

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

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UNITED STATES COAST GUARD

Complainant

vs.

CARROL GENE HEICK

Respondent

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Docket Number 2013-0149  
Enforcement Activity No. 4567248

**DECISION AND ORDER**  
**Issued: November 06, 2013**

**By Hon. Parlen L. McKenna**

**Appearances:**

**MCPO Bryan L. Sines**  
**Sector Los Angeles/Long Beach**

**For the Coast Guard**

**CARROL GENE HEICK, Pro se**

**For the Respondent**

The United States Coast Guard (Coast Guard) brought this proceeding against Respondent Carrol Gene Heick's Merchant Mariner Document pursuant to 46 U.S.C. § 7703(1)(A) and Coast Guard regulations found at 46 C.F.R. Part 5. The case was conducted under the Administrative Procedure Act (5 U.S.C. § 551 et seq.) and the Coast Guard's procedural and evidentiary rules found at 33 C.F.R. Part 20.

The Coast Guard sought to revoke Respondent's Coast Guard-issued credential for an alleged violation of law or regulation. See 46 U.S.C. § 7703(1)(A); 46 C.F.R. § 5.33.

Specifically, the Coast Guard alleged that Respondent violated 33 C.F.R. § 95.045 while serving as an able-bodied (AB) seaman on the M/V MAUNALEI on or about March 22, 2013 by being intoxicated and then refusing to take a reasonable cause alcohol test.

Respondent admitted at the hearing that he was intoxicated as alleged by the Coast Guard and that he refused to take the alcohol test when ordered by the vessel's Master because he was over the limit and would not have passed such a test. However, Respondent essentially argued that his refusal should be excused because he had injured his back prior to departing port and was self-medicating the pain with alcohol.

After carefully reviewing the record evidence, I find the Coast Guard has proven its allegations by a preponderance of the evidence. Respondent violated 33 C.F.R. § 95.045 and thus 46 U.S.C. § 7703(1)(A). Therefore, for the reasons given in this Decision and Order, the allegations against Respondent are found **PROVED** and Respondent's Coast Guard-issued credential is **SUSPENDED** for a period of **SIXTEEN (16) MONTHS, TWELVE (12) MONTHS OUTRIGHT**, with **FOUR (4) MONTHS REMITTED** on **TWELVE (12) MONTHS PROBATION**.

## I. PROCEDURAL BACKGROUND

On April 22, 2013, the Coast Guard filed a Complaint under the authority of 46 U.S.C. § 7703(1)(A) and 46 C.F.R. § 5.33. The Coast Guard alleged the following factual allegations:

1. On March 22, 2013, Respondent was acting under the authority of his Merchant Mariner Credential while serving as an Able Bodied Seaman (AB) while on board the M/V MAUNALEI.
2. On March 22, 2013, at approximately 1300 hours, Respondent failed to attend a scheduled fire and boat drill.
3. The Chief Mate (Richard Thomas) found Respondent in his room lying in bed.

4. The Chief Mate (Richard Thomas) and Second Mate (Katherine Bowman) observed Respondent's actions and speech patterns consistent with intoxication. Two empty bottles of alcohol were also found in Respondent's room.
5. The Master (Frank Reed) ordered Respondent to take a Reasonable Cause Alcohol Test.
6. Respondent refused to take the alcohol test.
7. The Respondent was in violation of 33 CFR 95.040.

The Coast Guard proposed revocation as the appropriate sanction for Respondent's alleged violation.

On April 24, 2013, Respondent filed an Answer denying all jurisdictional and factual allegations. Respondent raised no affirmative defenses.

On May 1, 2013, this case was assigned to me for review and disposition. On May 3, 2013, I issued a Scheduling Order and Notice of Hearing for a hearing to take place on May 3, 2013 in Long Beach, California.

On June 21, 2013, the Coast Guard filed an Amended Complaint. The Amended Complaint: 1) corrected the reference to Respondent's Merchant Mariner Credential; 2) modified factual allegation #3 to read: "The Chief Mate (Richard Thomas) found Respondent in his room slouched in his desk chair appearing to be asleep or unconscious"; 3) modified factual allegation #7 to read: "The Respondent was in violation of 33 CFR 95.045"; and 4) added a factual allegation #8 as follows: "In aggravation: On November 22, 2004, Respondent had his Merchant Mariner Document suspended outright for 9 months." The Amended Complaint also stated that Respondent was ordered to complete an alcohol-addiction program and attend an alcohol-abuse monitoring program, as reflected in a Consent Order approving this Settlement Agreement on November 2, 2004.<sup>1</sup>

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<sup>1</sup> Respondent did not file an Answer to the Amended Complaint. The Motion to Amend the Complaint was discussed at the hearing. As a result, the Coast Guard's Motion to Amend the Complaint was granted without objection

On June 24, 2013, the Coast Guard filed its Notice of Expected Witnesses and Exhibits. On July 11, 2013, the hearing took place as scheduled in Long Beach, California. The Coast Guard presented the testimony of 4 witnesses (one by deposition admitted into evidence) and offered 17 exhibits into evidence. Respondent testified in his own behalf; was assisted by his wife, Mrs. Charlene Dean Heick, who also testified; and offered 6 exhibits into evidence. The witnesses who testified at the hearing and the exhibits entered into evidence are identified in **Attachment A**. At the close of the hearing, both parties elected not to submit post-hearing briefs (including proposed findings of fact and conclusions of law) and decided to rest upon the existing record. See Tr. at 104:2-11.<sup>2</sup>

This Decision and Order, including all findings of fact and conclusions of law, is based upon my analysis of the entire record, applicable statutes, regulations and case law. Each exhibit entered, although perhaps not specifically mentioned in this Decision, has been carefully examined and given thoughtful consideration.

## II. FINDINGS OF FACT

- 1) At all relevant times herein, Respondent was the holder of a Coast Guard-issued merchant mariner credential. Tr. at 75:14-76:19; Resp. Exh. A.
- 2) The M/V MAUNALEI is U.S.-registered flag vessel subject to inspection by the Coast Guard. The manning requirements for this vessel require six able bodied seamen. CG Exh. 11.
- 3) The M/V MAUNALEI is owned and operated by Matson Navigation Company, Inc. (Matson). Id.
- 4) Respondent worked for Matson and occupied one of the credentialed, AB positions on the M/V MAUNALEI during a voyage that began in the Port of Long Beach, California on March 19, 2013. Tr. at 41:1-16; 54:8-11; 90:8-16; CG Exh. 9.
- 5) Respondent had worked consistently for Matson between 1999 and 2012 without incident. Tr. at 29:1-10.

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<sup>2</sup> References to the transcript take the form of “Tr. at [page #:line#]” and references to the parties’ exhibits are “CG Exh. [#]” for the Coast Guard’s exhibits and “Resp. Exh. [#]” for Respondent’s.

- 6) Captain Frank Reed had been the Master on board the M/V MAUNALEI for three years at the time of the hearing. Tr. at 32:9-12.
- 7) Captain Reed was serving as the Master on board the M/V MAUNALEI during all times relevant to this proceeding. Tr. at 32:13-15; CG Exhs. 5, 9.
- 8) Mr. Richard Thomas served as the M/V MAUNALEI's Chief Mate during all times relevant to this proceeding. CG Exhs. 3, 13, 17.
- 9) Ms. Katherine Bowman served as the M/V MAUNALEI's Second Mate during all times relevant to this proceeding. Tr. at 53:17-22; CG Exhs. 4, 14.
- 10) Ms. Bowman's duties included serving as the vessel's medical officer. Tr. at 53:23-54:4.
- 11) On March 18, 2013, Respondent alleged that he injured his back while helping load the M/V MAUNALEI in the Port of Long Beach. Tr. at 13:23-14-11; 15:23-16:2; 16:19-23; Resp. Exh. C.
- 12) Respondent returned home that evening after allegedly injuring his back, but nevertheless reported for duty before the M/V MAUNALEI left port on March 19, 2013. Tr. at 16:24-17:5.
- 13) Respondent admitted that he began drinking alcohol on the second day of the voyage, i.e., on March 20, 2013. Tr. at 13:23-14:11.
- 14) On March 21, 2013, Respondent did not report for duty and the Chief Mate went to Respondent's room. Tr. at 39:3-15; 40:10-20; CG Exh. 12; 17.
- 15) The Chief Mate questioned Respondent as to why he did not report for duty and informed Captain Reed that Respondent looked like he was tired and possibly hung over. The Captain decided not to give Respondent a breathalyzer test that day. Instead the Captain had the Chief Mate give him a warning letter for not reporting for duty. Tr. at 39:15-40:5; CG Exhs. 12, 17.
- 16) At no time during the interview with the Chief Mate did Respondent mention his back injury. Tr. at 40:6-9; CG Exh. 17 at 17.
- 17) Respondent admitted that he did not report for duty on March 21, 2013. Respondent stated that his failure to report was not due to his alcohol use, but insisted was due to his back injury. Tr. 99:9-21.
- 18) On March 22 at 13:00, the M/V MAUNALEI conducted its regularly scheduled fire emergency drill. Tr. at 32:16-21.
- 19) Respondent did not report for the drill as required. Tr. at 54:12-17; 91:1-6.
- 20) During the hearing, Respondent admitted that he was drinking alcohol on March 21, 2013. Tr. at 98:4-8.

- 21) Respondent claimed that he called the bridge before the fire and boat drill and informed the captain that he felt like he was having a heart attack. Tr. at 14:12-15.
- 22) Following muster for the drill, Captain Reed was informed that Respondent did not appear for the drill. Tr. at 33:2-3.
- 23) Captain Reed ordered the Chief Mate to go to Respondent's room to check on Respondent. Tr. at 33:3-4; CG Exh. 17.
- 24) The Captain was told that Respondent was found in his room, appeared to be intoxicated and was complaining of chest pain. Tr. at 33:5-7.
- 25) Captain Reed then dispatched the medical response team, led by the Second Mate, to evaluate Respondent. Tr. at 33:8-10; CG Exh. 17.
- 26) The Second Mate went to Respondent's room and found him unresponsive and unconscious. Tr. at 54:17-21; CG Exh. 14.
- 27) The crew discovered two empty bottles of liquor next to Respondent on the floor of his room. Tr. at 55:25-56:3; 94:24-95:4; CG Exh. 17.
- 28) The Second Mate checked Respondent's vitals and determined that he was not having a heart attack. Tr. at 56:8-15.
- 29) Captain Reed eventually ordered the Chief Mate to administer a QED saliva test for alcohol. Tr. at 33:14-34:1.
- 30) The Captain was told by both the Chief Mate and the Second Mate that Respondent refused to take the alcohol test. In so doing, Respondent stated that he was way over the limit and would not pass such a test. Tr. at 34:3-18; see also CG Exhs. 14, 17 at 14; Tr. at 55:4-15; 55:19-21.
- 31) The Captain then had the union delegate report to Respondent's room and Respondent was asked if he would take the test with the delegate standing by, to which Respondent refused. Tr. at 34:20-35:1.
- 32) During the hearing, Respondent admitted that he had used alcohol prior to the drill and that it was a violation of company policy to do so. Tr. at 15:14-19.
- 33) Respondent tried to excuse his alcohol use by saying that he wanted to get back to work and thought drinking the alcohol might kill the pain from his back injury. Tr. at 15:19-21; 94:17-23.
- 34) Respondent did not want to let anyone on the vessel know he was hurt because he wanted to stay on the ship and did not want to be terminated. Tr. at 84:18-22; 103:14-15.
- 35) Captain Reed did not receive any reports of Respondent injuring his back prior to him refusing to take the alcohol test. CG Exh. 10; Tr. at 37:6-38:17.

- 36) Respondent did not report his injury to the Second Mate until the after he failed to report for the boat drill. Tr. at 58:22-59:10; 63:23-64:6.<sup>3</sup>
- 37) After failing to report for the fire drill, Respondent made a statement of injury describing his injury on March 18, 2013. The Second Mate Respondent's written statement. CG Exh. 15.
- 38) When the M/V MAUNALEI arrived in Hawaii on the March 24, 2013, Matson terminated Respondent's employment for cause due to intoxication and he was removed from the vessel. Tr. at 16:11-16; 36:24-37:5.
- 39) On March 25, 2013, Respondent visited a doctor in Hawaii and was diagnosed with back pain/injury. Tr. at 16:17-18; Resp. Exhs. C, D, E.
- 40) Respondent was diagnosed with lumbar radiculopathy spinal stenosis and lumbar spine chronic low-back pain, with severe work restrictions such as no standing; no climbing ladders; no using of scaffolding; not lifting, carrying, or pulling greater than 5 lbs. Tr. at 18:19-25; Resp. Exh. E.
- 41) Respondent has filed for total disability with the state disability fund. Tr. 19:11-14.
- 42) Ms. Dale MacGillivray worked as Matson's offshore labor relations manager for approximately seven years at the time of the hearing. Tr. at 21:7-18.
- 43) Ms. MacGillivray's job duties include addressing day-to-day grievances between the company and offshore unions; collective bargaining negotiations; and responding to labor issues on the company's vessels, including the M/V MAUNALEI. Tr. at 21:19-22:9.
- 44) Matson's usual process involving the discharge of a mariner is for the captain of the vessel to send the termination documentation to Ms. MacGillivray prior to adverse action being taken. Tr. 22:10-17.
- 45) In Respondent's case, Ms. MacGillivray did not receive the paperwork prior to Respondent being discharged off the vessel as Respondent refused to take an alcohol/drug test and Matson policy did not require her to be informed of such action. Tr. at 22:18-24; CG Exh. 1.
- 46) Paragraph 4.1.1 of Matson's company policy concerning intoxicated crew members states that Matson enforces the standards of intoxication required by 33 C.F.R. § 90.020. Tr. at 23:6-19; CG Exh. 1.

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<sup>3</sup> Respondent's version of the Warning Letter (see Resp. Exh. B) is signed as of March 22, 2013 and has an explanation that his back was injured. However, it is not credible that Respondent signed this document prior to the fire/boat drill given the consistent testimony of the Captain, the Chief Mate and the Second Mate that: 1) Respondent did not sign the Warning Letter when it was presented to him and 2) he made no report of his back injury prior to the fire drill on the 22<sup>nd</sup>.

- 47) Under Paragraph 4.4 of that policy, crewmembers must report anyone suspected of being intoxicated to their superiors; the crewmember is relieved of all duties until a QED saliva test is conducted; and the results of the test return negative. Tr. at 24:13-24; CG Exh. 1.
- 48) Under Paragraph 4.7 of that policy, a crewmember failing the QED test (or refusing to take the QED test) shall be relieved of duty and terminated if in port or terminated upon arrival at the next port of call. Tr. at 24:25-25:11; CG Exh. 1.
- 49) Respondent admitted that he had previously been subject to a settlement agreement, approved by a consent order on November 2, 2004 regarding alcohol addiction. Tr. at 95:16-24; see also CG Exh. 16.

### III. DISCUSSION

#### A. Jurisdiction

The Coast Guard brought charges against Respondent under the authority of 46 U.S.C. § 7703(1)(A), which provides:

A license, certificate of registry, or merchant mariner's document issued by the Secretary may be suspended or revoked if the holder . . . when acting under the authority of that license, certificate, or document . . . has violated or fails to comply with this subtitle, a regulation prescribed under this subtitle, or any other law or regulation intended to promote marine safety or to protect navigable waters

Alleged violations of 46 U.S.C. § 7703(1)(A) are thus “acting under the authority” offenses in that the mariner needs to have been acting under the authority of his credentials in order to be subject to the Coast Guard's jurisdiction at the time of the alleged offense. See also 46 C.F.R. § 5.35 (providing that for alleged violations of 46 U.S.C. § 7703, the complaint “must state the specific statute or regulation by title and section number, and the particular manner in which it was allegedly violated.”).

Under the applicable regulations, a person employed in the service of a vessel is considered to be acting under the authority of a license, when holding such license is required by law or regulation, or required by an employer as condition for employment. Appeal Decision 2550 (RODRIQUES) (1993) (citing 46 C.F.R. § 5.57). Here, it is uncontested that Respondent is the holder of a Coast Guard-issued merchant mariner credential and was serving as an Able

Bodied Seaman pursuant to such document on the M/V MAUNALEI at all relevant times. See Resp Exh. A; Tr. at 90:8-16. Jurisdiction is thus established.

## **B. Burden and Standard of Proof**

Under the Coast Guard's Rules of Practice, Procedure, and Evidence, the party that bears the burden of proof shall prove their case by a preponderance of the evidence. 33 C.F.R. § 20.701. In these proceedings, the Coast Guard bears the burden of proof, except with respect to any affirmative defenses raised by a respondent, who then bears the burden. 33 C.F.R. § 20.702.

A preponderance of the evidence is generally defined as:

The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other. This is the burden of proof in most civil trials, in which the jury is instructed to find for the party that, on the whole, has the stronger evidence, however slight the edge may be.

Black's Law Dictionary (9th ed. 2009). "Thus, a party proves a fact by a preponderance of the evidence when he proves that the fact's existence is more likely than not." Greenwich Collieries v. Director, Office of Workers' Compensation Programs, 990 F.2d 730, 736 (3d Cir. 1993).

## **C. Violations of 33 C.F.R. § 95.045**

Title 33 C.F.R. Part 95 generally prohibits operating a vessel while under the influence of alcohol or a dangerous drug. That Part applies to vessels operated on waters subject to the jurisdiction of the United States; to vessels owned in the United States and operated on the high seas; and to those vessels inspected or subject to inspection under Chapter 33 of Title 46 United States Code. 33 C.F.R. § 95.005. An individual is considered "operating a vessel" when the individual is a crewmember (including an officer), pilot, or watchstander of a vessel other than a recreational vessel. 33 C.F.R. § 95.015.

Evidence of a respondent's status as a crewmember of an inspected vessel is thus conclusive evidence of operating the vessel for Section 95.015's purposes. Appeal Decision 2551 (LEVENE) (1993), aff'd sub nom. Kime v. Levene, NTSB Order No. EM-177, 1994 WL 475808 (NTSB 1994). The vessel need not be underway; nor is a crewmember required to be working at the time observations of intoxication are made. Appeal Decision 2624 (DOWNS) (2001). Here, the M/V MAUNALEI was an inspected U.S. registered flag vessel, and it is undisputed that Respondent was serving as a crewmember on that vessel during all relevant times. See CG Exh. 11. Therefore, Respondent was subject to 33 C.F.R. Part 95's restrictions on the use of alcohol.

An individual is considered "under the influence of alcohol" for non-recreational vessels when the individual has a Blood Alcohol Concentration .04 percent by weight or more in their blood or the "effect of intoxicant(s) consumed by the individual on the person's manner, disposition, speech, muscular movement, general appearance or behavior is apparent by observation." 33 C.F.R. § 95.020. Acceptable evidence of an operator's intoxication includes, but is not limited to, personal observation of the individual's manner, disposition, speech, muscular movement, general appearance, behavior, or the results of a chemical test. 33 C.F.R. § 95.030.

A marine employer may direct an individual operating a vessel to undergo a chemical test when reasonable cause exists. 33 C.F.R. § 95.035. "Reasonable cause" exists if the individual was either involved in the occurrence of a marine casualty or is suspected of being in violation of §§ 95.020 or 95.025. Id. When practicable, the marine employer should base its determination to order a reasonable cause test on observation by two individuals. Id.

Under 33 C.F.R. § 95.040(b), refusing to submit to or cooperate in the timely administration of a chemical test ordered by a marine employer based on reasonable cause is admissible as evidence of intoxication in any administrative proceeding. See Appeal Decision LEVENE, supra (noting that Section 95.040(b) is “evidentiary in nature and not proscriptive [and] [o]ne cannot violate a regulation which merely prescribes a rule of evidence”).

The determination as to whether reasonable cause exists to support a request for the administration of chemical testing is a factual determination made by the judge based upon all the evidence available. Appeal Decision 2672 (MARSHALL) (2007) (citing Appeal Decisions 2625 (ROBERTSON) and 2624 (DOWNS)); see also Appeal Decision 2666 (SPENCE) (2007).

For a violation of 33 C.F.R. § 95.045(b) to be proven under these circumstances, the Coast Guard must establish that Respondent was on board an inspected flag vessel, that he was a crewmember of that vessel, and that the effect of intoxicant was “apparent by observation” or evidenced through the results of a lawful chemical test. Appeal Decision LEVENE, supra. As discussed above, Respondent was unquestionably serving a crewmember aboard M/V MAUNALEI, a U.S. inspected flag vessel. The Coast Guard also proved by a preponderance of the evidence: 1) that Respondent refused to submit to a reasonable cause alcohol test and admitted that he was over the limit and 2) that the Master’s request was based upon the observation of at least two other crewmembers with Respondent’s use of alcohol both apparent and admitted.<sup>4</sup>

Specifically, the record reveals that Respondent did not report for a required boat and fire drill on March 22, 2013. Tr. at 54:12-17; 91:1-6. When the Chief Mate found Respondent in his cabin, Respondent was unresponsive. CG Exh. 17. The Captain therefore ordered a medical

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<sup>4</sup> Furthermore, as discussed above, Respondent’s refusal of the alcohol test constitutes evidence of his intoxication under 33 C.F.R. § 95.040(b).

response team to attend Respondent. Tr. at 33:8-10. The Second Mate attended to Respondent in her capacity as medical officer and determined that Respondent was not suffering from a heart attack or other obvious medical condition. Tr. at 56:8-15; CG Exh. 14. Rather, based on their observations of Respondent's behavior and Respondent's own admitted consumption of alcohol, the Chief Mate and the Second Mate determined that Respondent was intoxicated. Tr. at 34:3-18; CG Exhs. 13, 14. Furthermore, two empty bottles of alcohol were found in Respondent's room, evidencing his consumption of alcohol. Tr. at 55:25-56:3; 94:24-95:4.

The Master therefore rightfully ordered Respondent to take a reasonable cause alcohol test and Respondent wrongfully refused, stating that he was way over the limit. Tr. at 34:20-35:1; 55:4-15; 55:19-21; CG Exhs. 13, 14, 17. Respondent had not informed anyone on the vessel of his back injury prior to the boat and fire drill on March 22, 2013 and admitted that he, in effect, sought to self-medicate his injury by consuming alcohol on the voyage. Tr. at 15:19-21; 37:6-38:17; 58:22-59:10; 63:23-64:6; 84:18-22; 94:17-23; 103:14-15. All of this record evidence establishes that Respondent was intoxicated while serving aboard the M/V MAUNALEI and he thereby violated the provisions of 33 C.F.R. § 95.045.<sup>5</sup>

#### **IV. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. Respondent and the subject matter of this hearing are properly within the jurisdiction of the United States Coast Guard in accordance with 46 U.S.C. § 7703(1)(A); 46 C.F.R. Part 5, and 33 C.F.R. Part 20.
2. Respondent is the holder of a United States Coast Guard-issued mariner credential and was such a holder at the time of the March 22, 2013 request by his employer to take a reasonable cause alcohol test while he was serving as an Able Bodied Seaman on board the M/V MAUNALEI.

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<sup>5</sup> Indeed, Matson personnel followed all proper company procedures required by the regulations for terminating Respondent's employment as a result of this demonstrated intoxication based upon both the observations of intoxication by the Chief Mate and Second Mate and Respondent's own admissions that he had been drinking and was way over the limit.

3. Respondent's testimony that he called the bridge before the fire and boat drill and informed the captain that he felt like he was having a heart attack is rejected as not credible. Captain Reed and/or the Chief Mate would have been informed if Respondent had called the watch stander on the bridge if he was not able to report for that drill. Tr. at 38:24-39:1; CG Exh. 17 at 19-20.<sup>6</sup>

4. The Master of the M/V MAUNALEI had appropriate reasonable cause to order Respondent take the alcohol test based upon Respondent's behavior and own admissions of alcohol use and the observations of both the Chief Mate and the Second Mate.

5. On March 22, 2013, Respondent refused to submit to the reasonable cause alcohol test and admitted that he was way over the limit for alcohol consumption.

6. On March 22, 2013, Respondent was serving as a crewmember aboard an inspected vessel in an intoxicated state.

7. Respondent thus violated 33 C.F.R. 95.045 and as a result violated 46 U.S.C. § 7703(1)(A).

8. The allegations in the Coast Guard's Complaint are therefore found **PROVED**.

## V. SANCTION

Under Coast Guard procedural rules, the judge must include any appropriate order in the disposition of the case. 33 C.F.R. § 20.902(a)(2). Here, the Coast Guard has proposed an order of revocation. Having found the Coast Guard's allegations against Respondent proved, I must enter an order of sanction against Respondent.

Title 46 U.S.C. § 7703(1)(A) makes Respondent's Coast Guard-issued credential subject to revocation or suspension for this violation. The Coast Guard's Suggested Range of an Appropriate Order at 46 C.F.R. § 5.569 provides information and non-binding guidance for the judge and is "intended to promote uniformity in orders rendered." However, this guidance "should not affect the fair and impartial adjudication of each case on its individual facts and

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<sup>6</sup> Furthermore, to the extent Respondent challenged the accuracy of particular crewmembers' accounts, his ability to accurately recall the events on March 21 and 22, 2013 is subject to serious question. By his own admission, "he had no recollection of the events described" by the Chief Mate's Warning Letter of March 21, 2013 (though he attributed it to his back pain from which he claimed he "blacked out"). See Resp. Exh. B.

merits.” Id.; see also Appeal Decision (SPENCE), supra. The judge should consider the parties’ arguments and any mitigating or aggravating factors before imposing the order for a respondent’s violation. 46 C.F.R. § 5.569. Table 5.569 suggests a suspension in the range of 12-24 months for a refusal to take a required alcohol test.

Here, the Coast Guard proposed revocation as the appropriate sanction and argued that aggravating factors warranted this sanction. Specifically, the Coast Guard pointed toward Respondent’s prior suspension in November 2004 for alcohol use, conditions for which included Respondent’s completion of an alcohol addiction program and an alcohol-abuse monitoring program. See CG Exh. 16.<sup>7</sup>

In response, Respondent argued that revocation was too harsh for what he characterized as a one-time incident following nine years of being sober. Respondent maintained that he only consumed the alcohol because he had injured his back and sought to treat the pain so that he could keep working.

Revocation certainly can be an acceptable sanction for refusing to take a required alcohol test. See Appeal Decision (SPENCE), supra (revocation affirmed on appeal despite the guidance provided in Table 5.569). Here, Respondent was unquestionably intoxicated at the time of the fire and boat drill on March 22, 2013 (as he admitted)<sup>8</sup> and likely failed to report for duty on March 21, 2013 at least partially as a result of his alcohol use. However, Respondent presented credible evidence that he had previously injured his back during loading of the M/V MAUNALEI in the Port of Long Beach.

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<sup>7</sup> Under 33 C.F.R. § 20.1315, Respondent’s prior Settlement Agreement and Consent Order from 2004 is admissible in rebuttal as Respondent claimed that his admitted intoxication was a “one time thing”. However, given the length of time between this offense and the 2004 offense, I find his prior record to be a minor aggravating factor.

<sup>8</sup> The issue is thus not so much that Respondent refused to take a required alcohol test, which he certainly did. Rather, Respondent refused because he essentially admitted that he was intoxicated and therefore the test would be superfluous. Respondent clearly violated 33 C.F.R. § 95.045 by being intoxicated while aboard the M/V

Respondent then made an extremely poor decision to hide his injury and nevertheless report for duty aboard the vessel. Instead of timely informing his superiors that he was injured and unable to report for duty prior to leaving port on the 20<sup>th</sup> or on both March 21<sup>st</sup> and March 22<sup>nd</sup>, Respondent elected to treat his pain with alcohol. The record reveals that at no time prior to his failure to report for the drill on the 22<sup>nd</sup> did Respondent report his injury. Respondent's proffered reasons for not doing so, i.e., to keep his job and stay on the boat, provide no legitimate excuse for such silence.

Respondent has a prior history of alcohol problems but apparently had no record of any problems or incidents during his time working for Matson over the course of his employment. Nevertheless, Respondent should have come forward and sought treatment for his injury rather than "falling off the wagon" and becoming intoxicated while serving aboard the vessel. Respondent's actions could have endangered his crewmates through both his incapacity to assist with regular manning duties as required under the vessel's COI or being an added, previously unknown, burden had a real emergency arose during the voyage.

A significant sanction is thus appropriate under these circumstances. However, given the mitigating factor of Respondent's injury, which led him to abuse alcohol after a lengthy period without record of any alcohol or other related employment issues, I find that revocation is not appropriate. The record does not indicate that Respondent is currently a casual abuser of alcohol or would otherwise operate a vessel while intoxicated absent these circumstances. A suspension of **SIXTEEN (16) MONTHS, TWELVE (12) MONTHS OUTRIGHT**, with the remaining **FOUR (4) MONTHS REMITTED** on **TWELVE (12) MONTHS PROBATION** is therefore

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MAUNALEI, but the record does not show that he obstructed any necessary efforts to prove his intoxication by the refusal.

sufficient for Respondent's proven violation to ensure that Respondent does not relapse into alcohol abuse and promote safety of life and property at sea.

**WHEREFORE:**

**ORDER**

**IT IS HEREBY ORDERED THAT** the allegations in the Complaint are found **PROVED** and Respondent thereby violated 33 C.F.R. § 95.045 and 46 U.S.C. § 7703(1)(A).

**IT IS HEREBY FURTHER ORDERED THAT** all of Respondent Carrol Gene Heick's Coast Guard-issued credentials are **SUSPENDED FOR SIXTEEN (16) MONTHS, TWELVE (12) MONTHS OUTRIGHT**, with **FOUR (4) MONTHS REMITTED** on **TWELVE (12) MONTHS' PROBATION** from the date of this **ORDER**.

The conditions of Respondent's **PROBATION** are that he: (1) not be found proven of violating 46 U.S.C. § 7703 or any law or regulation there under; (2) not be found guilty of any alcohol or drug related offense under any state or Federal law for the duration of his **PROBATION**; and (3) attend, and provide proof of such attendance, at AA/NA meetings on at least a twice monthly basis for the duration of his **PROBATION**. Respondent shall provide documentation of such attendance to the Coast Guard Investigating Officer at the end of each quarter (i.e., every 3 months) of his **PROBATION**. The Investigating Officer shall thereupon forward such documentation to the Court and/or present a motion arguing for the imposition of the additional period of **SUSPENSION** if such documentation is lacking.

**IT IS HEREBY FURTHER ORDERED THAT** Respondent immediately surrender any and all of his Coast Guard-issued credentials to the Coast Guard's Investigating Officer.

**PLEASE TAKE NOTICE** that service of this Decision and Order on the parties serves as notice of appeal rights set forth in 33 C.F.R. § 20.1001 – 20.1004, a copy of which can be found in **Attachment B**.

**SO ORDERED.**

*/s/ Parlen L. McKenna*

**Hon. Parlen L. McKenna**  
**US Coast Guard Administrative Law Judge**

Date: November 06, 2013

## Attachment A – List of Witnesses and Exhibits

### **Coast Guard Witnesses**

1. Dale MacGillivray, Manager, Offshore Labor Relations, Matson Navigation Company
2. Captain Frank Reed
3. First Mate Richard Thomas, by deposition
4. Second Mate Katherine Bowman

### **Respondent Witnesses**

1. Respondent Carroll Gene Heick
2. Mrs. Charlene Dean Heick

### **Coast Guard Exhibits**

1. Matson Navigation Company Policy
2. Personnel Report – Carrol Heick
3. Personnel Report – Richard Thomas
4. Personnel Report – Katherine Bowman
5. Personnel Report – Frank Reed
6. Heick – Medical Report/Treatment
7. Heick – Sign-on Physical
8. Heick – Discharge for Cause Letter
9. MAUNALEI – Official Log Book
10. Accident/Illness Injury Report
11. MAUNALEI – Certificate of Inspection
12. Heick – Letter of Warning/Notice to Improve
13. Richard Thomas Written Statement
14. Katherine Bowman Written Statement
15. Heick – Statement of Injury
16. Consent Order Approving Settlement Agreement
17. Transcript of Deposition – Richard Thomas

### **Respondent Exhibits**

- A. Screenshot of Respondent's Credential Information
- B. Letter of March 21, 2013 from Matson
- C. Seaman's Request for Medical Treatment
- D. Prescription from Dr. Kientz dated March 25, 2013
- E. Diagnosis dated July 10, 2013 from Dr. Katherine Ann Chin
- F. Physician Work Activity Status Report dated March 25, 2013

## Attachment B – Appeal Rights

### **33 C.F.R. Part 20, Subpart J**

#### **§ 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.

#### **§ 20.1002 Records on appeal.**

(a) The record of the proceeding constitutes the record for decision on appeal.

(b) If the respondent requests a copy of the transcript of the hearing as part of the record of proceeding, then,—

(1) If the hearing was recorded at Federal expense, the Coast Guard will provide the transcript on payment of the fees prescribed in 49 CFR 7.45; but,

(2) If the hearing was recorded by a Federal contractor, the contractor will provide the transcript on the terms prescribed in 49 CFR 7.45.

#### **§ 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.

**§ 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.