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

UNITED STATES COAST GUARD
Complainant

vs.

AUSTIN RYAN GORE
Respondent

Docket Number 2012-0460
Enforcement Activity No. 4272313

DECISION & ORDER

Date Issued: September 5, 2013

Issued by: Honorable Bruce Tucker Smith
Administrative Law Judge

Appearances:

For Complainant
LT Thomas N. Hedden
Jim Wilson, Esq.
U.S. Coast Guard Marine Safety Unit Morgan City

For Respondent
Troy G. Broussard, Esq.

I. PRELIMINARY STATEMENT

The United States Coast Guard Marine Safety Unit Morgan City (Coast Guard) initiated the instant administrative action seeking revocation of Austin Ryan Gore's (Respondent) Coast Guard-issued Merchant Mariner's Credential (MMC).

On October 12, 2012, the Coast Guard filed a Complaint alleging that on February 18, 2012, Respondent committed Misconduct in violation of 46 U.S.C. §7703(1)(B) and 46 C.F.R. §5.27 as well as a Violation of Law or Regulation per 46 U.S.C. §7703(1)(A) and 46 C.F.R. §5.33.

On November 8, 2012, Respondent filed his Answer wherein he denied both the jurisdictional and factual allegations contained in the Complaint.

On November 19, 2012, the Chief Administrative Law Judge assigned the instant matter to the undersigned Administrative Law Judge (ALJ) for adjudication.

After a delay to allow Respondent an opportunity to obtain legal counsel, the court convened a telephonic prehearing conference with the parties on February 15, 2013. The court discussed possible hearing dates and locations as well as discovery deadlines.

On April 18 – 19, 2013, this matter came on for hearing in the ALJ Courtroom, Hale Boggs Federal Building, New Orleans, Louisiana.

All hearings in this case were conducted in accordance with the Administrative Procedure Act (APA), as amended and codified at 5 U.S.C. §§551-59 and the Coast Guard procedural regulations set forth at 33 C.F.R. Part 20. Jim Wilson, Esq., and Investigating Officer LT Thomas N. Hedden, appeared on behalf of the Coast Guard. Troy G. Broussard, Esq., appeared on behalf of Respondent, who was also present at the hearing.

At the conclusion of the April 19, 2013, hearing, the court, upon Motion from the Coast Guard, retained Respondent's MMC as more fully described in this court's Order of April 19, 2013.

On July 25, 2013, the court, upon its own motion, reconvened to take additional testimony and to receive additional items of documentary evidence.[1]

In total, seven witnesses testified as part of the Coast Guard's case-in-chief. The Coast Guard offered five documents into evidence, all of which were eventually admitted.[2]

Respondent offered two documents into evidence, withdrawing one. The other was admitted into evidence. Respondent called one witnesses.

At the conclusion of the July 25, 2013, hearing, the parties rested. The court permitted parties to file written closing arguments. Upon receipt of the parties' respective arguments, the court closed the administrative record and commenced its deliberation.[3]

II. FINDINGS OF FACT

These findings of fact are based on a thorough and careful analysis of the documentary evidence, the testimony of witnesses, and the entire record taken as a whole:

1. At all relevant times relevant herein, Respondent Austin Ryan Gore was the holder of a Coast Guard-issued Merchant Mariner's Credential (MMC). Respondent's MMC authorized him to serve as a Designated Duty Engineer of Motor Vessels of Not More than 4000 Horsepower and a Chief Engineer of Offshore Supply Vessels of Not More than 3000 Gross Tons of not More than 4000 Horsepower Upon Domestic Near Coastal Waters (ALJ Ex. I).

2. At all relevant times herein, the events described in the Complaint occurred upon the business premises known as "C-Port" in Port Fourchon, Louisiana. C-Port is a facility owned by a business entity called Edison Chouest Offshore. (Tr. Vol. III at 37 – 39).

[1]Respondent opted not to appear at the July 25, 2013, hearing; however, Respondent's counsel was present.

[2]Citations referencing the transcript are as follows: Transcript followed by the volume number and page number (Tr. at __). In this case, proceedings transcribed on April 18, 2013 are referred to as "Vol. I," proceedings transcribed on April 19, 2013, are referred to as "Vol. II," and proceedings transcribed on July 25, 2013 are referred to as "Vol. III." Citations referring to Agency Exhibits are as follows: "CG" followed by the exhibit number (CG Ex. 1, etc.); Respondent's Exhibits are as follows: "Resp." 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.).

[3]The court acknowledges, with thanks, the research assistance provided by Ms. Caitlin Goforth, legal intern, Norman Adrian Wiggins School of Law, Campbell University, Raleigh, North Carolina and Ms. Rebecca Bartlett, legal intern, Loyola University New Orleans College of Law, New Orleans, Louisiana.

3. Edison Chouest Offshore is the parent company of Galliano Marine Service, LLC, Respondent Austin Ryan Gore's marine employer at all times relevant to the instant Complaint. (Tr. Vol. III at 39).

4. At all relevant times herein, Respondent Austin Ryan Gore was on the payroll of Galliano Marine Services, LLC, was physically located upon the C-Port facility and was housed aboard his employer's vessel, the FAST BULLET, while awaiting transfer to another vessel, the C-FIGHTER. (Tr. Vol. III at 14, 39).

5. On or about February 18, 2012, and at times relevant to the events described in the Complaint, the FAST BULLET was deemed a "stacked" vessel; that is, a vessel not currently in service, moored to a fixed structure and used for temporary crew housing. The FAST BULLET was a non-operational vessel because of a "bent drop-down thruster." (Tr. Vol. I at 102 – 103, 127 - 129).

6. On or about February 18, 2012, and at times relevant to the events described in the Complaint, Respondent Austin Ryan Gore never boarded the C-FIGHTER and was never assigned any duties aboard the FAST BULLET. (Tr. Vol. III at 14).

7. On or about February 18, 2012, and at times relevant to the events described in the Complaint, Respondent Austin Ryan Gore was no more than a "passenger" aboard the FAST BULLET; he had not been assigned a "watch;" he had not been assigned any crewmember duties; and he was not a part of the crew of that vessel. (Tr. Vol. III at 14).

8. On or about February 18, 2012, Ms. Tina Adams was employed as a security guard by a business entity called Southern Guard Service. On that date, at approximately 9:20 p.m., CST, security guard Adams was assigned to work at the C-Port Terminal Facility Security Gate, Northern Extension. (CG Ex. 5).

9. On or about February 18, 2012, at approximately 9:20 p.m., CST, security guard Tina Adams encountered Respondent Austin Ryan Gore at the C-Port Terminal Facility Security Gate, Northern Extension. At that time, Respondent appeared to Ms. Adams to be intoxicated by alcohol. (CG Ex. 5).

10. On or about February 18, 2012, at approximately 9:20 p.m., CST, security guard Tina Adams attempted to prevent Respondent Austin Ryan Gore from entering the C-Port facility because of his intoxication. At that time, Respondent grabbed Ms. Adam's arm and fell against her. Thereafter, Respondent disappeared onto the C-Port facility. (CG Ex. 5).

11. On or about February 18, 2012, and after the 9:20 p.m., CST, confrontation between Respondent Austin Ryan Gore and security guard Tina Adams, a C-Port crew coordinator, Mr. Jeremy Bourgeois, together with Captain Roger Kunkle, found Respondent walking on a C-Port dock. At that time, Respondent was intoxicated and wet from head to toe, had a cut on his forehead, slurred speech, and wearing only one shoe. (Tr. Vol. I at 39 – 40).

12. On or about the evening of February 18, 2012, Mr. Jeremy Bourgeois telephoned Mr. Hank Savin, a paramedic employed by Edison Chouest Offshore at C-Port, and directed him to come to the location where Mr. Bourgeois was with Respondent Austin Ryan Gore. Thereafter, Mr. Savin transported Respondent to the C-Port medical infirmary, located on the C-Port premises. Mr. Savin personally observed Respondent as part of a medical evaluation. Mr. Savin testified that Respondent's speech was slurred and repetitious and that his eyes were "a little glassy." (Tr. Vol. I at 51 – 55, 69).

13. On or about the evening of February 18, 2012, paramedic Hank Savin administered two breathalyzer tests to Respondent Austin Ryan Gore. On the first breathalyzer test, Respondent's sample produced in a blood alcohol concentration level of .154. On the second breathalyzer test, Respondent's sample produced a blood alcohol concentration level of .162. Both breathalyzer test results exceeded the blood alcohol concentration level of .08 specified in 33 C.F.R. §95.020. Hence, Respondent is deemed to have been under the influence of alcohol at the relevant times alleged in the Complaint. (Tr. Vol. I at 55 – 68; Tr. Vol. III at 57 – 62; CG Ex. 1).

14. On or about the evening of February 18, 2012, and after administering two breathalyzer tests on Respondent Austin Ryan Gore, paramedic Hank Savin attempted to collect a urine specimen from Respondent for chemical testing. At that time, Respondent was unable to stand up straight and was unable to direct his stream of urine into the specimen collection cup. Respondent urinated on the floor, a countertop and the toilet and fell against a wall. Respondent thus failed to submit to a urinalysis test. (Tr. Vol. I at 70 – 71).

15. Respondent admitted to paramedic Hank Savin "that when he [Respondent Austin Ryan Gore] gets home, he does have substance abuse, and he cleans out four or five days prior to him coming to work." (Tr. Vol. I at 70 – 71).

16. On May 22, 2006, Respondent Austin Ryan Gore signed a Gallianio Marine Service, LLC "Drug and Alcohol Free Work Environment Policy" which provides, inter alia, that Respondent was subject to urinalysis testing for alcohol "whenever there is reasonable suspicion to believe an employee is using…alcohol in violation of the company's policy," and that "Failure to submit to the … alcohol tests… will result in disciplinary action." (CG Ex. 3).

III. SUMMARY OF DECISION

The Coast Guard **PROVED** by a preponderance of reliable, probative, and credible evidence that Respondent committed the acts alleged in Specification 4 of the Complaint.

For the reasons set forth infra, the Merchant Mariner's Credential issued by the U.S. Coast Guard to Respondent is hereby **REVOKED.**

IV. DISCUSSION

A. General

The purpose of Coast Guard Suspension and Revocation proceedings is to promote safety at sea. See 46 U.S.C. §7701. Pursuant to 46 C.F.R. §5.19, an ALJ holds the authority to suspend or revoke a license or certificate in a hearing for violations arising under 46 U.S.C. §7703 and/or §7704.

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). Additionally, the ALJ is vested with broad discretion in resolving inconsistencies in the evidence, and findings do not need to be consistent with all of the evidence in the record as long as there is sufficient evidence to reasonably justify the findings reached. Id.; Appeal Decision 2639 (HAUCK) (2003).

B. Jurisdiction

"The jurisdiction of administrative bodies is dependent upon the validity and the terms of the statutes reposing power in them." Appeal Decision 2620 (COX) (2001) (quoting Appeal Decision 2025 (ARMSTRONG) (1975)). "Where an Administrative forum acts without jurisdiction its orders are void." Appeal Decision 2025 (Armstrong) (1975). Therefore, establishing jurisdiction is critical to the validity of a proceeding. Appeal Decisions 2677 (WALKER) (2008); 2656 (JORDAN) (2006).

As discussed infra, the Coast Guard charged Respondent with four Specifications which describe certain events that occurred on February 18, 2012, on the business premises known as "C-Port" in Port Fourchon, Louisiana. C-Port is a facility owned by Edison Chouest Offshore (Edison). Edison, in turn, is the parent company of Galliano Marine Service, LLC, (Galliano)

Respondent's maritime employer at all times relevant to the instant Complaint. (Tr. Vol. III at 38 - 39).

In order to establish jurisdiction in a Misconduct case, the Coast Guard must prove that the acts of Misconduct or violation of a regulation occurred while the mariner was "acting under the authority of his MMC." 46 U.S.C. §7703. Appeal Decision 2425 (BUTTNER) (1986) plainly states that jurisdiction is a question of fact that must be proven by the Coast Guard. "A person employed in the service of a vessel is considered to be acting under the authority…[when a credential 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). Accordingly, if neither of the criteria set forth at 46 C.F.R. §5.57(a) is met, then the Coast Guard has no jurisdiction for a Suspension and Revocation proceeding. Appeal Decision 2620 (COX) (2001) further adds that jurisdiction must be affirmatively shown and will not be presumed. See also Appeal Decision 2025 (ARMSTRONG) (1975).

At all relevant times herein, Respondent was on his marine employer's payroll; was physically located upon his marine employer's property, C-Port; and was housed aboard his marine employer's vessel, the FAST BULLET, as he awaited transfer to the C-FIGHTER, an inspected vessel, for service as an engineer. (Tr. Vol. III at 13 – 14; CG Ex. 2). Inasmuch as Respondent was to serve as an engineer on an inspected vessel that required a credentialed engineer, the character of Respondent's employment was clearly within the scope of his MMC. In that regard, the court agrees with the Coast Guard's assertion that Appeal Decision 2615 (DALE) (2000) finds jurisdiction appropriate in a case such as the one at bar.

Here, the court has jurisdiction over Respondent and the subject matter at hand.

C. Burden of Proof

In this case, like all Suspension and Revocation cases, the Coast Guard bears the burden of proof to establish the requisite facts mandated by the organic statute, 46 U.S.C. §7703, and the

implementing regulations, 46 C.F.R. Part 5 and Part 10, Subpart B; 33 C.F.R. Part 20. The Administrative Procedure Act (APA), 5 U.S.C. §§551-559, applies to Coast Guard Suspension and Revocation hearings before United States ALJs. The APA authorizes imposition of sanctions if, upon consideration of the entire record as a whole, the charges are supported by reliable, probative and substantial evidence. 5 U.S.C. §556(d). The Coast Guard bears the burden of proof to establish the charges are supported by a preponderance of the evidence. 33 C.F.R. §§20.701, 20.702(a). Similarly, a respondent bears the burden of proof in asserting any affirmative defense by a preponderance of the evidence. 33 C.F.R. §§20.701, 20.702; Appeal Decisions 2640 (PASSARO) (2003); 2637 (TURBEVILLE) (2003). "The term substantial evidence is synonymous with preponderance of the evidence as defined by the U.S. Supreme Court." Appeal Decision 2477 (TOMBARI) (1988) (citing Steadman v. SEC, 450 U.S. 91, 107 (1981)).

The burden of proving a fact by a preponderance of the evidence "simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence.'" Concrete Pipe & Products of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 622 (1993) (quoting In re Winship, 397 U.S. 358, 371-72 (1970) (Harlan, J., concurring) (brackets in original)).

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

Title 46 U.S.C. §7703(1)(A),(B) provides that a mariner's credential may be suspended or revoked if that mariner has committed a violation of law or regulation or an act of Misconduct.

In this case, Respondent is charged with four Specifications[4] including: battery, trespass, operating a vessel under the influence of alcohol in violation of 33 C.F.R. Part 95, and refusing to provide a urine specimen for alcohol testing when ordered to do so by his maritime employer.

Specification 1: Battery

The First Specification of the Complaint alleges that on February 18, 2012, Respondent committed Misconduct by inflicting a battery upon the person of security guard, Tina Adams, "a person designated . . . to control access to the designated Marine Security Facility C-Port in Port Fourchon, Louisiana, by grabbing her by the arm when she tried to retreat to the guard shack." (sic).

"Misconduct" is defined in 46 C.F.R. §5.27 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."

However, the First Specification does not identify which "formal, duly established rule" Respondent violated.

[4]As discussed infra, Specifications One, Two and Four fail to identify the legal basis for Misconduct, which is defined in 46 C.F.R. §5.27 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." These omissions are not inconsequential. Even though the Commandant has famously said that "[t]his is not the proper forum to determine the constitutionality of the definition of misconduct . . ." Appeal Decision 2613 (SLACK) (1999), simple due process requires a Complaint to put a respondent on notice of the act he/she is alleged to have violated and the law or rule he/she offended. The question here is not the definition of Misconduct, but, rather, whether the Coast Guard has plead Misconduct at all. Indeed, 33 C.F.R. §20.307 requires the Coast Guard to set forth in its Complaint "the statute or rule violated." But simply citing 46 C.F.R. §5.27, alone, is insufficient without citation to the underlying "rule" described in that regulation. In Appeal Decision 2512 (OLIVIO) (1989), the Commandant also said, "[g]iven the remedial and administrative nature of suspensions and revocation actions, 'a specification need not meet the technical requirements of court pleadings, provided it states facts which, if proved, constitute the elements of an offense.'" [citations omitted]. This issue here is the absence of any reference to any offense at all. The court and Respondent are left to guess which "offense" the Coast Guard intends. This is no mere "technical" omission; absent other factors (such as constructive notice) it is a fundamental failure to provide adequate notice of the "offense" to be defended.

The United States Supreme Court has, in recent years, provided clear guidance concerning the appropriate contents of a complaint and has required the government to plead factual and legal allegations sufficient to raise a right to relief above the speculative level. A legally sufficient complaint is one which provides a respondent enough plausible information to enable him to properly respond to the allegations therein. See Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007). Absent citation to the underlying "rules" which constitute "Misconduct," the three Specifications herein are deficient.

The Coast Guard's only evidence of the alleged battery is contained in CG Ex. 5, a handwritten statement written by the "victim," Ms. Tina Adams. Ms. Adams was not called as a witness by the Coast Guard. Hence, she did not testify in this hearing. Rather, the Coast Guard relied solely upon her handwritten statement as proof of the battery. The pertinent portion of that statement reads only,

> Employee [Respondent] wanted to go into C-Port yard and board his vessel, having alcohol on him and refusing to listen to what I was telling him. He then grabbed my arm and fell against me, I pushed him off me, grab the door knob to guard shack, closed & locked it for my own safety. (sic)

(CG Ex. 5)

The Coast Guard offered no other probative evidence of the alleged battery.

As noted above, the First Specification does not identify which "formal, duly established rule" Respondent violated. Thus, the court, and Respondent, must guess which "formal, duly established rule" the Coast Guard intends to prove.

For instance, Louisiana Revised Statutes Annotated (La. Rev. Stat. Ann.) Title 14, Part II, Subpart B lists those offenses which describe a "battery" in its various iterations.

La. Rev. Stat. Ann. §14:33 defines "battery" as: "The intentional use of force or violence upon the person of another; or the intentional administration of a poison or other noxious liquid or substance to another." Here, there is no proof that Respondent made use of intentional force or violence upon the person of Ms. Adams. Hence, this section is inapplicable.

La. Rev. Stat. Ann. §14:34 defines "aggravated battery" as "a battery committed with a dangerous weapon." The Coast Guard's proof does not establish any use of a dangerous weapon.

La. Rev. Stat. Ann. §14:35 defines "simple battery" as "a battery committed without the consent of the victim." Once again, the Coast Guard's quantum of proof does not establish an intentional use of force or violence. Hence, no battery was proven; simple or otherwise.

La. Rev. Stat. Ann. §14:36 defines "assault" as "an attempt to commit a battery, or the intentional placing of another in reasonable apprehension of receiving a battery." However, the Coast Guard did not allege an assault, nor did the proof establish that such an offense occurred.

Assuming the Coast Guard relies upon the Louisiana Criminal Code as the "rule" Respondent violated, the evidence simply is insufficient to meet the requirements of any of the varieties of "battery" or "assault" listed in Louisiana statutory law. [5] There was no proof Respondent used intentional force or violence, as required for proof of a battery in Louisiana. See La. Rev. Stat. Ann. §14:33, et seq.

Although hearsay statements, such as the contents of CG Ex. 5, are admissible in Suspension and Revocation hearings, admissibility does not equate to probative weight.[6] In this case, Ms. Adams' statement is ambiguous; it might be reasonably read to mean Respondent was simply trying to catch himself from falling, as opposed to an intentional act of force or violence directed toward Ms. Adam's person. Thus, the court assigns very little probative value to this ambiguous hearsay statement.

For the foregoing reasons, the First Specification was **NOT PROVED**.

Specification 2: Trespass

The Second Specification alleges that on February 18, 2012, Respondent committed Misconduct by committing "a trespass against C-Port . . . by wrongfully entering the facility after being denied entry by C-Port security guard Tina Adams."

To reiterate, "Misconduct" is defined in 46 C.F.R. §5.27 as the violation of "some formal, duly established rule. Such rules are found in, among other places, statutes, regulations . . . . It is

[5]The court is mindful that the Coast Guard need only prove the allegations by the "preponderance of the evidence" standard, per 33 C.F.R. §20.701. However, the proof of the allegations in the First Specification did not rise even to that standard.

[6]Title 33 C.F.R. 20.803 specifically provides "The ALJ may consider the fact that evidence is hearsay when determining its probative value."

an act which is forbidden or a failure to do that which is required." Hence, in order to prevail on this Specification, the Coast Guard was obliged to prove the existence of a "rule" prohibiting a trespass.

The Second Specification does not identify which "formal, duly established rule" Respondent violated.[7] Thus, the court, and Respondent, must guess which "formal, duly established rule" the Coast Guard relies upon in its assertion of a trespass.

For instance, La. Rev. Stat. Ann. §14:63 describes "trespass," in part, as:

> A. No person shall enter any structure, watercraft, or movable owned by another without express, legal, or implied authorization.
> B. No person shall enter upon immovable property owned by another without express, legal, or implied authorization.
> C. No person shall remain in or upon property, movable or immovable, owned by another without express, legal, or implied authorization.
> D. It shall be an affirmative defense to a prosecution for a violation of Subsection A, B, or C of this Section, that the accused had express, legal, or implied authority to be in the movable or on the immovable property.

Once more, Ms. Adams' absence looms large, because her in-court testimony might have provided reliable information. Her handwritten statement does state:

> I told the employee Mr. Austin Gore he could not be allowed on the facility or board his vessel as alcohol and alcohol use was not allowed on C-Port facilitys. He didn't want to hear what I was saying and wanted to board any way which was out of my control. So Mr. J. Reddy handled it from there. (sic)

(CG Ex. 5)

It is true that the Galliano Marine Service, LLC "Drug and Alcohol Free Work Environment Policy" (CG Ex. 3) does pronounce a general prohibition of alcohol and/or drugs on company property and vessels. However, no part of the Galliano Drug Policy subjects an

[7]At the hearing, the Coast Guard elicited testimony from a Mr. Mike Jarreau, an individual identified as a "C-Port "facility security officer." (Tr. Vol. II at 14 – 16.) Mr. Jarreau testified that he is familiar with the Maritime Transportation Security Act [P.L.107–295, NOV. 25, 2002], cited in the Coast Guard's Complaint. That law does not appear to define or prohibit trespass. Mr. Jarreau also referenced his knowledge of the C-Port security plan. However, the Coast Guard did not offer such a plan into evidence. Thus, the court was presented with no evidence of "some formal, duly established rule" by which to adjudicate Respondent's alleged actions, as per 46 C.F.R. §5.27.

employee to removal from, or denial of entry to, the company's premises because of intoxication or possession of alcohol.[8] Thus, Ms. Adams' suggestion that Respondent was a trespasser is incorrect. Her statement (or even her opinion) does not prove the existence of "some formal, duly established rule." See 46 C.F.R. §5.27.

No other witness testified that Respondent's presence on the C-Port facility constituted a trespass.[9] Nor was any documentary evidence offered by the Coast Guard to establish what acts might constitute a trespass.

While it is true that La. Rev. Stat. Ann. §14:63(C) says that "No person shall remain in or upon property, movable or immovable, owned by another without express, legal, or implied authorization," it is equally true that La. Rev. Stat. Ann. §14:63(D) specifically creates an affirmative defense to trespass, by virtue of Respondent's "express, legal, or implied authority to be" on his employer's premises.

As the evidence reveals, and as discussed infra, Respondent's (intoxicated) presence on his employer's premises was actually facilitated by his employer.[10] Hence, the facts adduced at the hearing suggest an affirmative defense to trespass, per the provisions of La. Rev. Stat. Ann. §14:63(D).

Because the Coast Guard did not plead any "human behavior which violates some formal, duly established rule," it could not prove a trespass or Misconduct per 46 C.F.R. §5.27.

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[8]The Galliano Drug Policy does state that "non-employees, including visitors, contractors, employees of contractors, consultants, etc. found in violation of the company's policy for a drug and alcohol free work environment . . .or suspected of having alcohol . . .in his or her body, may be refused entry onto or removed from the company's . . . premises." Thus, a non-employee might correctly be regarded as a trespasser; but not an employee like Respondent.

[9] Mr. Jarreau might have been asked this question, but he was not.

[10]When discovered on the C-Port premises, Respondent was not escorted from the C-Port premises. Rather, he was taken by his employer to the C-Port infirmary and medically examined. (Tr. Vol. I at 52 – 56). Query: Whether such accommodation would be afforded to a trespasser?

Moreover, the Coast Guard's quantum of proof was insufficient to establish any violation by the required preponderance of the evidence.

Thus, the Second Specification was **NOT PROVED**.

Specification 3: Operating a vessel under the influence of alcohol

The Third Specification alleges that on February 18, 2012, Respondent violated a law or regulation, to wit: 33 C.F.R. Part 95, which proscribes the operation of a vessel while under the influence of alcohol.

a. Under the influence of alcohol

In this case, the evidentiary record is replete with evidence of Respondent's intoxication while he was ashore on the business premises of C-Port in Port Fourchon, Louisiana on February 18, 2012.

On the night of February 18, 2012, at approximately 9:20 p.m. (CST), Respondent attempted to enter the C-Port facility via a controlled entry point, guarded by Ms. Adams. Her handwritten statement, CG Ex. 5, reveals Respondent "had alcohol on him" and that after refusing to follow security guard Adams' instructions, Respondent "grabbed my arm and fell against me." (CG Ex. 5). Although not probative of a battery, Ms. Adams' hearsay statement does suggest Respondent was either in possession of alcohol – or that alcohol was in possession of him.

Additional testimony reveals that after his encounter with the security guard, Respondent disappeared onto the C-Port premises.

Shortly thereafter, Mr. Jeremy Bourgeois, a crew coordinator/crane operator at C-Port, received a telephone call from Ms. Adams describing Respondent's behavior at the gate. (Tr. Vol. I at 35 – 36).

Mr. Bourgeois, who, accompanied by Captain Roger Kunkle, a Galliano captain assigned to the FAST BULLET, soon found Respondent walking on a dock. (Tr. Vol. I at 37). Mr.

Bourgeois immediately noted Respondent was "wet from head to toe, had a cut on his forehead, slurred speech, and one shoe." (Tr. Vol. I at 38). Mr. Bourgeois opined that Respondent was intoxicated. Mr. Bourgeois further testified that he later discovered an empty vodka bottle among Respondent's personal effects. (Tr. Vol. I at 39 – 40).

Captain Kunkle testified that he personally observed Respondent on the evening of February 18, 2012, and that, in his opinion, Respondent was intoxicated. (Tr. Vol. III at 10).

It is relevant to note that at no relevant time was Respondent escorted off of the C-Port premises or directed to leave – as one might expect a trespasser to be treated.[11] Instead, and not long thereafter, paramedic Hank Savin was summoned. (Tr. Vol. I at 77 – 80).

Mr. Savin is a paramedic employed by Edison at C-Port. (Tr. Vol. I at 51). Mr. Savin testified that he was called to the location where Mr. Bourgeois was with Respondent. Thereafter, Mr. Savin transported Respondent to the company infirmary, a trailer on the C-Port premises. (Tr. Vol. I at 54 – 55). Mr. Savin testified that he personally observed Respondent as part of an appropriate "head to toe" medical evaluation. Mr. Savin testified that Respondent's speech was slurred and repetitious and that his eyes were "a little glassy." (Tr. Vol. I at 69.)

(1) <u>Breathalyzer results</u>

Once at the C-Port infirmary, Mr. Savin administered two breathalyzer tests to Respondent. On the first test, Respondent's sample produced a blood alcohol concentration level of .154. On the second test, Respondent's sample produced a blood alcohol concentration level of .162. (Tr. Vol. I at 55 – 68; Tr. Vol. III at 59 – 68; CG Ex. 1).[12] Both results exceeded the blood alcohol concentration level of .08 specified in 33 C.F.R. §95.020. Hence, the court finds

[11] La. Rev. Stat. Ann. §14:63(D).

[12] The court admitted CG Ex. 1 at the July 25, 2013, hearing, following the testimony of Mr. Edward Conde, of the Volpe National Transportation Systems Center, Alcohol Countermeasures Laboratory, who provided an adequate foundation for the admissibility of test results from the Phoenix 6 breathalyzer, the instrument used to test Respondent's breath samples on February 18, 2012. During the April 18 – 19, 2013 hearing, the court had denied admissibility of those test results, for want of an adequate evidentiary foundation. (See Tr. Vol. I at 55 – 68).

that Respondent was under the influence of alcohol at the relevant times alleged in the Complaint.

(2) Personal Observations

After performing the breathalyzer tests, Mr. Savin then attempted to collect a urine specimen from Respondent for chemical testing. Mr. Savin testified that Respondent was "unable to stand up straight . . . and he was unable to hit the cup. He was urinating on the floor, the countertop and the toilet . . . There was a few times when he fell up against a wall, knocking over stuff on my wall. I had to get him a chair." (Tr. Vol. I at 70, 85).

Based upon these observations, Mr. Savin opined that Respondent was intoxicated. (Tr. Vol. I at 70). Further, Mr. Savin testified that Respondent candidly admitted "that when he gets home, he does have substance abuse, and he cleans out four or five days prior to him coming to work." (Tr. Vol. I at 71).

Title 33 C.F.R. §95.030 provides guidance on the acceptable evidentiary standards for proof of operation of a vessel while under the influence of alcohol. The court may consider "personal observations of an individual's manner, disposition, speech, muscular movement, general appearance, or behavior." Id.

In this instance, the court is satisfied that the breathalyzer test results, coupled with the personal observations of Ms. Adams, Mr. Bourgeois, Captain Kunkle and Mr. Savin warrant a finding that on February 18, 2012, Respondent was intoxicated by the consumption of alcohol and was so severely impaired that he had lost control of his bodily functions.

b. Operating a vessel

The more important question, however, is whether Respondent was "operating a vessel" at the time he was impaired. The court turns to 33 C.F.R. §95.015, which specifically provides:

> For purposes of this part, an individual is considered to be operating a vessel when:

> (b) The individual is a crewmember (including an officer), pilot, or watchstander not a regular member of the crew, of a vessel other than a recreational vessel.

A reading of this regulation suggests that one "operates" a vessel if one is merely a regular crewmember or a watchstander of that vessel, without regard to that person's actual duties or function or whether the mariner was actually aboard the vessel. In that regard, the Commandant's guidance in Appeal Decision 2551 (LEVENE) (1993) is instructive:

> Section 95.045 plainly states, "[w]hile on board a vessel inspected … under Chapter 33 of Title 46 United States Code, a crewmember (including a licensed individual) … (b) Shall not be intoxicated at any time …." Absent knowledge of the individual's blood alcohol content, intoxication for the purposes of 33 C.F.R. §95.045(b) is established only when it is proved that the individual was operating the vessel and the effect of the intoxicant was "apparent by observation." 33 C.F.R. §95.020. For the purposes of these regulations, however, evidence of Appellant's status as crewmember of an inspected vessel, is also conclusive evidence that Appellant was "operating the vessel". 33 C.F.R. §95.015. Thus, a violation of 33 C.F.R. §95.045(b) is established by evidence that the individual was on board an inspected vessel, that he was a crewmember, and that the effect of intoxicant was "apparent by observation."

Id. (emphasis added).

Thus, in order for the court to find Respondent was "operating a vessel while under the influence of alcohol," LEVENE appears to require the Coast Guard to prove Respondent was intoxicated while aboard an inspected vessel as a crewmember or watchstander. See also Appeal Decision 2438 (TURNER) (1986).

Other Commandant's Decisions on Appeal, 2669 (LYNCH) (2007); 2524 (TAYLOR) (1991); and 2505 (TAYLOR) (1990), also seem to require Respondent's physical presence aboard the vessel he is charged with operating. Appeal Decision 2299 (BLACKWELL) (1983), seemingly adds the requirement that: "A person may be said to be operating a boat by controlling its movements . . .The term can have many meanings depending upon the use, employment, or navigation of the vessel." Id.

The facts of this case are problematic in this regard.

Ms. LaVerne Reed, a Human Resources Specialist with Edison Chouest Offshore, testified that on February 18, 2012, Respondent was an employee of Galliano Marine Services, LLC. (Tr. Vol. III at 38 - 39).[13] The evidence also revealed that on February 18, 2012, Respondent had been housed by his employer in an inoperational, moored vessel, the FAST BULLET while he awaited his transfer to another, operational, inspected vessel, the C-FIGHTER. (Tr. Vol. I at 103, 131; CG Ex. 2)).

The Coast Guard produced neither testimony nor documentary evidence to prove Respondent was a crewmember on board any inspected vessel.

At all relevant times, the FAST BULLET was deemed a "stacked" vessel; that is, a vessel not currently in service, moored to a fixed structure like a dock and used for temporary crew housing, a floating hotel. (Tr. Vol. I at 102 – 103, 129). The facts revealed that the FAST BULLET was a non-operational vessel because of a "bent drop-down thruster." (Tr. Vol. I at 127). Mr. Roddy Pitre, the Edison operations manager, testified that on or about February 18, 2012, the FAST BULLET was non-operational. (Tr. Vol. I at 127 - 128). Mr. Pitre further testified that there was a captain aboard the vessel, Roger Kunkle" (Tr. Vol. I at 128).

The Coast Guard did not offer any evidence or testimony concerning either the make or function of the vessel FAST BULLET. No Certificate of Inspection was produced, nor was any testimony elicited on the question whether the FAST BULLET was an inspected vessel per the requirements of 46 U.S.C. §3301, et seq.

Neither was any proof offered to suggest Respondent was a "crewmember" of the FAST BULLET. To the contrary; Captain Kunkle specifically testified that Respondent was not a crewmember of that vessel, and that he stood no watch. (Tr. Vol. III at 14). Rather, he was

[13]Ms. Reed explained that Galliano is a subsidiary corporation of Edison. (Tr. Vol. III at 37, 43 - 44). Other testimony had confused whether Respondent was an employee of Edison or Galliano. The court is satisfied that Ms. Reed's testimony is accurate and, therefore, the court regards Respondent as having been an employee of Galliano at all relevant times herein.

simply waiting ashore for his transfer to the C-FIGHTER; whereupon Respondent was to have boarded that vessel and begin his service as an engineer. (Tr. Vol. I at 129 – 132).

There was no proof that Respondent ever set foot aboard the C-FIGHTER.[14]

Hence, there was no evidence that Respondent controlled, or participated in the control, of any vessel, directly or indirectly. Absent clear guidance from the Commandant to the contrary, this court cannot find that Respondent was a crewmember aboard the C-FIGHTER for the purposes of either 33 C.F.R. §95.015 or the Third Specification of the Complaint.

By contrast, Respondent had been temporarily assigned a berth aboard the non-operational FAST BULLET, a moored vessel with a "bent drop-down thruster" used for temporary crew housing; essentially a floating hotel. (Tr. Vol. I at 102 – 103, 127 – 129).

Furthermore, the evidence produced by the Coast Guard did not prove Respondent was actually aboard the non-operational, moored vessel FAST BULLET at the time he was intoxicated. To the contrary, Respondent appeared to have become intoxicated away from both port and the vessel. Hence, his unfortunate encounter with the security gate guard, Ms. Adams as he attempted to enter the C-Port facility. (CG Ex. 5). Moreover, the testimony of Messrs. Bourgeois and Savin suggest Respondent had, on the evening of February 18, 2012, been everywhere but aboard the FAST BULLET (including in the bayou itself).

Finally, the Coast Guard did not establish whether the non-operational FAST BULLET was an inspected vessel by testimony or documentary evidence, as required by 33 C.F.R. §95.045. Accordingly, the court cannot conclude that Respondent was a crewmember of the FAST BULLET. The evidence is insufficient to establish he was ever actually aboard any vessel (much less participated in its operation or control) during the time he was so clearly intoxicated.

[14]The C-FIGHTER is an inspected, steel-hulled Offshore Supply Vessel, home-ported in Port Fourchon, Louisiana at C-Port. (Tr. Vol. I at 21, 35, 41; CG Ex. 2).

The Coast Guard did not prove Respondent operated any vessel. Thus, the Third Specification was **NOT PROVED**.

Specification 4: Refusal to provide a urine specimen

The Fourth Specification alleges that Respondent committed Misconduct by refusing to provide a urine specimen when ordered to do so by paramedic Mr. Hank Savin. Thus, the question is presented whether Respondent had a duty to provide a urine specimen.

Unfortunately, the Specification does not identify which "formal, duly established rule," Respondent violated for the purposes of 46 C.F.R. §5.27. (The court cannot over-emphasize the legal and procedural difficulty posed by the Coast Guard's pleading.)

Once again, the court and Respondent are left to guess which "rule" the Coast Guard intends.

a. 33 C.F.R. Part 95?

Title 33 C.F.R. §95.035 specifies that: "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." The regulation further specifies that reasonable cause exists when: "The individual is suspected of being in violation of the standards in . . .§95.020." (emphasis added).

Section 95.020 says that an individual is under the influence of alcohol when that "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 of behavior is apparent by observation."

Title 33 C.F.R. §95.040(b) specifies that that if an individual refuses to submit to or cooperate in the administration of a timely chemical test, when directed by a marine employer, based upon reasonable cause, evidence of that refusal is admissible in an administrative hearing. However, the regulation does not specify any sanction for a mariner's failure to provide a chemical test sample.

Taken together 33 C.F.R. Part 95 requires the Coast Guard to prove:

1. Respondent was operating a vessel, and

2. Reasonable cause existed to believe Respondent was intoxicated; and,

3. Respondent's marine employer directed Respondent to submit to a chemical test; and,

4. Respondent failed to submit to or failed to cooperate in the administration of that test.

Because of the unique facts of this case, the court must examine each element separately.

1. <u>Respondent "operating" a vessel</u>

As in the Third Specification, the court must address the question whether Respondent was "operating" a marine vessel.

The testimony reveals that on February 18, 2012, Respondent was on the Galliano facility as a licensed engineer. (Tr. Vol. III at 38 – 39). On that day, Respondent had been housed by his employer on an inoperative vessel, the FAST BULLET while he awaited his transfer to another, fully operational OSV, the C-FIGHTER. (Tr. Vol. I at 103, 131).

At all relevant times, the FAST BULLET was deemed a "stacked" vessel; that is, a vessel not currently in service, moored to a fixed structure like a dock and used for temporary crew housing; a floating hotel. (Tr. Vol. I at 102 – 103, 129). The evidence revealed that the FAST BULLET was a non-operational vessel because of a "bent drop-down thruster." (Tr. Vol. I at 127).

Galliano Captain Roger Kunkle testified that, at all relevant times, Respondent was a "passenger" aboard the FAST BULLET; that he had not been assigned a "watch;" that he had not been assigned any duties; and that he was not a part of the crew. (Tr. Vol. III at 14).

Title 33 C.F.R. §95.015 specifically provides:

> For purposes of this part, an individual is considered to be operating a vessel when:

> (b) The individual is a crewmember (including an officer), pilot, or watchstander not a regular member of the crew, of a vessel other than a recreational vessel.

The proof at the hearing suggests only that Respondent was waiting to join the crew of the C-FIGHTER. No fact was adduced that Respondent was more than a crewmember-in-waiting. He performed no duties, engineering or otherwise, as he waited ashore for the C-FIGHTER. (Tr. Vol. III at 14).

The Commandant's guidance in Appeal Decision 2551 (LEVENE) (1993) says:

> Section 95.045 plainly states, "[w]hile on board a vessel inspected … under Chapter 33 of Title 46 United States Code, a crewmember (including a licensed individual) … (b) Shall not be intoxicated at any time …." Absent knowledge of the individual's blood alcohol content, intoxication for the purposes of 33 C.F.R. §95.045(b) is established only when it is proved that the individual was operating the vessel and the effect of the intoxicant was "apparent by observation." 33 C.F.R. §95.020. For the purposes of these regulations, however, evidence of Appellant's status as crewmember of an inspected vessel, is also conclusive evidence that Appellant was "operating the vessel". 33 C.F.R. §95.015. Thus, a violation of 33 C.F.R. §95.045(b) is established by evidence that the individual was on board an inspected vessel, that he was a crewmember, and that the effect of intoxicant was "apparent by observation."

Id. (emphasis added).

Other Commandant's Decisions on Appeal, 2669 (LYNCH) (2007); 2524 (TAYLOR) (1991); and 2505 (TAYLOR) (1990), all seem to require, at the very least, Respondent's physical presence aboard the vessel he is charged with operating. Appeal Decision 2299 (BLACKWELL) (1983) seemingly adds the requirement that: "A person may be said to be operating a boat by controlling its movements . . .The term can have many meanings depending upon the use, employment, or navigation of the vessel." Id.

Once more, the facts of this case are problematic for the Coast Guard.

Respondent was awaiting service aboard the inspected C-FIGHTER on February 18, 2012. Hence, Respondent was not aboard that vessel on February 18, 2012. Absent clear

guidance from the Commandant to the contrary, this court cannot find that Respondent was a crewmember aboard the C-FIGHTER for the purposes of either 33 C.F.R. §95.015, or the Third and Fourth Specifications of the Complaint. There is no evidence that Respondent was ever aboard, much less ever controlled, the C-FIGHTER – directly or indirectly.

By contrast, Respondent had been temporarily assigned a berth aboard the FAST BULLET[15], a moored, non-operational vessel with a "bent drop-down thruster" used for temporary crew housing. (Tr. Vol. I at 102 – 103, 127 – 129).

The evidence produced by the Coast Guard did not prove Respondent was actually aboard the non-operational, moored vessel FAST BULLET at any time he was intoxicated. To the contrary, Respondent appeared to have become intoxicated away from the vessel; hence, his unfortunate encounter with the security gate guard, Ms. Adams, as he attempted to enter the C-Port facility. (CG Ex. 5). The testimony of Messrs. Bourgeois and Savin suggest Respondent had, on the evening of February 18, 2012, been everywhere but aboard the FAST BULLET (including in the bayou itself).

The evidence is insufficient to establish he was ever actually aboard the FAST BULLET (much less that he participated in its actual operation or control) during the time he was so clearly intoxicated. Hence, the court cannot conclude that Respondent was a crewmember of the FAST BULLET for the purposes of the regulation.

Because the Coast Guard did not prove that Respondent was "operating any vessel," it could not prove an essential element of 33 C.F.R. §95.020.

2. Reasonable cause to believe Respondent was intoxicated

Read together, 33 C.F.R. §95.020(c) and §95.035 say that reasonable cause to believe a person is under the influence of alcohol exists when the individual is operating the vessel and the

[15]The Coast Guard did not establish whether the FAST BULLET was an inspected vessel by testimony or documentary evidence.

effect of the intoxicant consumed by the individual is established by observation of the suspected person's manner, disposition, speech, muscular movement, general appearance of behavior.

As indicated, supra, the court is satisfied that the personal observations of Ms. Adams, Mr. Bourgeois, Captain Kunkle and Mr. Savin warrant a finding that on February 18, 2012, Respondent was intoxicated by the consumption of alcohol and was so severely impaired that he had lost control of his bodily functions.[16] Hence, reasonable cause existed to believe that Respondent was under the influence of intoxicants.

3. Respondent's marine employer directed Respondent to submit to a chemical test

Mr. Savin, the paramedic, testified that on the night of February 18, 2012, he conferred with his "boss," a Mr. Billy Pellegrin, identified as the Edison "employee representative."(Tr. Vol. I at 72 – 73). Mr. Savin then explained: "I advised Billy that we had a possible mariner that could be possibly intoxicated that fell off the dock into the water. I needed to get him back to my hospital, let him know what was going on. He readvised me to go ahead and get a breathalyzer on him." (Tr. Vol. I at 73) (sic).

Mr. Savin testified that Mr. Pellegrin was his "boss," and further testified that Mr. Pellegrin is "is the [Edison] HFC manager . . . He's the safety manager." (Tr. Vol. I at 74). The court finds that Mr. Pellegrin's status as "safety manager" qualifies him as a person of appropriate authority, i.e., Respondent's "marine employer," to direct that a breathalyzer test be performed on Respondent's urine sample. 33 C.F.R. §95.035.

The analysis presented under 33 C.F.R. Part 95 describes a "chemical test" as one which analyzes an individual's breath, blood, urine, saliva and/or other bodily fluids. But the distinction between a breathalyzer and a urinalysis is crucial in this case.

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[16]The witnesses' personal observations are buttressed by the two breathalyzer test results, supra.

The court pays particular attention to Mr. Savin's testimony: that Mr. Pellegrin specifically directed him to perform a breathalyzer test on Respondent. (Tr. Vol. I at 73). The Coast Guard did not present any evidence why Mr. Savin attempted to collect a urine sample when his boss, Mr. Pellegrin, had directed him to perform a breathalyzer test. The evidence suggests Mr. Savin acted on his own initiative, without authority, when he attempted to collect a urine sample from Respondent.

Title 46 C.F.R. §16.500(a)(2) specifies that the urinalysis/alcohol testing provisions of 49 C.F.R. Part 40 are inapplicable to the Coast Guard or marine employers. This distinction is important, because 49 C.F.R. Part 40 describes the collection and testing of human urine for the purposes of detecting drugs. By operation of 46 C.F.R. §16.500(a)(2), the urine collection and testing procedures described in 49 C.F.R. Part 40 cannot be employed for the analysis of alcohol.

Mr. Savin, a paramedic, was neither Respondent's supervisor nor his marine employer and thus, had no authority to order any "chemical test" as that term is used in 33 C.F.R. Part 95. Moreover, it is doubtful that even Mr. Pellegrin (or any marine employer) could order Respondent to submit to a urinalysis "chemical test" to detect alcohol in a mariner's system, per the direct guidance of 46 C.F.R. §16.500(a)(2).

Thus, Respondent's "marine employer" could not direct Respondent to submit a urine sample for analysis. Accordingly, Respondent had no duty to submit a urine sample. Thus, his "failure" to provide one cannot be described as "Misconduct" for the purposes of 46 C.F.R. §5.27.

4. Respondent failed to submit to or failed to cooperate in the administration of the test

The analysis presented under 33 C.F.R. Part 95 describes a "chemical test" as one which analyzes an individual's breath, blood, urine, saliva and/or other bodily fluids. If the charge of Misconduct in Specification 4 is defined by 33 C.F.R. Part 95, then Respondent complied with

his marine employer's direction to submit to a "chemical test," because he successfully submitted to two breathalyzer tests.

The evidence revealed that on February 18, 2012, paramedic Savin administered two breathalyzer tests to Respondent. On the first test, Respondent's sample produced in a blood alcohol concentration level of .154. On the second test, Respondent's sample produced a blood alcohol concentration level of .162. Both results exceeded the blood alcohol concentration level of .08 specified in 33 C.F.R. §95.020. (Tr. Vol. I at 55 – 68; Tr. Vol. III at 57 – 62; CG Ex. 1).

But does 33 C.F.R. Part 95 require Respondent to provide a urine sample as well? Title 46 C.F.R. §16.500(2) plainly says it cannot.

In sum, the Coast Guard did not plead, nor did it establish, that Respondent had a duty to provide a urine specimen for alcohol testing under the provisions of 33 C.F.R. Part 95. Additionally, the Coast Guard did not prove Respondent was operating a vessel; a necessary element of the proof of reasonable cause required in 33 C.F.R. §95.035 and 33 C.F.R. §95.020(b) and (c). Finally, the Coast Guard did not establish that Respondent's "marine employer" directed Respondent to submit to a urinalysis/chemical test. The evidence does establish, however, that the Respondent did obey his employer's direction to submit to a breathalyzer test.

Accordingly, if the Coast Guard intended that 33 C.F.R. Part 95 serve as the "rule" for a charge of Misconduct in the Fourth Specification, the Coast Guard failed to prove Respondent violated that "rule."

b. 46 C.F.R. Part 16?

Title 46 C.F.R. Part 16 provides for chemical testing by urinalysis, if a maritime employer has "reasonable cause" to believe a mariner has used a "dangerous drug." Section 16.250 specifically permits an employer to direct a mariner to submit to a urine sample chemical test . . . and the mariner's failure would serve as the basis for a charge of Misconduct under 46 C.F.R. §5.27 and 46 C.F.R. §16.205. In short, if a maritime employer has reasonable suspicion

to believe a mariner has used a dangerous drug, that employer may order the mariner to provide a urines specimen for testing.

In this case, however, the Coast Guard did not present any evidence that suggested Respondent's marine employer had a reasonable suspicion of dangerous drug use by Respondent. (The record is devoid of any reference to a suspicion of drug use.) Thus, neither Respondent's marine employer, nor paramedic Savin (acting on his own accord), were entitled to order Respondent to submit a urine specimen for chemical testing for drugs. Hence, Respondent had no duty to provide a urine specimen per 46 C.F.R. Part 16 for the purposes of the Fourth Specification.

c. Galliano Drug and Alcohol Policy?

A third alternative "rule" establishing Respondent's duty provide a urine specimen (for the purposes of 46 C.F.R. §5.27) might be Respondent's marine employer's alcohol policy. Here, the Coast Guard plainly failed to plead the Galliano policy as the basis for the "rule" contemplated by 46 C.F.R. §5.27.

The use of an employer's policy, manual or directive raises a question of long-standing: Whether a marine employer's policy, manual or directive constitutes a "formal, duly established rule," the violation of which constitutes "Misconduct" as that term is defined in 46 C.F.R. §5.27?

The Commandant has never squarely addressed that question. However, in a recent Appeal Decision 2701 (CHRISTIAN) (2013), the Vice Commandant affirmed the notion that "a company policy as to conduct of the crew, relative to matters of safety aboard the ship, is a good norm for judging misconduct." There, the Vice Commandant went on to conclude that a policy "regarding the use of intoxicants present in an employee's system has a clear nexus to vessel safety and thus provides a valid basis for judging misconduct."

The court notes with particularity that Respondent did not object the Coast Guard's failure to identify the "rule" upon which the charge of Misconduct was based, in Specification 4.

This omission is material, because, as the Vice Commandant said in Appeal Decisions 2400 (WIDMAN) (1985), and 2386 (LOUVIERE) (1985), "Any challenge to the adequacy of a specification must be raised at the hearing rather than for the first time on appeal." Moreover, in Appeal Decision 2512 (OLIVIO) (1990), the Vice Commandant noted that even in cases where a specification was legally insufficient, "it is clear that Appellant understood the charges and the context in which they arose, and thus cannot be heard now to complain of their insufficiency."

On its own motion, however, the court raised concerns about the relevance of the Galliano "Drug and Alcohol Free Work Environment Policy" (CG Ex. 3), because the Coast Guard did not reference that drug policy as the "rule" allegedly violated in Specification 4. (Tr. Vol. III at 34). The court was eventually satisfied, however, that the Coast Guard laid an appropriate foundation for the document, and accounted for the relationship between Galliano and Edison and, thus establishing relevancy.[17] Of greater importance, however, the court is satisfied that the Respondent understood the significance of the Galliano policy (CG Ex. 3), in light of Specification 4 and defended accordingly. (Tr. Vol. III at 32 – 49).

Coast Guard Exhibit 3 is the Galliano "Drug and Alcohol Free Work Environment Policy." That policy provides:

> The company may also require any current employee to submit to a urinalysis . . .for . . .alcohol in the following circumstances: (2) whenever there is reasonable suspicion to believe than an employee is using . . . alcohol in violation of the company's policy. Failure to submit to the . . . alcohol tests . . . will result in disciplinary action, up to and including termination. (emphasis added)

(CG Ex. 3)

[17]Coast Guard Exhibit 3 was admitted over Respondent's objection. (Tr. Vol. III at 45).

But what is the Galliano "policy?" [18] A close examination of CG Ex. 3 reveals this curious (verbatim) statement: "Additionally, the company strictly prohibits any person with any detectible amount of alcohol, drugs, or controlled substances present in his or her body." (sic)

The "policy" simply doesn't say "what" any such person is prohibited from doing.

That literary conundrum aside, this case is further complicated by the fact that it was paramedic Hank Savin, who, apparently on his own initiative, attempted to collect a urine specimen from the Respondent. Recall that the Galliano drug policy specifically says "The company may also require any current employee to submit to a urinalysis." (CG Ex. 3). Query: is a paramedic an appropriate person to direct an employee to submit to a urinalysis? The Galliano policy is silent, and the Coast Guard failed to elicit any testimony from any witness which might establish whether paramedic Savin was vested with appropriate authority to direct an employee to submit to a urinalysis.[19] Although not controlling, 33 C.F.R. §95.010 says that an "agent" of a "marine employer" may direct an employee to submit to a chemical test when that employee is reasonably suspected of alcohol intoxication. See 33 C.F.R. §95.035.

Absent legal authority to the contrary, the court presumes that paramedic Hank Savin was vested with a certain degree of professional discretion in the performance of his duties on the night of February 18, 2012. Although paramedic Savin's testimony was not thoroughly developed by the Coast Guard, it is reasonable to presume that once confronted with (an

[18]The Galliano policy seems at odds with the express provisions of 46 C.F.R. §16.500(a)(2), which specifies that the alcohol testing provisions of 49 C.F.R. Part 40, (i.e., urinalysis) are inapplicable to the Coast Guard or marine employers. If 46 C.F.R. §16.500 is an expression of public policy that the urinalysis testing procedures set forth in 49 C.F.R. Part 40 are inapplicable to maritime alcohol testing, how can a marine employer's policy require otherwise? Otherwise, stated, "Can a marine employer require or an employee that which is forbidden by regulation?" It is axiomatic that in American jurisprudence, when a contract violates public policy, as expressed in statute or regulation, it is void ab initio and will be treated as though no contract ever existed. See Paul Revere Life Ins. Co. v. Fima, 103 F. 3d 490 492 (9th Cir. 1977); United States v. Acorn Technology Fund, L.P., 295 F. Supp 2d 494 (E.D. Pa. 2003).

[19]The court turns to the provisions of 33 C.F.R. Part 95 for guidance. Although not controlling, that regulation does provide that only a "law enforcement officer or a marine employer" may order an employee to submit to a chemical test. Title 33 C.F.R. §95.010 then defines a "marine employer" as an "owner, managing operator, charterer, agent, master, or person in charge of a vessel."

impaired) Respondent and not knowing the complete cause of his obvious impairment, it would be reasonable for paramedic Savin to attempt to collect a urine specimen in an effort to determine the nature and extent of Respondent's medical condition.

Thus, if the Galliano drug and alcohol policy pertaining to urinalysis is an appropriate "rule" for the purposes of 46 C.F.R. §5.27, then Respondent clearly violated that rule. The evidence supports the conclusion that Respondent's employer had a reasonable suspicion of his intoxication. The evidence further supports the conclusion that Respondent failed to provide an adequate urine specimen; that, by his voluntary intoxication, he rendered himself unable to cooperate fully in the testing process. The employer's policy clearly put Respondent on advanced notice that he was subject to urinalysis in the event he was suspected of alcohol intoxication. Moreover, the same policy clearly informed Respondent of the consequences of his failure to submit to the testing.

Thus, for the reasons set forth above, the Fourth Specification was **PROVED**.

IV. SANCTION

The authority to impose sanctions at the conclusion of a case is exclusive to the ALJ. 46 C.F.R. §§5.567; 5.569(a); Appeal Decision 2362 (ARNOLD) (1984). The nature of this non-penal administrative proceeding is to "promote, foster, and maintain the safety of life and property at sea." 46 U.S.C. §7701; 46 C.F.R. §5.5; Appeal Decision 1106 (LABELLE) (1959).

The Coast Guard seeks revocation of Respondent's credential. In determining an appropriate sanction for offenses for which revocation is not mandatory, an ALJ should consider: any remedial actions undertaken by a respondent; respondent's prior records; and evidence of mitigation or aggravation. See 46 C.F.R. §5.569(b)(1)-(3).

Remedial Action: Respondent did provide any evidence of independent, remedial action undertaken by him which might mitigate the sanction here imposed. See 33 C.F.R. §5.569(b)(1). Specifically, Respondent offered the testimony of a Mr. Ray Odle. Mr. Odle is a twenty-five

year member of Alcoholics Anonymous and has known Respondent through that organization as his sponsor for the past year. (Tr. Vol II at 59).

Mr. Odle was generally supportive of Respondent and told the court that he (as a thirty-year commercial fisherman) would not "see any problems with" Respondent returning to sea duty work under his credentials. (Tr. Vol. II at 61 – 62).

Respondent's Prior Records: The Coast Guard did not provide any adverse information from Respondent's prior records.

Mitigation or Aggravation: The court takes particular note of the testimony of paramedic Hank Savin, whose discussion with Respondent proved insightful. Respondent admitted to paramedic. Savin "that when he gets home, he does have substance abuse, and he cleans out four or five days prior to him coming to work." (Tr. Vol. 1 at 71). This admission is compounded by another admission Respondent made to paramedic Savin. "He told me that he missed the flight [en route to C-Port] because they would not let him on the flight because he was intoxicated." (Tr. Vol. I at 71).

The court further notes the circumstantial evidence that on the night of February 18, 2012, Respondent was so intoxicated that he fell into the water near the vessel FAST BULLET. The court specifically recalls Mr. Bourgeois' testimony that, after the fall into the water, the clearly-intoxicated Respondent was "wet from head to toe, had a cut on his forehead, slurred speech, and one shoe." (Tr. Vol. 1 at 38).

Hence, Respondent is demonstrably dangerous to himself and unsafe to others. Despite Respondent's laudable participation in Alcoholics Anonymous, the Coast Guard's proof demonstrates that Respondent poses a present threat to safety at sea or on the waterways. Time, abstinence and intensive continued participation in Alcoholics Anonymous may alleviate that threat.

Therefore, based upon the record as a whole, the appropriate sanction is **REVOCATION** of Respondent's Merchant Mariner's Credential.

VI. CONCLUSION

For the foregoing reasons, I find the Coast Guard has **PROVED** its allegations that Respondent refused to provide a urine specimen as alleged in Specification 4.

WHEREFORE,

VII. ORDER

IT IS HEREBY ORDERED, that the Merchant Mariner's Credential issued by the U.S. Coast Guard to Austin Ryan Gore is **REVOKED**.

I**T IS FURTHER ORDERED**, that Respondent Austin Ryan Gore is hereby prohibited from serving aboard any vessel requiring a Merchant Mariner's Credential issued by the U.S. Coast Guard.

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

Bruce Tucker Smith
Administrative Law Judge
US Coast Guard

Date: September 05, 2013

ATTACHMENT A_ – EXHIBIT & WITNESS LIST

COAST GUARD EXHIBITS

1. US DOT ALCHOHOL TESTING FORM
2. CERTIFICATE OF INSPECTION
3. DRUG AND ALCOHOL POLICY
4. EVANS CV
5. ADAMS' WITNESS STATEMENT
6. CONE CV

COAST GUARD WITNESSES

1. Harold J. Dufrene, Jr.
2. Jeremy J. Bourgeois
3. Hank Savin
4. Roddy J. Pitre
5. Mike Jarreau
6. Amy Lynn Evans
7. Roger Kunkle
8. Laverne Reed
9. Edward Conde

RESPONDENT EXHIBITS

A. WITHDRAWN BY COUNSEL
B. HYATT STATEMENT

RESPONDENT WITNESSES

1. Ray A. Odle

ALJ EXHIBITS

I. Respondent's MMC

ATTACHMENT B – NOTICE OF ADMINISTRATIVE 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 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.