UNITED STATES OF AMERICA

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

UNITED STATES COAST GUARD

Complainant

v.

TONY ODELL REED

Respondent

Docket No: 2012-0379
CG Enforcement Activity No: 4405794

DECISION & ORDER

Date Issued: March 7, 2013

Issued by: Hon. Bruce Tucker Smith
Administrative Law Judge

Appearances:

For the Complainant

LT Sarah Brennan, IO
U.S. Coast Guard Marine Safety Unit Houma

Mr. Gary F. Ball, Esq.
U.S. Coast Guard Suspension and Revocation
National Center of Expertise

For Respondent

Tony Odell Reed, pro se

I. PRELIMINARY STATEMENT

On August 24, 2012, the United States Coast Guard Marine Safety Unit Houma (Coast Guard) initiated the instant administrative action by filing a Complaint seeking revocation of Respondent Tony Odell Reed's (Respondent) Coast Guard-issued Merchant Mariner's Credential (MMC). The instant action is brought pursuant to the legal authority codified at 46 USC §7703(1)(B) and 46 CFR §5.27 (Misconduct).

The Complaint alleges that on May 29, 2012, Respondent was informed by his marine employer, Settoon Towing, LLC (Settoon), that he had been randomly selected for a drug test. The Complaint further alleges that Respondent was directed to report immediately to Occupational Medical Services (OMS) to provide a urine specimen so that the required testing could take place. The Complaint alleges that although Respondent did report to OMS, he thereafter departed and did not provide a urine specimen for testing.

The Coast Guard alleges that Respondent's failure to provide a specimen "as described by 49 CFR §40.191" is a "refusal to test" and, thus, constitutes "Misconduct as described by 46 CFR §5.27." Based upon the foregoing allegations, the Coast Guard seeks revocation of Respondent's credential as an appropriate sanction.

The administrative record reveals that on or about September 2, 2012, Respondent filed his Answer (albeit an incomplete one) specifically requesting to be heard on the proposed order. In an abundance of caution for the due process rights of the Respondent, the court regards incomplete Answers as general denials of both the jurisdictional and factual allegations in the Complaint.

On September 12, 2012, the court conducted a telephonic prehearing conference with the parties wherein the court generally informed the Respondent of his rights and responsibilities—and specifically informed Respondent of his right to legal counsel. At that time, Respondent indicated that he wished to obtain legal counsel. Again, in an abundance of caution for the due process rights of the Respondent, the

court suspended the September 12, 2012, telephonic prehearing conference and gave Respondent abundant time within which to obtain counsel. (See, Order September 20, 2012.)

Thereafter, on October 11, 2012, the court again convened a telephonic prehearing conference with the parties. Despite his earlier request for time to obtain counsel, Respondent appeared at the October 11, 2012, telephonic prehearing conference without an attorney. Thereafter, the court informed the Respondent of his rights and responsibilities, at length, and scheduled dates for discovery and the evidentiary hearing.

On November 29, 2012, this matter came on for hearing in New Orleans, Louisiana, in the ALJ Courtroom, Hale Boggs Federal Building. The proceeding was conducted in accordance with the Administrative Procedure Act (APA), as amended and codified at 5 USC §§551-59, and the Coast Guard procedural regulations set forth at 33 CFR Part 20. The Coast Guard was present and represented by LT Sarah Brennan, Investigating Officer, U.S. Coast Guard Marine Safety Unit Houma and Mr. Gary F. Ball, Esq., U.S. Coast Guard Suspension and Revocation National Center of Expertise.[1]

Unfortunately, and despite having received adequate advanced written notice of the hearing, Respondent was absent. Once more, in an abundance of caution for the due process rights of the Respondent, the court suspended the hearing and asked court support staff and the Coast Guard representatives to attempt to locate Respondent. After significant efforts by all concerned, Respondent was eventually located, telephonically, and the court made an on-the-record inquiry as to Respondent's whereabouts. (Tr. Vol. I at 7).

After hearing Respondent's claim of automobile-related difficulties, the court re-scheduled the hearing to commence anew on January 16, 2013.

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

On January 16, 2013, the court once again convened in New Orleans, Louisiana, in the ALJ Courtroom, Hale Boggs Federal Building. The Coast Guard was again represented by LT Brennan and Mr. Ball. Respondent was present, pro se, and participated meaningfully in his own defense at the hearing. (Tr. Vol. II).

At the conclusion of the January 16, 2013, hearing, court asked the Coast Guard to provide further testimony and evidence at a subsequent telephonic evidentiary hearing.

On February 15, 2013, the court convened a telephonic evidentiary hearing. Once more, the Coast Guard was represented by LT Brennan and Mr. Ball. Despite having received adequate advanced written notice of the hearing Respondent was absent from the proceedings.[2] (See ALJ Ex. II Affidavit of Nicole Simmons). The court, having assured itself that Respondent had been provided timely, written notice, heard additional testimony from relevant witnesses. (See Tr. Vol. III).

On February 20, 2013, the court convened a second telephonic evidentiary hearing. Once more, the Coast Guard was represented by LT Brennan. And, despite having received adequate advanced written notice of the hearing, Respondent was late in attending the proceeding. He did eventually join the teleconference and thereafter participated meaningfully. (Tr. Vol. IV at 5, 21).

After hearing the testimony presented at the February 20, 2013, telephonic evidentiary hearing, the court closed the administrative record and commenced deliberations.

In sum, both parties appeared, presented their respective cases, and rested. Four witnesses testified as part of the Coast Guard's case-in-chief and the Coast Guard offered three exhibits into evidence, all of which were admitted. Respondent testified on his own behalf and offered one exhibit into evidence, which was admitted.

[2] Title 33 CFR§§20.310, 705 empowers the court to enter a default judgment against a respondent who absents himself from a proceeding for which that respondent had been provided timely and appropriate notice. The court's forbearance in this instance reflects an abundance of caution for the due process interests of a pro se litigant as suggested by the Commandant in Appeal Decision 2697 (GREEN) (2011).

The parties were afforded the opportunity to make closing arguments; thereafter, the court closed the administrative record.

II. FINDINGS OF FACT/CONCLUSIONS OF LAW

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

1. At all relevant times referenced herein, Respondent Tony Odell Reed was the holder of, and acting under the authority of, a Coast Guard-issued Merchant Mariner's Credential (MMC). (ALJ Ex. I).

2. On or about May 29, 2012, Respondent Tony Odell Reed was employed by, and was on duty on behalf of, Settoon Towing, LLC, as a tankerman. (Tr. Vol. II at 22, 50; CG Ex. 18).

3. At all relevant times referenced herein, Settoon Towing, LLC was a marine employer, per 46 CFR §16.105. (Tr. Vol. II at 20 – 24).

4. On or about April 5, 2012, Multi Management Services Incorporated, a contractor in the employ of Settoon Towing, LLC, provided a computer-generated, randomly-drawn list of Settoon Towing employees for chemical drug testing. (CG Ex. 2).

5. The random selection of Settoon Towing, LLC employees was conducted in a mathematically and scientifically valid manner. (Tr. Vol. III at 25 – 31).

6. On May 29, 2012, Timothy John Vedros, personnel manager of Settoon Towing, LLC, personally directed Respondent Tony Odell Reed to report to Occupational Medical Services (a Department of Transportation-designated drug testing facility), Houma, Louisiana, and to provide a urine specimen for drug testing. (Tr. Vol. II at 37 – 38).

7. On May 29, 2012, at approximately 10:00 a.m., Respondent Tony Odell Reed drove himself to Occupational Medical Services in Houma, Louisiana, and entered the facility, but departed soon thereafter without providing a urine specimen. (Tr. Vol. II at 75 – 80; Vol. IV at 7 – 30).

8. Respondent Tony Odell Reed wrongfully refused to submit a urine specimen as described by 49 CFR §40.191(2) in that he failed to remain at a properly-designated testing facility (Occupational Medical Services, Houma, Louisiana) until the testing process was complete. (Tr. Vol. II at 75 – 80; Vol. IV at 7 – 30).

9. By virtue of Respondent Tony Odell Reed's refusal to submit a urine specimen when lawfully directed by his marine employer, Respondent committed an act of Misconduct. 46 CFR §5.27.

III. SUMMARY OF DECISION

The instant matter is governed by the interplay of 46 USC §7703(1)(B), 46 CFR §5.27 and 46 CFR Part 16, Subpart B. The statute provides that a mariner's credential may be suspended or revoked if that mariner has committed an act of Misconduct. 46 USC §7703(1)(B). The regulation, in turn, defines "Misconduct" as "human behavior which violates some formal, duly established rule. Such rules are found in, among other places, statutes, regulations . . . . It is an act which is forbidden or a failure to do that which is required." 46 CFR §5.27. Herein, Respondent is charged with refusing to test, an act of Misconduct, as a result of his alleged inability to produce a urine specimen for a random drug test on May 29, 2012, which was lawfully ordered by his maritime employer pursuant to 46 CFR §16.230.

For the reasons discussed herein, the Coast Guard **PROVED** by a preponderance of reliable, probative and credible evidence that Respondent Tony Odell Reed committed an act of Misconduct by his refusal to submit a urine specimen in response to his marine employer's lawful directive without an adequate medical explanation for such inability.[3]

IV. DISCUSSION

A. General

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

Determining the weight of the evidence and making credibility determinations as to the evidence is within the sole purview of the ALJ. See Appeal Decision 2640 (PASSARO) (2003).[4] Additionally, the ALJ is vested with broad discretion in resolving inconsistencies in the evidence, and findings do not

[3] The facts of this case did not involve, or suggest, that Respondent's refusal to submit a urine specimen was occasioned by a medical or psychological issue.

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

need to be consistent with all of the evidence in the record as long as there is sufficient evidence to reasonably justify the findings reached. Id.; Appeal Decision 2639 (HAUCK) (2003).

B. Jurisdiction

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

In the instant case, the Coast Guard proved that at all relevant times mentioned herein Respondent Tony Odell Reed was the holder of a Coast Guard-issued Merchant Mariner's Credential (credential) and that he was acting under the authority of that credential when he was directed to submit to a random drug test by his marine employer.

C. Burden of Proof

In this case, like all Suspension and Revocation cases, the Coast Guard bears the burden of proof to establish the requisite facts mandated by the organic statute, 46 USC §7703, and the implementing regulations, 46 CFR Part 5; Part 10, Subpart B; 33 CFR Part 20. The Administrative Procedure Act (APA), 5 USC §§551-559, applies to Coast Guard Suspension and Revocation hearings before United States ALJs. The APA authorizes imposition of sanctions if, upon consideration of the entire record as a whole, the charges are supported by reliable, probative and substantial evidence. See 5 USC §556(d). The Coast Guard bears the burden of proof to establish the charges are supported by a preponderance of the evidence. 33 CFR §§20.701, 20.702(a). Similarly, a respondent bears the burden of proof in

asserting his affirmative defense by a preponderance of the evidence. 33 CFR §§20.701, 20.702; Appeal Decisions 2640 (PASSARO) (2003); 2637 (TURBEVILLE) (2003). "The term substantial evidence is synonymous with preponderance of the evidence as defined by the U.S. Supreme Court." Appeal Decision 2477 (TOMBARI) (1988) (citing Steadman v. SEC, 450 U.S. 91, 107 (1981). The burden of proving a fact by a preponderance of the evidence "simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence.'" Concrete Pipe & Products of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 622 (1993) (quoting In re Winship, 397 U.S. 358, 371-72 (1970) (Harlan, J., concurring) (brackets in original)).

D. Discussion of the Evidence

1. Respondent was selected at random for chemical drug testing

Although Respondent neither contested the manner in which he was selected for testing, nor the "randomness" of his selection[5], Appeal Decision 2697 (GREEN) (2011), dictates that the court conduct an extraordinary examination of facts which might provide Respondent with a cognizable legal defense.[6] Hence, the court developed additional testimony and evidence concerning the "randomness" with which Respondent was selected for chemical drug testing.

Title 46 CFR §16.230 specifies that marine employers shall establish programs for the chemical testing for dangerous drugs on a random basis of crewmembers on inspected vessels. Here, Respondent served as a tankerman aboard one of Settoon's twenty-three inspected vessels. (Tr. Vol. II at 22).

[5] Respondent's Answer in this case fails to allege any Affirmative Defense i.e., failure of his employer to have conducted a scientifically-valid "random" selection.

[6] "Implicit in the right to self-representation is an obligation on the part of the court to make reasonable allowances to protect pro se litigants from inadvertent forfeiture of important rights because of their lack of legal training." Appeal Decision 2697 (GREEN) (2011) quoting Traguth v. Zuck, 710 F.2d 90, 95 (2d Cir. 1983).

Title 46 CFR §16.230(c) further provides that the selection of crewmembers for random drug testing "shall be made by a scientifically valid method" such as a computer-based random number generator that is matched with crewmembers' identifying numbers.

The evidence establishes that on May 29, 2012, Timothy John Vedros, Settoon's personnel manager, personally directed Respondent Tony Odell Reed to report to Occupational Medical Services (OMS) (a Department of Transportation-designated drug testing facility), Houma, Louisiana, and to provide a urines specimen for drug testing. (Tr. Vol. II at 37 – 38). Although Respondent specifically denies that such a conversation ever took place, the court gives full credibility to Mr. Vedros' account of the events of May 29, 2012.[7]

Mr. Vedros testified that his official duties at Settoon require him to implement his marine employer's drug and alcohol testing program. (Tr. Vol. II at 21 – 23).

Mr. Vedros testified that when Respondent was initially employed by Settoon, he was provided with a copy of the marine employer's drug and alcohol policy. (Tr. Vol. II at 25; CG Ex. 1).

Mr. Vedros testified that at approximately 10:00 a.m. on the morning of May 29, 2012, he personally observed Respondent departing his marine vessel after completion of a towing trip or "hitch," and informed Respondent that he had been selected at random for a urinalysis test. (Tr. Vol. II at 37, 39).

Mr. Vedros further testified that he personally directed Respondent to present himself to OMS in Houma, Louisiana for testing. (Tr. Vol. II at 38).

Mr. Vedros testified, at length, that Settoon utilizes the services of a business entity called Multi Management Services Incorporated (MMSI) to provide Settoon with quarterly, computer-generated, randomly-drawn lists of employee names for testing. (Tr. Vol. II at 28 –

[7] Respondent testified that Mr. Vedros did not direct him to provide a urine specimen for testing; specifically claiming Mr. Vedros' testimony about the event was dishonest. (Tr. Vol. II at 73 – 74).

35). Mr. Vedros further testified that on or about April 5, 2012, MMSI provided Settoon with a randomly-generated list of Settoon employee names for chemical drug testing in that quarter and that Respondent's name appeared on that list. (Tr. Vol. II at 34 – 37; CG Ex. 2).

In turn, Mr. Frank Bonvillain testified that he is the general manager of MMSI. He testified that his business provides computer-generated lists of randomly-drawn names to Settoon for employee chemical testing. (Tr. Vol. III at 9 – 14). Mr. Bonvillain testified that the computer program his business uses to generate random lists of employee names is provided by a business entity called Innovative Business Resources, Incorporated (IBR).

Mr. William Jesse Brown testified that he is self-employed as the principal at IBR. He testified that he is the creator of the computer software that generates the random lists of names utilized by MMSI and, ultimately, Settoon. (Tr. Vol. III at 25). Mr. Brown testified that he has been a computer programmer since 1982 and that his bachelor's degree is in economics. He testified that MMSI has been a client of his for the past fifteen years. (Tr. Vol. III at 26 – 39).

Mr. Brown testified at length regarding the mathematical/scientific basis by which names are randomly generated by the computer program he developed for MMSI and which was employed in Respondent's selection for chemical testing. (Tr. Vol. III at 25).

In sum, Mr. Brown testified that an MMSI employer will input a list of employee names into a given computer, which contains Mr. Brown's program. Mr. Brown's program then assigns a discreet and unique one, two, three or four-digit computer number to each employee name. He testified that when a computer operator then queries the computer to generate a random list containing a defined number of names, Brown's software then generates a "seed number" (determined by reference to the digits displayed on the computer's internal clock at the moment the inquiry is submitted) and thereafter, the program generates an algorithm which automatically creates long runs of the discreet numbers previously assigned to each employee name until the required number of names is provided. (Tr. Vol. III at 28 – 31). In short, because the total of the

analog digits in the computer clock are never the same at any given moment, the seed number can never be the same, hence, "randomness." The court is satisfied that the method by which Respondent's name was generated (then communicated to Settoon) was mathematically and scientifically valid.

2. Respondent reported to the testing facility but failed to remain for testing

Respondent admitted that on May 29, 2012, at approximately 10:00 a.m., he presented himself to OMS, a Department of Transportation (DoT) - designated drug testing facility, in Houma, Louisiana. (Tr. Vol. II at 75 – 80). Likewise, Respondent also admitted that on May 29, 2012, he departed OMS without having first provided a urine specimen for chemical drug testing. (Tr. Vol. II at 75 – 80; Vol. IV at 7 – 30). He explained that he departed OMS because "It was a lot of people in there. I was tired, I was exhausted. I was ready to get home." (sic) (Tr. Vol. II at 80).[8]

Title 49 CFR §40.191(a)(2) specifically defines what constitutes a refusal to take a DoT drug test; explaining that a refusal occurs when a mariner fails "to remain at the testing site until the testing process is complete."

The evidence is clear that Respondent did report to the OMS facility but failed to remain for testing.

3. Refusal to submit a urine specimen for a lawfully directed drug screen constitutes Misconduct

Title 46 CFR §5.27, defines Misconduct as "human behavior which violates some formal, duly established rule. Such rules are found in, among other places, statutes [and] regulations, ... It is an act which is forbidden or a failure to do that which is required." Id.

[8] Interestingly, Ms. Ada Leboeuf testified that she was a clinician in the employ of OMS and on duty on the morning of May 29, 2012. She testified that Respondent did not sign the registration form located in the reception area in the OMS facility on the morning of May 29, 2012. She testified that she attempted to locate Respondent in the reception area that morning and was unable to do so. Ms Leboeuf further testified that it would have taken

The Settoon Towing Safety Management System incorporates a "Drug and Alcohol Policy and Procedure" which is provided to all Settoon employees. (CG Ex. 1). Respondent was provided with a copy of the Settoon Drug and Alcohol Policy on April 24, 2012. (Tr. Vol. II at 23 – 35; CG Ex. 1 at 4).

The Settoon Drug and Alcohol Policy clearly specifies that all employees are subject to random chemical drug testing as a condition of employment. (CG Ex. 1 at 2). Moreover, the same policy states that "Refusing to take a drug test is equal to an admission of guilt and must be treated as a positive result." (CG Ex. 1 at 4). Hence, in this case, the Settoon Drug and Alcohol policy constitutes a "formal, duly established rule," the violation of which constitutes Misconduct.

Title 49 CFR §40.191(c) also imposes a clear duty upon mariners: "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."

When Respondent departed the OMS facility without providing a urine specimen, he refused to take a urine test. Again, 49 CFR §40.191(a)(2) specifically says that a refusal occurs when a mariner fails "to remain at the testing site until the testing process is complete."

By virtue of his admitted refusal to submit a urine specimen, when lawfully directed to do so by his marine employer, Respondent violated the express terms of his employer's Drug and Alcohol drug testing policy and, by definition, 49 CFR §40.191. Thus, Respondent committed an act of Misconduct.

V. SANCTION

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

Respondent not more than fifteen minutes to register and provide his specimen had he decided to remain at the OMS facility. (Tr. Vol. IV at 10 – 16).

(1984). The nature of this non-penal administrative proceeding is to "promote, foster, and maintain the safety of life and property at sea." 46 USC §7701; 46 CFR §5.5; Appeal Decision 1106 (LABELLE) (1959).

The decision on an appropriate sanction is one of the most crucial aspects of a court's resolution of a Suspension and Revocation hearing. Guidance on whether a credential ought to be suspended or revoked is found in 46 CFR §5.569 and its attendant Table. The Table provides a "Suggested Range of Appropriate Orders" for various offenses. The purpose of the Table is to provide guidance to the Administrative Law Judge and promote uniformity in orders rendered. 46 CFR §5.569(d); Appeal Decision 2628 (VILAS) (2002), aff'd by NTSB Docket ME-174. In this case, the Coast Guard seeks revocation of Respondent's Merchant Mariner's credential.

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

While it is true that 46 CFR §5.569(d) also explains that "[the] table should not affect the fair and impartial adjudication of each case on its individual facts and merits," it is not for the undersigned to speculate what those individual aggravating facts and merits are relative to this Respondent, absent an evidentiary basis.

In this case, the Coast Guard seeks revocation, yet Table 5.569 lists the offense of "Refusal to Take Chemical Drug Test" and suggests a suspension of between twelve and twenty-four months.

In determining an appropriate sanction for offenses for which revocation is not mandatory, an Administrative Law Judge should consider: any remedial actions undertaken by a respondent; a respondent's prior records; and evidence of mitigation or aggravation. See 46 CFR §5.569(b)(1)-(3).

Remedial Action: Neither party offered any evidence pertaining to Respondent's efforts at remediation of Respondent's behavior vis-à-vis this offense.

Respondent's Prior Records: The Coast Guard did not produce any evidence that Respondent's credential had ever been the subject of any prior sanctions or disciplinary action.

Mitigation or Aggravation: The Coast Guard offered no evidence in aggravation and Respondent offered no evidence in mitigation. However, the evidence, particularly Respondent's own testimony, strongly suggests Respondent's mendacity in that he was generally evasive and untrustworthy in his testimony regarding the events of May 29, 2012. By way of example, the court notes with particularity Respondent's attempt to deceive the court regarding Timothy John Vedros' order that Respondent submit a urine specimen for chemical drug testing, infra.

The court is satisfied that on the morning of May 29, 2012, Mr. Vedros, Settoon's marine personnel manager, personally directed Respondent to present himself to OMS in Houma, Louisiana for urine specimen chemical testing. (Tr. Vol. II at 37 – 38).

In contrast, Respondent testified that Mr. Vedros did not direct him to provide a urine specimen for testing; unmistakably testifying that Mr. Vedros' testimony about the event was dishonest. (Tr. Vol. II at 73 – 74). In fact, Respondent specifically testified that no one from Settoon Towing, LLC ever ordered him to submit to chemical drug testing or that he should report to OMS in Houma, Louisiana for testing. (Tr. Vol. II at 75). Despite this assertion, Respondent then testified that he spontaneously and voluntarily drove himself to OMS in Houma, Louisiana (without having been told to do so) for urine specimen chemical testing.

Upon inquiry by the court, Respondent changed his convoluted testimony and claimed he went to OMS because his captain (not Mr. Vedros) had (in a telephone conversation) "informed him about a drug screen." (Tr. Vol. II at 76). Yet Respondent still denied that the captain directed him to take a drug test and further testified that no one told him where he should go for a drug test. (Tr. Vol. II at 78). The following colloquy between the court and Respondent illustrates Respondent's convoluted attempt to deceive the court:

Q. And you never talked to Mr. Vedros after that?

A. No. I tried to reach him, but couldn't get him.

(Tr. Vol. II at 78). (Query: If respondent had never had a conversation with Mr. Vedros regarding drug testing, why would he have attempted to "reach" Mr. Vedros?)

* * *

Q. But then, of your own volition and on your own accord and by your own mental process, you then decided to go on your own to the OMS testing facility?

A. I just didn't want to get in any trouble. I didn't know if it really was really a requirement.

Q. Then if you went there, did you provide a urine specimen while you were there?

A. No, sir, I didn't.

Q. Why not?

A. Well, he told me they were waiting for me.

Q. Who?

A. Mr. Vedros.

Q. I'm sorry?

A. Mr. Vedros told me that they were waiting for me.

Q. I thought you didn't talk to Mr. Vedros.

A. I didn't talk to him specifically. Well, when he called me – I did talk to him.

* * *

Q. See, what I'm having a hard time understanding, Mr. Reed, is this: If you went to this drug testing facility on your own accord without anybody telling you to do so, you did it because you knew you had to go provide a urine specimen and you went there, and then you chose to leave because you didn't want to wait. That doesn't make much sense to me.

A. I'm sorry. I just - - I mean, I didn't think it was right. I didn't think he was being considerate at all as far as, you know, what I had to do.

(Tr. Vol. II at 78 – 81).

The court can only speculate as to who Respondent faulted for being inconsiderate in directing him to submit to chemical drug testing.

The court specifically notes Respondent's mendacity as an aggravating factor in this case.

Furthermore, and as an additional consideration, the holdings in Appeal Decisions 2578 (CALLAHAN) (1996) and 2624 (DOWNS) (2001), dictate that a person who evades a chemical drug test ought not suffer a lesser sanction than one who takes a chemical drug test and fails. The logic and import of CALLAHAN and DOWNS is that a lesser sanction for failure to submit to a chemical drug test would encourage offenders to evade or fail to submit to chemical testing. In this case, the evidence suggests Respondent intentionally evaded providing a urine specimen when lawfully directed to do so and that he was less-than-honest in his sworn account of the events surrounding his refusal.

The court finds that anything less than revocation herein would indeed encourage offenders to attempt to evade testing and would undermine the government's compelling interest in maintaining safety at sea.

Accordingly, revocation of Respondent's credential is appropriate in this case.

VI. CONCLUSION

For the reasons discussed above, the Coast Guard **PROVED** by a preponderance of reliable, probative and credible evidence that Respondent Tony Odell Reed committed an act of Misconduct by his refusal to submit a urine specimen in response to his marine employer's lawful directive.

WHEREFORE,

VII. ORDER

IT IS HEREBY ORDERED, that the allegations contained in the Coast Guard's Complaint were **PROVED** and that Respondent's credential is **REVOKED**. The Coast Guard will undertake appropriate and timely measures to ensure retrieval of Respondent's credential.

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

Bruce Tucker Smith
Administrative Law Judge
US Coast Guard

Date: March 07, 2013

ATTACHMENT A – Exhibit & Witness List

COAST GUARD EXHIBTS

1. Settoon towing Drug and Alcohol Policy and Procedure

2. Random list

3. Letter of notification, copy of MMC, roster

COAST GUARD WITNESSES

1. Timothy John Vedros

2. Frank Bonvillain

3. Jesse Brown

4. Ada Leboeuf

RESPONDENT'S EXHIBITS

A. Cell telephone call list

RESPONDENT'S WITNESSES

1. Tony Odell Reed

ALJ EXHIBITS

I. Respondent's MMC

II. Affidavit of Nicole Simmons

ATTACHMENT B – Appellate 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 C.F.R. 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 C.F.R. 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.