

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

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UNITED STATES COAST GUARD  
Complainant

vs.

AUSTIN RYAN GORE  
Respondent

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Docket Number 2012-0460  
Enforcement Activity No. 4272313

**SUPPLEMENTAL DECISION & ORDER**

**Date Issued: January 3, 2014**

**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.

On September 5, 2013, the court issued its original Decision & Order in the above-captioned matter, finding three of the four Specifications in the Complaint not proved. The court found Specification 4, Refusal to Provide a Urine Specimen, proved. Although the court ruled in favor of the Coast Guard on Specification 4, the court expressed significant reservations about both the manner in which Specification 4 had been pled and the quantum of proof that the Coast Guard offered in support thereof.

Specification 4 alleged Austin Ryan Gore (Respondent) committed Misconduct when he refused to provide a urine specimen when ordered to do so by paramedic Hank Savin. **The court remains concerned that Specification 4 failed to identify any “formal, duly established rule” Respondent violated for the purposes of 46 C.F.R. §5.27, i.e., “Misconduct.”** In its post-hearing brief, the Coast Guard argued: “A company policy which says you can use urinalysis to test for alcohol is valid.” That may be true – but the court believes (consistent with the dictates of due process) that it is first incumbent upon the Coast Guard to plead that policy as the basis for a charge of Misconduct.

In the original Decision & Order, the court presumed that the Galliano “Drug and Alcohol Free Work Environment Policy” (CG Ex. 3) was an appropriate “rule” for the purposes of 46 C.F.R. §5.27; although the Complaint made no such allegation. That presumption is the underpinning for the court’s decision herein and may prove a valid basis for an appeal by the Respondent.

Based upon that presumption, the court originally concluded that paramedic Savin was vested with a certain degree of professional discretion in the performance of his

duties on the night of February 18, 2012, and that he appropriately ordered Respondent to provide a urine specimen for testing.

However, on its own motion, the court re-opened the hearing<sup>1</sup> on November 12, 2013, to receive additional testimony from paramedic Savin. The court called paramedic Savin to provide additional testimony about his professional qualifications and his interactions with Respondent on the night of February 18, 2012. In particular, the court wanted to address three issues of concern:

- (1) Whether paramedic Savin was an appropriate person to order Respondent to provide a urine specimen?
- (2) Whether paramedic Savin could lawfully order Respondent to provide a urine specimen for alcohol testing?
- (3) Whether paramedic Savin could lawfully order Respondent to provide a urine specimen for drug testing.

#### **Paramedic Savin's Authority**

At the November 12, 2013, rehearing, paramedic Savin testified extensively regarding his professional qualifications, to wit: that he is a graduate of a basic, six-month emergency medical technician course, offered through the National EMS Academy (Tr. Vol. IV at 7); that he is also a graduate of an advanced, eighteen-month paramedic course, also offered through the National EMS Academy, which provided extensive clinical, classroom, and emergency-room training (Tr. Vol. IV at 10); that, as a nationally-registered paramedic, he attends yearly continuing medical education courses (Tr. Vol. IV at 9); and that he is trained in the diagnosis and emergency treatment of various human medical conditions (Tr. Vol. IV at 9).

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<sup>1</sup> Respondent opted not to appear at the November 12, 2013, hearing; however, Respondent's counsel was present and waived his client's presence. (Tr. Vol. IV at 4).

Paramedic Savin also testified that although he works under the direction of his company's medical director, Darren Duet, M.D., he (paramedic Savin) was the only medical professional stationed at C-Port on the night of February 18, 2012. (Tr. Vol. IV at 13 – 14). Paramedic Savin further explained that as one of two paramedics employed by Galliano, he worked a 24-hour “on call” seven-day shift, before being relieved by the company's other paramedic – both of whom report to Dr. Duet. (Tr. Vol. IV at 14 – 16). Most importantly, paramedic Savin testified that when he was on duty at C-Port, he was in charge of the company's infirmary with full professional responsibility for “anything medical” that occurred on the C-Port installation; and thus vested with professional discretion to determine an employee's physical or medical condition. (Tr. Vol. IV at 17).

The following colloquy is illustrative of paramedic Savin's professional autonomy:

Q. Let's talk about . . . the drug testing environment. Did you need permission from an official either with Edison Chouest, Dr. Duet, Cajun Ironworks, to obtain a urine specimen in an emergency medical situation?

A. No, sir, I don't.

(Tr. Vol. IV at 18)

Based upon paramedic Savin's November 12, 2013, testimony, the court concludes that paramedic Savin was, under appropriate circumstances, an appropriate person to order Respondent to provide a urine specimen.

As his marine employer's “agent,” paramedic Savin was certainly vested with the appropriate training and independent professional/medical judgment to attempt to collect a urine specimen for purposes of routine medical diagnosis and treatment.<sup>2</sup> However, a

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<sup>2</sup> In its original Decision and Order, the court found that paramedic Savin had ordered Respondent to provide a urine specimen in an effort to determine the nature and extent of Respondent's medical condition. This was a particularly reasonable course for Savin to follow, given Respondent's obvious impairment and

crucial question remains: Whether, under the terms of the Galliano Drug and Alcohol Free Work Environment Policy, paramedic Savin could direct Respondent to provide a urine specimen, particularly if that request was for some reason other than routine medical diagnosis and treatment.

The Galliano policy suggests several independent reasons a urine sample might be obtained and tested.

### **Urinalysis for alcohol testing**

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 . . . (emphasis added).

(CG Ex. 3)

The policy plainly states that Galliano may require an employee to submit to a urinalysis if that employee is reasonably suspected of alcohol use. The court notes, however, that the Galliano policy is 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? It is axiomatic that in American jurisprudence,

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paramedic Savin’s professional need to diagnose the cause of that impairment. Even though it was medically appropriate for paramedic Savin to attempt to obtain a urine specimen for that reason, Respondent was not legally obliged to provide a specimen for the purpose of medical diagnosis, per se. Hence, a charge of Misconduct cannot stand for Respondent’s failure to provide a urine specimen for the purpose of medical diagnosis and treatment alone.

when a contract (or here, an employer's policy) violates public policy, as expressed in statute or regulation, it is void ab initio and will be treated as though no contract (or policy) ever existed. Respondent's post-hearing brief correctly cites as settled law the proposition that an employer's policies which contravene federal constitutions, statutes and administrative regulations may render an employment contract may void. See DeGaetano v. Smith Barney, Inc., 983 F.Supp. 459 (S.D.N.Y. 1997) quoting Thomas James Assoc. v. Jameson, 102 F.3d 60 (2d Cir. 1996). See also Paul Revere Life Ins. Co. v. Fima, 103 F.3d 490 492 (9<sup>th</sup> Cir. 1977); United States v. Acorn Technology Fund, L.P., 295 F. Supp 2d 494 (E.D. Pa. 2003). Thus, per the express provisions of 46 C.F.R. §16.500(a)(2), paramedic Savin could not solicit Respondent's urine specimen for the purposes of alcohol testing.

#### **Urinalysis for drug testing**

However, the Galliano policy also provides that: "The company may also require any current employee to submit to a urinalysis and/or blood test for drugs . . . in the following circumstances: (1) following an accident occurring within the course and scope of employment; (2) whenever there is reasonable suspicion to believe that an employee is using drugs . . . in violation of the company's policy . . ." (emphasis added).

The court concludes that it was proper for paramedic Savin to order Respondent to provide a urine specimen for the purposes of drug testing "following an accident occurring within the course and scope of employment." Likewise, the court also concludes that paramedic Savin had "reasonable suspicion to believe that an employee is using drugs . . . in violation of the company's policy."

**(1) Post Accident**

In reference to the night of February 18, 2012, paramedic Savin testified :

Q. All right. So it was Mr. Bourgeois who called you to the scene?

A. Correct, he called me to the scene.

Q. And you had a guy who had fallen into the water and maybe injured himself. We need a medical professional there now.

A. Yes, sir.

...

Q. You were en route to an uncertain medical situation. You'd been asked to go there by Mr. Bourgeois. You'd called Mr. Pellegrin. He said okay, and he gave you guidance on the phone, correct?

A. Yes.

Q. What specifically did he tell you?

A. He goes, get the guy evaluated, make sure he's okay.

Q. Physical evaluation.

A. Yes, sir.

Q. Make sure there are no broken bones or crushed skull.

A. Absolutely. That's first and foremost. When I got there, like I said, Mr. Austin [Gore] had a little bit of blood on his face and stuff. I was focusing on the medical aspect of it at that time.

(Tr. Vol. IV at 20 – 22).

Based upon his testimony, the court is satisfied that on the night of February 18, 2012, paramedic Savin was called to the scene of an accident involving Respondent. Hence, the court concludes that, under the terms of the Galliano Drug and Alcohol policy (CG Ex. 3), it was proper for paramedic Savin to order Respondent to provide a urine specimen for the purposes of drug testing “following an accident occurring within the

course and scope of employment.” Respondent’s failure to provide a specimen was a violation of the Galliano Drug and Alcohol policy and thus, Misconduct.

**(2) Reasonable Suspicion**

The court also finds that paramedic Savin also held a reasonable suspicion of drug use sufficient to warrant a urinalysis, per the terms of the Galliano Drug and Alcohol policy (CG Ex. 3). In response to repeated questioning by the court and counsel for both parties, paramedic Savin’s testimony established he held the requisite reasonable suspicion of Respondent’s drug use. The following colloquy is instructive:

Q. . . . So if you were attempting to obtain a urine specimen for eventual drug testing, why were you interested in the results of a drug test? Why did you want to know that?

A. Like I said, he already appeared to be intoxicated and the results came out on a Breathalyzer. Like I said, I wanted to cover my rear, so to speak, and obtain a drug screen. That way I could say everything was done, but it didn’t happen that way.

Q. Did you have a reasonable belief or suspicion that the Respondent had been using drugs?

A. With the way he was acting, I definitely suspected alcohol, but it could have possibly been drug use there too as well. I don’t know. Like I say, when you have slurred speech, having a hard time standing up, you know, I was kind of suspecting possible other things.

Q. And to ask the same question again: Did his earlier statement to you that he used cocaine, did that factor into your thinking at all?

A. No, sir. If I remember correctly, Your Honor, I believe that conversation happened after I had tried to obtain the drug screen.

Q. So he did not tell you about his potential drug abuse, cocaine, until after he was unable to supply a urine specimen?

A. If I remember correctly, Your Honor – I could be wrong, it was a long time ago – but if I remember correctly, it possibly happened after -- the conversation happened after the attempt.



(Tr. Vol. IV at 27 – 28).

Q. Okay, and I understand that, but did you have a reasonable suspicion that he had used drugs?

A. Yes, sir, I did. Absolutely.

Q. And what were the observations you made that led you to that suspicion?

A. Like I said, when I approached Mr. Austin Gore the first time, he was slurred speech, swaying in the wind, basically having a hard time standing up, uncoordinated, and so that kind of led me to believe either alcohol or drug use or both.

(Tr. Vol. IV at 29).

Thus, the import of this Supplemental Decision & Order is that for the purposes of Specification 4, the court specifically finds<sup>3</sup> that Respondent committed Misconduct by his failure to submit to a drug urinalysis when he was properly directed to do so by paramedic Hank Savin. Paramedic Savin was an appropriate agent of Galliano Marine to direct Respondent to provide a urine specimen, per the provisions of the Galliano policy which required Respondent to provide a urine specimen for drug testing “following an accident occurring within the course and scope” of Respondent’s employment and/or because “there was a reasonable suspicion to believe” Respondent had used drugs in violation of his employer’s policy. (CG Ex. 3).

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<sup>3</sup> This finding is to be read together, and in concert with, Finding of Fact 14 of this court’s initial Decision & Order, September 5, 2013. Otherwise, the court hereby incorporates and adpots the entirety of its September 5, 2013 Decision & Order, including all Findings of Fact previously issued in this case.

Whether the Coast Guard's failure to plead a violation of the employer's policy as the basis for a charge of Misconduct amounts to a denial of due process – is for the Commandant to decide.<sup>4</sup>

**WHEREFORE**, this courts' original Order of **REVOCATION** is affirmed.

**IT IS SO ORDERED.**

Done and dated this 3rd of January, 2014, at New Orleans, LA

Handwritten signature of Bruce T. Smith in black ink.

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**HON. BRUCE T. SMITH**  
**Administrative Law Judge**  
**United States Coast Guard**

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<sup>4</sup>Respondent did not object to the Coast Guard's failure to plead a basis for Misconduct in Specification 4 until the November 12, 2013, hearing. (Tr. Vol. IV at 65).