit-16	LT Trevor Parra, U. S. Coast Guard Email to SecHono Commander July 14, 2010
CG Exhibit-17	Freida S. Taumua Statement to Coast Guard November 16, 2010
CG Exhibit-18	Freida S. Taumua DOT Urine Drug Collector Training Certificate
CG Exhibit-19	Chief Mate Ronald Thierfelder Federal Custody and Control Form
CG Exhibit-20 and Exhibit 20A	Dr. Patrick J. Lam, MRO Statement to Coast Guard 9Nov10 and corrected statement to Coast Guard provided at hearing in Honolulu.
CG Exhibit-21	Dr. Patrick J. Lam, MRO Certificate (#940515210)
CG Exhibit 22	Chief Mate Ronald Theirfelder Termination Agreement
CG Exhibit 23	Crew Agreement
CG Exhibit 24	Drug Testing Policy
CG Exhibit 25	Emails from the files of Peter Kelley, including emails from Respondent to Peter Kelly
CG Exhibit 26	Updated DOT Urine Drug Collector Training Certificate for Freida S. Taumua
CG Exhibit 27	Certificate of Inspection for M/V Bluefin

APPENDIX III Docket Filings

Docket Item	Document	Document Date	Filing Date
1	Complaint	12/09/2010	12/09/2010
2	Notice of Filing of Complaint	12/09/2010	12/09/2010
3	Certificate of Service (Complaint)	12/09/2010	12/09/2010
4	Return of Service of Complaint	12/23/2010	12/23/2010
5	Notice of Appearance and Request for Extension to file Answer	01/18/2011	01/19/2011
6	Notice of Extension	01/19/2011	01/19/2011
7	Certificate of Service (Notice of Extension)	01/19/2011	01/19/2011
8	Notice of Assignment	02/03/2011	02/03/2011
9	Certificate of Service (Notice of Assignment)	02/03/2011	02/03/2011
10	Motion for Extension	02/02/2011	02/03/2011
11	Amended Complaint	02/04/2011	02/04/2011
12	Notice of Filing of Amended Complaint	02/04/2011	02/04/2011
13	Certificate of Service (Amended Complaint)	02/04/2011	02/04/2011
14	Answer	02/04/2011	02/07/2011
15	Motion of Attorney to Withdraw	02/10/2011	02/15/2011
16	Return of Service (Amended Complaint)	02/25/2011	02/25/2011
17	Letter from Respondent re Bluefin.	02/21/2011	03/02/2011
18	Pre-Hearing Conference Scheduling Order	03/23/2011	03/23/2011
19	Certificate of Service (Scheduling Order)	03/23/2011	03/23/2011
20	Agency Notice of Expected Witnesses and Exhibits	04/05/2011	04/05/2011
21	Certificate of Service (Witnesses and Exhibit List)	04/05/2011	04/05/2011
22	Hearing Scheduling Order	04/12/2011	04/12/2011
23	Certificate of Service Scheduling Order	04/12/2011	04/12/2011
24	Motion for Telephonic Testimony	04/13/2011	04/13/2011
25	Letter from Respondent Regarding Response to Allegations.	04/13/2011	04/15/2011
26	Certificate of Service (Motion)	04/15/2011	04/15/2011
27	Order Granting Motion for Telephonic Testimony	04/18/2011	04/18/2011
28	Hearing Scheduling Order	04/28/2011	04/28/2011
29	Certificate of Service (Hearing Scheduling Order)	04/28/2011	04/28/2011
30	Motion for Additional Telephonic Testimony	05/05/2011	05/05/2011
31	Certificate of Service (Motion)	05/05/2011	05/05/2011
32	Post Hearing Order	07/06/2011	07/06/2011
33	Certificate of Service (Post Hearing Order)	07/06/2011	07/06/2011
34	Email from Respondent Regarding Post Hearing Order	07/07/2011	07/12/2011