

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

UNITED STATES COAST GUARD
Complainant

vs.

DANIEL BENJAMIN LINKLETTER

Respondent

Docket Number 2013-0268
Enforcement Activity No. 4661679

DECISION AND ORDER
Issued: January 27, 2014

By Hon. Parlen L. McKenna

Appearances:

LT Morgan D. Armstrong
LT Jon D. Lane
Sector San Francisco

For the Coast Guard

Robert Talbot, Esq.
Tara Dudum
Brittany Stevens
Alex Leenson

For the Respondent

The United States Coast Guard (Coast Guard) brought this proceeding against Respondent Daniel Benjamin Linkletter's Merchant Mariner Credential (MMC) pursuant to 46 U.S.C. § 7703(1)(B) 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 on two separate charges of Misconduct as defined by 46 C.F.R. § 5.27: 1) Respondent's alleged violation of 33 C.F.R. § 95.045 by his serving on board the USNS BOWDITCH while having a blood alcohol concentration of 0.186 (**Charge 1**) and 2) Respondent's alleged refusal to submit to a reasonable cause drug test ordered by the USNS BOWDITCH's Master (**Charge 2**). Respondent admitted through an Amended Answer and at the hearing that he was intoxicated as alleged by the Coast Guard in **Charge 1**, but he denied **Charge 2**.

After carefully reviewing the record evidence, I find the Coast Guard has proven Respondent's Misconduct as to **Charge 1** but failed to prove **Charge 2**. The record demonstrates Respondent violated 33 C.F.R. § 95.045 through his admitted intoxication; but, by the plain terms of the applicable Department of Transportation (DOT) drug testing regulations, Respondent did not refuse to submit to a reasonable cause drug test. Therefore, for the reasons given in this Decision and Order, the allegations against Respondent are found **PROVED** as to **Charge 1** and **NOT PROVED** as to **Charge 2**. As a result of the proven violation of 33 C.F.R. § 95.045, Respondent's Coast Guard-issued credential is **SUSPENDED** for a period of **THREE (3) MONTHS** outright with an additional **THREE (3) MONTHS' SUSPENSION REMITTED on TWELVE (12) MONTHS PROBATION**.

I. PROCEDURAL BACKGROUND

On July 23, 2013, the Coast Guard filed a Complaint under the authority of 46 U.S.C. § 7703(1)(B) and 46 C.F.R. § 5.27. The Coast Guard alleged Respondent committed two separate counts of Misconduct:

Charge 1

1. On or about June 27, 2013, the respondent was assigned as a crewmember on the USNS BOWDITCH.
2. On or about June 27, 2013, while on board the USNS BOWDITCH, the respondent's alcohol concentration in his blood was determined by breath analysis to be 0.186 percent, a violation of 33 CFR 95.045.

Charge 2

1. On or about June 27, 2013, the respondent was assigned as a crewmember on the USNS BOWDITCH.
2. On or about June 27, 2013, it was alleged that the respondent assaulted another crewmember on board the USNS BOWDITCH.
3. On or about June 27, 2013, while on board the USNS BOWDITCH, the respondent was directed by his marine employer to take a reasonable cause drug test.
4. On or about June 27, 2013, the respondent refused to submit to a reasonable cause drug test, which constitutes an act of misconduct under 46 CFR 5.27.

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

On August 7, 2013, Respondent filed an Answer that: 1) did not admit or deny the jurisdictional and factual allegations; 2) asserted no affirmative defenses; and 3) indicated he wished to be heard on the proposed order.

On August 12, 2013, this case was assigned to me for review and disposition. On October 4, 2013, the University of San Francisco Employment Law Clinic filed a Notice of Appearance as Respondent's legal representative.¹ On October 28, 2013, I issued a Scheduling Order and Notice of Hearing for a hearing to take place on November 12, 2013 in Alameda, California. On October 30, 2013, Respondent filed an Amended Answer, which admitted the jurisdictional allegations, admitted **Charge 1**, but denied **Charge 2**.

On October 30, 2013, the Coast Guard filed its Notice of Expected Witnesses and Exhibits. On October 31, 2013, Respondent filed his Notice of Expected Witnesses and Exhibits. Respondent later supplemented his Notice of Expected Witnesses and Exhibits on November 7, 2013.

¹ The Court has a program in place to refer unrepresented mariners to the Clinic in contested cases. The Clinic is supervised by licensed attorneys and law students act as representatives. The Court's involvement is to make mariners aware of the opportunity for such pro bono representation in an effort to ensure that their due process rights are protected. The Clinic filed an Amended Notice of Appearance on November 5, 2013, which indicated that USF Law Students Tara Dudum, Brittany Stevens, and Alex Leenson would serve as Respondent's law student representatives at the hearing.

On November 12, 2013, the hearing took place as scheduled in Alameda, California. The Coast Guard presented the testimony of 2 witnesses (both telephonically) and offered 9 exhibits into evidence. Respondent testified in his own behalf and offered 2 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 131:3-6.²

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

The USNS BOWDITCH and Key Personnel Associated with the Incident

- 1) At all relevant times, Respondent was the holder of a Coast Guard-issued Merchant Mariner Credential (MMC) number [redacted]. Tr. at 5:24-8:8; 97:1-5; Amended Answer.
- 2) At all relevant times, Respondent served as an ordinary seaman, day worker, aboard the USNS BOWDITCH under the authority of that MMC. Tr. at 15:4-6; 98:4-12; Amended Answer; CG Exh. 2; CG Exh. 3.
- 3) At all relevant times, the USNS BOWDITCH was subject to inspection by the Coast Guard. Tr. at 13:21-14:19; CG Exh. 1.
- 4) Maersk Line Limited (Maersk) was the operating company for the USNS Bowditch at all relevant times. Tr. at 17:25-18:2.
- 5) Maersk had a drug and alcohol policy in place during all relevant times that applied to each of its employees working on the USNS BOWDITCH. Tr. 18:3-19:8; CG Exh. 4.

² 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. [alphabetic]” for Respondent’s.

- 6) On or about June 27, 2013, Captain Myron Bister served as master on the USNS BOWDITCH. Tr. at 13:18-20.
- 7) At the time of the hearing, Captain Bister had been a licensed U.S. Merchant Mariner for approximately 26 years and currently holds a Master Seaman Motor Vessel, any gross tonnage credential. Tr. at 13:9-17.
- 8) At the time of the hearing, Mr. Jackson Senseney had been a licensed mariner for approximately 8 years and with endorsements of hospital corpsman, ordinary seaman, wiper, stewards department and person in charge of medical care. Tr. at 49:20-50:4.
- 9) Mr. Senseney's previous medical experience includes serving 20-plus years in the Navy as a hospital corpsman. Tr. at 50:5-8.
- 10) At all relevant times, Mr. Senseney was serving as the medical department representative (MDR) on the USNS BOWDITCH. Tr. at 50:9-14.
- 11) Mr. Senseney was also a trained DOT drug test collector and performed any necessary collections for the crew on the USNS BOWDITCH Tr. at 51:3-18; CG Exh. 10.
- 12) As the MDR, Mr. Senseney was responsible for the routine and urgent medical care of the crew. Tr. at 50:15-18.
- 13) At the time of the hearing, MDR Senseney's most recent training as a DOT drug test collector occurred on May 5, 2008 and he had not completed the required 5-year refresher collector training at the time of Respondent's drug test. Tr. at 61:5-15; 61:21-62:22; CG Exh. 10.

The Events Leading up to Respondent's Drug and Alcohol Test

- 14) The night of the incident, Respondent had left the ship while it was in port and drank some alcohol with a local contractor who had been working on the ship. Tr. at 99:4-24.
- 15) Respondent admitted that he drank 4 beers while he was off the ship during this time. Tr. at 99:25-2.
- 16) After later boarding the ship, Respondent went back to his room, which he shared with another seaman, Mr. Joherky Concepcion. Tr. at 101:1-12.
- 17) Respondent and Mr. Concepcion then engaged in a verbal altercation concerning Respondent's activities while on shore. Tr. at 101:21-103:2; 103:11-16.
- 18) Respondent denied ever hitting or threatening Mr. Concepcion or getting into a physical altercation with him. Tr. at 103:3-10. This testimony is found to be credible.
- 19) Respondent stated that Mr. Concepcion told him that he was going to get Respondent fired. Tr. at 103:18-25. This testimony is found to be credible.
- 20) Mr. Concepcion left the room and reported that he had been assaulted by Respondent. Tr. at 19:23-24; CG Exh. 6.

- 21) As a result, Respondent was ordered to report to the Captain's office. Tr. at 19:18-20:1; 104:3-9.
- 22) Prior to having Respondent report to his office, Captain Bister ordered the second mate to get MDR Senseney ready to administer drug and alcohol testing. CG Exh. 6.
- 23) Mr. Concepcion was in the Captain's office with Captain Bister when Respondent got there. Tr. at 104:13-15.
- 24) Respondent was informed that Mr. Concepcion claimed Respondent had hit or pushed him, which Respondent denied. Tr. at 104:18-21.
- 25) Respondent was concerned about the allegations of him assaulting Mr. Concepcion. Tr. at 107:16-17.
- 26) Respondent did not want to do anything to admit that he had in fact assaulted his roommate. Tr. at 110:2-12; 114:2-11.
- 27) No independent witnesses verified Respondent's alleged assault on Mr. Concepcion. Tr. 30:25-31:1.
- 28) In the Captain's office, Respondent admitted to drinking but denied he assaulted Mr. Concepcion. Tr. 27:23-25; 32:24-33:3; CG Exh. 6..
- 29) When Respondent reported to the Captain, Respondent appeared to Captain Bister to be under the influence of either drugs or alcohol. Tr. at 20:2-4.
- 30) Specifically, Captain Bister observed that Respondent's gait was somewhat awkward or abnormal and his speech was slurred. Tr. at 21:14-21.
- 31) Captain Bister did not have an opinion as to whether Respondent seemed impaired because of drugs or alcohol, as in his view, the signs of drug or alcohol intoxication can be similar. Tr. at 20:23-21:6.
- 32) Captain Bister ordered both Respondent and Mr. Concepcion to undergo both alcohol and drug testing. Tr. at 22:17-19; 24:9-11; 28:3-6; CG Exh. 6; CG Exh 12.

The Conduct of Respondent's Drug and Alcohol Testing

- 33) MDR Senseney observed Respondent when he reported for the drug and alcohol testing and thought he appeared to be under the influence of alcohol but not drugs. Tr. at 52:21-53:1; 66:6-9.
- 34) MDR Senseney believed that he could determine whether someone was impaired by alcohol or drugs or by only one of those. Tr. at 53:2-8.
- 35) Respondent willingly submitted to the alcohol test and was cooperative throughout that test. Tr. at 67:13-21.
- 36) Respondent's blood alcohol concentration as a result of this test came back at a concentration of 0.186. Tr. at 22:22-23:7; 53:9-13; CG Exh. 5.

- 37) MDR Senseney then conducted a drug test collection on Respondent, which he claimed was in accordance with DOT regulations found at 49 C.F.R. Part 40. Tr. at 53:21-24.
- 38) MDR Senseney felt that Respondent was cooperative in the drug testing process until after he handed in his urine sample. Tr. at 55:22-56:11; 66:21; 86:12-17.
- 39) At that time, Respondent stated to MDR Senseney that he was finished with the test; was not going to sign the CCF without talking to his Union representative; and took steps to leave; at which point, Mr. Senseney told Respondent what he understood to be the ramifications for Respondent not completing the process. Tr. at 35:1-7; 35:21-36:10; 69:16-71:1.
- 40) Specifically, MDR Senseney informed Respondent that if he left without completing the paperwork, he would have to dispose of Respondent's urine sample since the required procedures for chain of custody were not being followed. Tr. at 58:16-21; CG Exh. 12.
- 41) MDR Senseney characterized Respondent's actions as not remaining at the testing site until the process was complete and refusing to engage in the process further without his Union representative being present. Tr. at 55:8-10; 58:9-11; CG Exh. 12.
- 42) Following this exchange, MDR Senseney and Respondent left the ship's hospital and proceeded to Captain Bister's office. Tr. at 71:4-8.
- 43) Captain Bister was told that Respondent did not want to sign the CCF without a Union representative being present. Tr. at 25:19-22.
- 44) Captain Bister explained to Respondent that failing to complete the drug test or refusing to take the drug test would be treated the same as a positive test. Tr. at 25:10-15; 28:10-11; CG Exh. 6.
- 45) After Respondent told Captain Bister he would not cooperate with finishing the drug test (i.e., sign the CCF and labels); MDR Senseney returned to the ship's hospital and disposed of Respondent's sample by flushing it down the toilet. Tr. at 28:11-12; 28:22-29:2; 42:5-9; 85:5-18; CG Exh. 6.
- 46) MDR Senseney did not mark on the CCF that Respondent refused to sign the form in the remarks section and did not complete the collection process. Tr. at 74:6-15.
- 47) Coast Guard Exh. 11 is the CCF MDR Senseney used for Respondent's drug test. Tr. at 54:3-3-18.
- 48) MDR Senseney wrote on the CCF that: "Employee refuses to provide urine sample for drug testing." Tr. at 54:19-22; CG Exh. 11.
- 49) MDR Senseney admitted that aside from signing the CCF and the seals over the sample bottles, Respondent complied with all the steps in the drug testing process. Tr. at 71:9-12; 73:2-15.
- 50) MDR Senseney provided a written statement to Maersk concerning this incident. Tr. at 57:15-25; CG Exh. 12.

- 51) Captain Bister claimed that Respondent did not complete the drug test because he believed he left the test site prior to fully completing the test. Tr. at 24:25-25:15; 36:17-20; 44:1-11.
- 52) Captain Bister recorded Respondent's alleged failure to take the drug test in the ship's log by noting: "At 0145 [Respondent] [r]efused to provide urine sample for drug testing for incident in paragraph 1 above". Tr. at 26:9-16; CG Exh. 5.
- 53) Captain Bister provided a written statement concerning this incident to Maersk. Tr. at 27:1-11; CG Exh. 6.
- 54) Captain Bister's written statement noted that Respondent "provided a sample, but then refused to sign the paperwork." Tr. at 28:7-9; CG Exh. 6.
- 55) Captain Bister's written statement did not specify that Respondent ever left the testing site. Tr. at 44:23-45:3; CG Exh. 6.
- 56) Captain Bister explained that he did not mention Respondent leaving the testing site because he either "overlooked that or just assumed he refused to sign and le[ft] the process, obviously, he left. I guess I didn't see any reason to put it in writing." Tr. at 45:9-16.
- 57) However, Captain Bister admitted that Respondent refused to sign the CCF presented by the MDR, which was before he left the testing room to see the Captain about his questions. Tr. at 45:17-21.
- 58) MDR Senseney also conducted a medical evaluation of Mr. Concepcion, but there was no sign of physical injury. Tr. at 33:11-19.
- 59) Captain Bister characterized Respondent as a "very pleasant shipmate" and had never seen Respondent physically assault anyone. Tr. at 31:2-8.

III. DISCUSSION

A. Jurisdiction

The Coast Guard brought charges against Respondent under the authority of 46 U.S.C. § 7703(1)(B), 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 committed an act of misconduct or negligence[.]

Alleged violations of 46 U.S.C. § 7703(1)(B) 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. The Coast Guard proceeded on the basis of two charges of Misconduct, which 33 C.F.R § 5.27 defines as:

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

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 USNS BOWDITCH at all relevant times. See Tr. at 5:24-6:8; 15:4-6; 97:1-5; 98:4-12; Amended Answer; CG Exh. 2; CG Exh. 3. 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. Charge 1 - Violation 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 USNS BOWDITCH 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 Exhs. 1-3. 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.

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, 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 USNS BOWDITCH, a U.S. inspected flag vessel. Respondent also admitted that he had been drinking and willingly submitted to an alcohol breath test, the results of which exceeded the limit of .04 blood alcohol concentration. Tr. at 22:22-23:7; 53:9-13; 67:13-21; CG Exh. 5.

Additionally, the Captain Bister's request for Respondent to submit to this alcohol test was based upon his observation of Respondent's condition and a claimed altercation between Respondent and another crewmember. Reasonable cause readily existed to order chemical

testing of Respondent under these circumstances.³ Indeed, during the hearing and in his Amended Answer, Respondent admitted he violated the provisions of 33 C.F.R. § 95.045. The Coast Guard's allegation that Respondent committed Misconduct under **Charge 1** is thus found **PROVED** and Respondent will be sanctioned accordingly.

D. Charge 2 – Respondent's Alleged Refusal to Take the Chemical Drug Test

As discussed above, the Coast Guard also proceeded with a second charge of Misconduct based on Respondent's alleged refusal to submit to a chemical drug test. The Coast Guard implemented the Federal Transportation Workplace Drug Testing as part of its drug testing requirements through its regulations in 46 C.F.R. Part 16. See 46 C.F.R. § 16.113(a) ("Drug testing programs required under this part must be conducted in accordance with 49 CFR part 40"). To be valid, the drug test thus must comport both with 46 C.F.R. Part 16 and the requirements of 49 C.F.R. Part 40. See Appeal Decision 2631 (SENGEL) (2002) ("In the interest of justice and the integrity of the entire drug testing system, it is important that the procedures outlined in 49 C.F.R. Part 40 are followed").

Here, the issue is not any positive test results occurring as a result of a chemical drug test, but the effects, if any, of Respondent's admitted refusal to sign the CCF as part of such a drug test. The potential ramifications of such failure to sign the CCF are important, for refusing to take a lawfully ordered chemical drug test is clearly an act of Misconduct under Coast Guard regulations and subjects Respondent to serious consequences, up to and including, revocation of his credentials. See, e.g., Appeal Decision 2694 (LANGLEY) (2011).

³ To the extent Respondent argued that reasonable cause existed for Captain Bister to order the alcohol test but not the drug test, such arguments are rejected. Captain Bister had reason to believe that drugs and/or alcohol might be involved in the reported incident. This is particularly true given Respondent's admission that he had been drinking and his overall condition indicating some form of intoxication or possibly being under the influence of some unlawful drug. Captain Bister had a reasonable, articulable reason for ordering both an alcohol and a drug test based on his "direct observation of specific, contemporaneous physical, behavioral, or performance indicators of probable use." 46 C.F.R. § 16.250. A marine employer or Master of a vessel need not be so precise in their evaluation of a respondent's impaired condition to parse with medical certainty whether such condition might result from drugs but not alcohol, vice versa, or both, to order reasonable cause chemical testing.

The Coast Guard based its theory on **Charge 2** that Respondent refused to submit to the chemical drug test because he did not finish the testing process and left the “testing facility” before the test was complete. See, e.g., Tr. at 134:10-12. The Coast Guard correctly asserted that generally an employee refuses to take a drug test when that employee fails to remain at the testing site until the testing process is complete. 49 C.F.R. § 40.191(a)(2).⁴ See also 49 C.F.R. § 40.191(c) (if an employee refuses to take a drug test, the employee incurs “the consequences specified under DOT agency regulations for a violation of those DOT agency regulations”). Furthermore, the regulations provide that an employee refuses to take a drug test when the employee “[f]ail[s] to cooperate with any part of the testing process (e.g., refuse to empty pockets when directed by the collector, behave[s] in a confrontational way that disrupts the collection process, [and] fail[s] to wash hands after being directed to do so by the collector).” 49 C.F.R. § 191(a)(8).

However, the Part 40 regulations also specifically speak to an employee’s failure or refusal to sign the tamper-evident bottle seals/CCF. See 49 C.F.R. § 40.71(b)(7). With respect to the tamper-evident bottle seals, the regulations provide that the collector must “note this [failure/refusal] in the ‘Remarks’ line of the CCF (Step 2) and complete the collection process.” With respect to the CCF, the regulations provide the collector must:

Direct the employee to read and sign the certification statement on Copy 2 (Step 5) of the CCF and provide date of birth, printed name, and day and evening contact telephone numbers. If the employee refuses to sign the CCF or to provide date of birth, printed name, or telephone numbers, you must note this in the “Remarks” line (Step 2) of the CCF, and complete the collection. If the employee refuses to fill out any information, you must, as a minimum, print the employee's name in the appropriate place.

⁴ Section 40.191 contains an exception to this general rule in the pre-employment test situation where an employee leaves the testing site before the testing commences. That exception is inapplicable here.

49 C.F.R. § 40.73(a)(1) (emphasis added).⁵ If the employee's signature is omitted from the CCF, the regulations make it a "correctable" (i.e., non-fatal) flaw. Under this circumstance, the MRO must attempt to correct such a flaw from the CCF certification statement, unless the employee's failure or refusal to sign is noted on the "Remarks" line of the CCF. 49 C.F.R. § 40.203(d)(1).

The regulations thus contemplate that an employee may refuse to sign the CCF and direct what steps are to be taken in such instances. Nowhere do the regulations allow a collector to simply discard the urine sample provided in such instances. Rather, the collector should make a note of such refusal on the CCF and proceed to complete the collection. 49 C.F.R. § 40.73(a)(1). In such instances, the specimen would be tested and the results reported. See, e.g., Appeal Decision 2555 (LAVALLAIS) (1994) (discussing the ramifications for chain of custody where an unsigned CCF is presented without explanation in the remarks section). Had it come back positive, a respondent would have to provide much more than the mere fact that he or she failed to sign the CCF in order to disregard the test's results (i.e., a respondent would be prevented from claiming error in a test that resulted from their own actions).⁶

Here, MDR Senseney did not comply with the Part 40 rules. Respondent provided a urine sample and gave it to MDR Senseney but simply refused to sign the tamper evident labels and the CCF. Under the 49 C.F.R. Part 40 rules, nothing was left for Respondent to do as part of the collection process but sign those items. Everything else to complete the collection process under 49 C.F.R. § 40.73 was effectively in the hands of the collector (e.g., complete the CCF;

⁵ See also 49 C.F.R. § 40.205(b)(1) (discussing the mechanism by which the collector should correct a problem of omitting required information, such as the employee not signing the certification on the CCF and the collector failing to note such refusal in the "Remarks" section of the CCF). Assuming such corrections are made, the test would not be cancelled. See 49 C.F.R. § 40.205(c).

⁶ For example, perhaps a respondent questioned the custody and control of the urine collection process (e.g., multiple open specimen containers were present or some other problem arose during the collection that led the employee to question whether he could certify that the sample was actually his). Under such circumstances a refusal to sign the CCF would be explainable and might lead to a cancellation of the test's results. However, a respondent should not be allowed to circumvent the drug testing regime by creating errors in the testing process.

ensure the CCF and copies are legible and complete; give a copy to the employee; place the specimen bottles and Copy 1 of the CCF in the plastic bag; secure the pouches of the plastic bag; and prepare the sealed bag and CCF for shipment). Part of this process does involve the collector, advising “the employee that he or she may leave the collection site.” Id. at § 40.73(a)(7). However, given the specific nature of the regulations’ direction as to what to do when an employee refuses to sign the tamper evident seals and/or CCF discussed above, I cannot read Respondent’s conduct as either: (1) leaving the testing site before the test was complete or (2) otherwise being uncooperative during the test so that his conduct constituted a refusal to test.

The record demonstrates that Respondent had questions about the process and wanted to talk with someone (like his Union representative) before signing tamper evident seals/CCF. Tr. at 35:1-7; 35:21-36:10; 69:16-71:1. MDR Senseney admitted that Respondent cooperated with the drug testing process until right after Respondent handed MDR Senseney the urine sample. Tr. at 55:22-56:11; 66:21; 86:12-17. Given Respondent’s concerns and questions concerning the process and ramifications for the drug test, MDR Senseney and Respondent went to Captain Bister’s office to discuss the matter. Tr. at 71:4-8. Once it became clear that Respondent was unwilling to sign the CCF, MDR Senseney then returned to the infirmary and disposed of Respondent’s sample. Tr. at 28:11-12; 28:22-29:2; 42:5-9; 85:5-18; CG Exh. 6. Such action did not comply with 49 C.F.R. Part 40’s mandates for the reasons discussed above and Respondent’s drug test should not have been effectively “cancelled” for a refusal to test. Respondent did not leave the testing site before the test was complete; nor did his conduct undermine the potential testing for the presence of unlawful drugs.

Had MDR Senseney, whose status as a DOT-certified collector lapsed at the time of the collection⁷, followed 49 C.F.R. Part 40’s mandates, Respondent’s specimen would have been

⁷ MDR Senseney’s status is not directly applicable in this instance and would not have resulted in the cancellation of the test. See 49 C.F.R. § 40.33(e) (required refresher training), § 40.209(b)(3) (fact that collection was done by a

tested. Nothing Respondent did prevented or otherwise effectively circumvented the collection and testing of his urine for dangerous drugs. Given the specific procedural mechanisms in place to address Respondent's failure to sign the tamper evident seals and the CCF, Respondent's conduct cannot be deemed a refusal to test. The Coast Guard's allegations that Respondent committed Misconduct by his refusal to take a required chemical drug test under **Charge 2** are therefore found **NOT PROVED**.

E. Respondent's Dispositive Motion at the Close of the Coast Guard's Case in Chief

During the hearing, Respondent moved for a directed verdict at the close of the Coast Guard's presentation of its case. Specifically, Respondent's counsel argued that the testimony confirmed that Respondent submitted to the drug test and the collector did not follow the requirements of 49 C.F.R. Part 40. Therefore, Respondent's representatives argued that the Coast Guard had failed to meet its burden of proof with respect to **Charge 2** because Respondent had not, in fact, refused to submit to the drug test. See Tr. at 88:24-89:9.

I reserved ruling on the motion and for the reasons given below hereby **DENY** Respondent's motion, which might most properly be considered a motion for dismissal for failure of proof. See 33 C.F.R. § 20.309. A motion to dismiss will only be granted if no evidence is introduced in support of at least one of the required elements of the government's case. See Appeal Decisions 2603 (HACKSTAFF) (1998); 2461 (KITRELL) (1987); 2321 (HARRIS) (1983).

As will be fully discussed below, the Coast Guard introduced sufficient evidence during its case in chief (and prior to Respondent's rebuttal) that Respondent failed to submit to the drug test ordered by his employer. First, the Coast Guard demonstrated that the vessel's master had sufficient reason, based on 1) Respondent's admitted alcohol consumption; 2) the alleged assault

collector not current in his training pursuant to Section 40.33 is a procedural problem which does not result in the cancellation of the test).

of a fellow crewmember and 3) his observations of Respondent's then-current condition, to reasonably order both an alcohol test and a drug test. Second, the Coast Guard presented sufficient evidence and legal argument concerning the possible effect of Respondent's failure to sign the CCF and his alleged departure from the testing location prior to completing what were alleged to be necessary steps to the collection process to withstand Respondent's motion. At the time of Respondent's motion, enough of a factual question concerning if and when Respondent might have left the testing site prior to the test's completion existed to make the grant of Respondent's motion improper.

Just because the Coast Guard ultimately failed to meet its burden of proof as to **Charge 2** does not mean that at the close of its case in chief, Respondent's motion to dismiss must have been granted. If I had found that Respondent's actions as a whole constituted leaving the testing site for 49 C.F.R. Part 40's purposes, Respondent's certainly would not have been entitled to a dismissal of **Charge 2**. That question was not resolved until the record was fully developed following Respondent's rebuttal and the presentation of closing arguments.

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)(B); 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 June 27, 2013 reasonable cause alcohol test and a chemical drug test ordered by the vessel's Master while he was serving as an Able Bodied Seaman on board the USNS BOWDITCH.
3. Respondent's testimony that he did not assault his roommate, Mr. Concepcion is deemed credible. Mr. Concepcion did not appear or testify at the hearing; no physical evidence substantiated Mr. Concepcion's claims of an assault; and the MDR did not note any evidence of such assault in his examination of Mr. Concepcion. However, the fact that this testimony is found credible does not invalidate Captain Bister's reasons for ordering Respondent to submit to chemical drug testing.
4. The Master of the USNS BOWDITCH had appropriate reasonable cause to order Respondent take both the reasonable cause alcohol test and the chemical

drug test based upon Respondent's behavior and own admissions of alcohol use and the reported assault of another crewmember.

5. On June 27, 2013, Respondent was serving as a crewmember aboard an inspected vessel in an intoxicated state.
6. Respondent thus violated 33 C.F.R. 95.045 and as a result violated 46 U.S.C. § 7703(1)(B) through this Misconduct.
7. The allegations in the Coast Guard's Complaint with respect to **Charge 1** are therefore found **PROVED**.
8. On June 27, 2013, Respondent did not refuse to provide a urine sample as alleged; nor did he leave the testing site prior to completion of the testing process under DOT regulations at 49 C.F.R. Part 40.
9. MDR Seseney failed to follow the procedures mandated by 49 C.F.R. Part 40 for collection of a urine sample where the specimen donor refuses to sign the tamper resistant sample bottle labels and the CCF.
10. The allegations in the Coast Guard's Complaint with respect to **Charge 2** concerning Respondent's alleged refusal to submit to a reasonable cause drug test are therefore found **NOT 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 as to **Charge 1**, I must enter an order of sanction against Respondent.

Title 46 U.S.C. § 7703(1)(B) 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, which provides information and non-binding guidance for the judge does not suggest a particular range for intoxication. But see Table 5.569 – Misconduct – Possession of Intoxicating Liquor (1-4 months suspension). Under a general Misconduct charge of “Failure to comply with U.S. law or regulations” – the Table provides a suggested range of 1-3 months suspension.

Table 5.569's guidance "should not affect the fair and impartial adjudication of each case on its individual facts and merits." Id.; see also Appeal Decision 2666 (SPENCE) (2007). 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.

Here, the Coast Guard proposed revocation as the appropriate sanction based upon proof of both **Charge 1** and **Charge 2**. As I have found only **Charge 1** proved, revocation is clearly not appropriate and is thus deemed excessive. However, Respondent's blood alcohol concentration was significantly over the limit (0.186 versus the threshold of .04). Respondent claimed that he only drank four beers while not aboard the vessel, and had the incident not occurred with Mr. Concepcion, it might very well have been that Respondent would have reported for duty the next morning while not being in an intoxicated state.

However, the regulations do not require a mariner to be on duty for this violation to be proven and Respondent was clearly in violation of 33 C.F.R. 95.045 with an excessive amount of alcohol in his system. See Appeal Decision 2512 (OLIVO) (1990) (rejecting argument that it is not an offense under 33 C.F.R. § 95.045 for an intoxicated seaman to return to his vessel from shore leave when he is not scheduled for duty for at least six hours). Respondent committed an act of Misconduct by reporting back to his ship while intoxicated, whether he was on duty or not.

Coast Guard precedent concerning intoxication often involves cases where intoxication is coupled with other offenses of misconduct (like a refusal to submit to an alcohol or chemical test and/or assault of a crewmember), and thus a lengthy period of suspension or outright revocation is regularly given as a sanction. See, e.g., SPENCE, supra; OLIVO, supra. Here, no such additional violations were found proved.

Nothing in the record indicates that Respondent is currently an abuser of alcohol or has any other history of being intoxicated while serving on a vessel. Nevertheless, I have concerns that Respondent not continue his demonstrated misconduct. Therefore, a suspension of **SIX**

MONTHS, THREE (3) MONTHS OUTRIGHT, with the remaining **THREE (3) MONTHS REMITTED** on **TWELVE (12) MONTHS PROBATION** is a sufficient sanction to insure that Respondent does not continue his alcohol abuse while acting under the authority of his MMC and promote safety of life and property at sea.

WHEREFORE:

ORDER

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

IT IS HEREBY FURTHER ORDERED THAT the allegations in the Complaint are found **NOT PROVED** with respect to **CHARGE 2** in that Respondent did not refuse to submit to a required chemical drug test.

IT IS HEREBY FURTHER ORDERED THAT all of Respondent Daniel Benjamin Linkletter's Coast Guard-issued credentials are **SUSPENDED FOR SIX MONTHS, THREE (3) MONTHS OUTRIGHT, with the remaining THREE (3) MONTHS REMITTED on TWELVE (12) MONTHS PROBATION.**

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.

<p><i>/s/ Parlen L. McKenna</i> Hon. Parlen L. McKenna US Coast Guard Administrative Law Judge</p>
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Attachment A – List of Witnesses and Exhibits

Coast Guard Witnesses

1. Captain Bister
2. MDR Senseney

Respondent Witnesses

1. Respondent Daniel Benjamin Linkletter

Coast Guard Exhibits

1. USNS BOWDITCH Certificate of Inspection
2. Articles of Agreement
3. Particulars of Engagement and Discharge
4. Maersk Line, Limited Drug and Alcohol Policy'
5. Record of Official Log Entry
6. Statement of Captain Myron J. Bister (June 27, 2013)
7. NOT OFFERED
8. NOT OFFERED
9. NOT OFFERED
10. Drug Test Collector Training Course certificate for Mr. Jackson Senseney (May 5, 2008)
11. DOT CCF
12. Statement of MDR Jackson Senseney (June 27, 2013)

Respondent Exhibits

- A. NOT OFFERED
- B. Initial Screen and Assessment Report (June 27, 2013)
- C. NOT OFFERED
- D. NOT OFFERED
- E. NOT OFFERED
- F. Urine Specimen Collection Guideline (DOT) – Office of Drug and Alcohol Policy and Compliance (rev. October 1, 2010)

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.