

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

UNITED STATES COAST GUARD
Complainant

vs.

TONY H. REAMES
Respondent

Docket Number 2013-0159
Enforcement Activity No. 4574985

DECISION AND ORDER

Issued: February 04, 2014

By Administrative Law Judge: Honorable Dean C. Metry

Appearances:

**Mr. James D. Fayard
Sector Lower Mississippi**

and

Auxiliarist William H. Davis

For the Coast Guard

Tony H. Reames, *Pro se*

For the Respondent

The United States Coast Guard (Coast Guard) initiated this Suspension and Revocation proceeding seeking revocation of Respondent Tony H. Reames' Merchant Mariner's License Number 874207 and Merchant Mariner's Credential Number 000177920. This action is brought pursuant to the authority contained in 46 U.S.C. § 7703(1)(B) and its underlying regulations codified at 46 C.F.R. Part 5 and 33 C.F.R. Part 20.

On April 30, 2013, the Coast Guard issued a Complaint charging Respondent with violating 46 U.S.C. § 7703(1)(A), alleging one count of Violation of Law or Regulation pursuant to 46 C.F.R. § 5.33. On May 1, 2013, the Coast Guard filed an Amended Complaint with similar factual allegations, but instead charging Respondent with violating 46 U.S.C. § 7703(1)(B), alleging one count of Misconduct pursuant to 46 C.F.R. § 5.27. Specifically, the Coast Guard alleged that on March 28, 2013, Respondent's marine employer ordered Respondent to submit to a breath test for alcohol, and the test measured an alcohol concentration of .152 percent.

Respondent filed his Answer on May 21, 2013, admitting all jurisdictional allegations and factual allegations, but requesting a hearing. The Answer indicated Respondent wished to present "mitigating circumstances." On May 30, 2013, the Acting Chief Administrative Law Judge (ALJ) referred this case to the undersigned for hearing and disposition.

On June 3, 2013, the Coast Guard filed a Motion for Summary Decision, arguing Respondent had admitted all jurisdictional and factual allegations in the Complaint, and requesting the undersigned "issue a Summary Decision and Order against the Respondent for the jurisdictional and factual allegations of the Complaint."

Thereafter, on June 19, 2013, the undersigned convened a pre-hearing conference call with the parties pursuant to 33 C.F.R. § 20.501. During the call, Respondent indicated he did not agree with the factual and jurisdictional allegations of the Complaint, and stated he did not understand his Answer. In light of Respondent's *pro se* status, the undersigned provided Respondent additional time to file a response to the Motion for Summary Decision. See Appeal

Decision 2697 (GREEN) (2011). Thereafter, the undersigned denied the Coast Guard's Motion for Summary Decision.

A hearing on this matter was held on November 19-20, 2013 in Greenville, Mississippi. The hearing was conducted in accordance with the Administrative Procedure Act (APA) as amended and codified at 5 U.S.C. §§ 551-59, and Coast Guard procedural regulations set forth in 46 C.F.R. Part 5 and 33 C.F.R. Part 20. Investigating Officer James Fayard and Auxiliarist William Davis represented the Coast Guard; Respondent appeared *pro se*.

At the hearing, the Coast Guard presented testimony of three (3) witnesses and offered eleven (11) exhibits, all of which were admitted into the record. Respondent did not present any witnesses; he was not called as a witness by the Coast Guard, and chose not to testify on his own behalf. Respondent offered eight (8) exhibits, all of which were admitted into the record. The list of witnesses and exhibits is contained in Attachment A. Both parties elected to file closing briefs.¹ (See Tr. at 243-244).²

FINDINGS OF FACT

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

a. Background

1. At all relevant times mentioned herein, Respondent was the holder of Merchant Mariner's License Number 874207 and Merchant Mariner's Credential Number 000177920. (CG Ex. 1).
2. W.M.S. Marine, Inc. employed Respondent at all relevant times mentioned herein. (See CG Ex. 4) (Tr. at 22, 67).
3. At all relevant times herein, Charles Willard Enoch, Jr. served as Captain aboard the M/V KANSAS CITY. (CG Ex. 3, CG Ex. 3A) (Tr. at 102).

¹ The Coast Guard filed a closing brief on January 6, 2014; Respondent filed a closing brief on January 9, 2014.

² Citations referencing the hearing transcript are as follows: Transcript, followed by the page number (Tr. at ___).

4. At all relevant times mentioned herein, Jon Smith was a certified breath alcohol technician employed by Western Kentucky Drug. (CG Ex. 5) (Tr. at 36, 75).
5. Mr. Smith has been certified as a breath alcohol technician since March 8, 2011. Since then, he has conducted approximately 500 to 600 alcohol breath tests. (CG Ex. 5) (Tr. at 43).

b. Reasonable Cause

6. On March 28, 2013, John Rigney, a personnel manager and supply officer with W.M.S. Marine, received a call from Chris Mauterer, a junior engineer aboard the M/V KANSAS CITY, indicating the vessel was “all over the river” and something was “going on in the pilot house.” (Tr. at 136).
7. Captain Enoch testified that on March 28, 2013, the crew woke him up to indicate that Respondent, the pilot of the M/V KANSAS CITY at that time, “was having trouble” and “appeared to be possibly under the influence of alcohol.” (Tr. at 107, 119-20).
8. Captain Enoch testified he received a call from Mr. Rigney “suggesting the same thing.” He further testified Mr. Rigney informed him the deck crew had reported Respondent was “having some problems.” (Tr. at 108, 127).
9. Captain Enoch relieved Respondent of his watch early. (CG Ex. 3A) (Tr. at 107-08).
10. Captain Enoch testified it was not unusual for him to relieve Respondent early and referred to the relief as “...a general average watch change.” (Tr. at 113, 118).
11. Captain Enoch testified he did not tell Respondent why he was relieving him. However, Captain Enoch subsequently testified he could not remember exactly what was said between the two, but was “pretty sure [he] did tell [Respondent] that the crew had had suspicion that something was wrong...”. (Tr. at 109-10, 114).
12. Captain Enoch also testified that, while relieving Respondent, the two discussed “temperature, current vessel position, mile mark, river and current position, radio current channel and volume check, radar operation, updating on oncoming vessels, other vessels within three miles, [and] updated current weather conditions.” (Tr. at 112).
13. Mr. Rigney ordered Captain Enoch to tie the boat up near Wickliffe, Kentucky such that drug and alcohol testing could be conducted aboard the vessel. W.M.S. Marine decided to test the entire crew. (Tr. at 138, 161).

c. The Testing Procedure

14. Mr. Smith took a breath alcohol sample from Respondent on March 28, 2013 using a properly calibrated AlcoSensor. Mr. Smith conducted the test aboard the M/V KANSAS CITY while the vessel was anchored at sea near Wickliffe, Kentucky. (CG Ex. 4) (Tr. at 42, 45-48, 57-61, 69-70, 79-80, 88-89).

15. On March 28, 2013 at 11:26 PM, Respondent had a breath alcohol concentration of .152. (CG Ex. 4) (Tr. at 71).

16. On March 28, 2013 at 11:44 PM, Respondent had a breath alcohol concentration of .138. (CG Ex. 4) (Tr. at 73).

d. Evidence in Aggravation and Mitigation

17. On June 3, 2003, the Coast Guard issued a Complaint against Respondent alleging one count of Use of, or addiction to the use of dangerous drugs pursuant to 46 C.F.R. § 5.35. Specifically, the Coast Guard alleged Respondent tested positive for marijuana during a random drug test. Thereafter, Respondent entered into a Settlement Agreement with the Coast Guard. (CG Ex. 8) (Tr. at 184-85).

18. On August 11, 2011, the Coast Guard issued a Complaint against Respondent alleging one count of Misconduct pursuant to 46 C.F.R. § 5.27 for having a blood alcohol concentration over the acceptable limit while operating a vessel. On August 12, 2011, Respondent entered into a Voluntary Surrender Agreement with the Coast Guard and voluntarily relinquished his Merchant Mariners Credentials and all associated rights. (CG Ex. 7) (See Tr. at 182-83).

19. Respondent presented various certificates and letters of recommendation for purposes of evidence in mitigation. (Resp. Ex. 1- Resp. Ex. 8).

DISCUSSION

The purpose of Coast Guard Suspension and Revocation proceedings is to promote safety at sea. 46 U.S.C. § 7701(a). In furtherance of this goal, ALJs have the authority to suspend or revoke a mariner's license, certificate, or document for violations arising under 46 U.S.C. § 7703.

Here, the Coast Guard has alleged one count of Misconduct pursuant to 46 C.F.R. § 5.27. Title 46 C.F.R. § 5.27 defines Misconduct 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." In the instant case, the Coast Guard alleges Respondent's marine employer ordered Respondent to submit to a breath test for alcohol, and the test measured an alcohol concentration of .152 percent. Thus, the Coast Guard proffers Respondent violated the standards set forth at 33 C.F.R. § 95.020(b).

A. Burden of Proof

The Administrative Procedure Act (APA), 5 U.S.C. §§ 551-559, applies to Coast Guard Suspension and Revocation hearings before Administrative Law Judges. 46 U.S.C. § 7702(a). The APA authorizes sanctions if, upon consideration of the entire record as a whole, the charges are supported by reliable, probative, and substantial evidence. 5 U.S.C. § 556(d). Under Coast Guard procedural rules and regulations, the burden of proof is on the Coast Guard to prove the charges are supported by a preponderance of the evidence. 33 C.F.R. §§ 20.701, 20.702(a). “The term substantial evidence is synonymous with preponderance of the evidence as defined by the U.S. Supreme Court.” Appeal Decision 2477 (TOMBARI) (1988); see also Steadman v. Sec. and Exch. Comm’n, 450 U.S. 91, 107 (1981).

The burden of proving a fact by a preponderance of the evidence “simply requires the trier of fact ‘to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact’s existence.’” Concrete Pipe and Prod. of California, Inc. v. Constr. Laborers Pension Trust for S. California, 508 U.S. 602, 622 (1993) (citing In re Winship, 397 U.S. 358, 371-72 (1970) (Harlan, J., concurring) (brackets in original)). Therefore, the Coast Guard Investigating Officer (IO) must prove by credible, reliable, probative, and substantial evidence that Respondent more likely than not committed Misconduct while aboard the M/V KANSAS CITY.

B. Applicable Law

The May 1, 2013 Amended Complaint charges Respondent with violating 46 U.S.C. § 7703(1)(B), alleging one count of Misconduct pursuant to 46 C.F.R. § 5.27. Specifically, the Coast Guard alleged Respondent committed Misconduct by operating a vessel in violation of the

standards set forth at 33 C.F.R. § 95.020(b).³ See 66 Fed. Reg. 42964, 42965 (Aug. 16, 2001) (explaining maritime alcohol testing requirements are found in 46 C.F.R. subpart 4.06 and 33 C.F.R. Part 95). See also Appeal Decision 2659 (DUNCAN) (2006).

Title 33 C.F.R. § 95.020 states as follows:

An individual is under the influence of alcohol or a dangerous drug when:

(b) The individual is operating a vessel other than a recreational vessel and has an alcohol concentration of .04 percent by weight or more in their blood.

33 C.F.R. § 95.020(b).

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. When practicable, the employer should base its determination to order a reasonable cause test on observation by two individuals. Id.

The applicable regulations explain that acceptable evidence of 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. However, either behavior or a chemical test alone may constitute sufficient evidence of intoxication. 33 C.F.R. § 95.030(a)-(b). See 52 Fed. Reg. 47526, 47527-28 (Dec. 14, 1987).

In the instant case, in the initial Complaint filed on April 30, 2013, the Coast Guard specifically alleged “WMS Marine hired West Ky Drug [sic] to administer reasonable cause testing.” However, the May 1, 2013 Amended Complaint does not specifically allege the test

³ Title 33 C.F.R. § 95.015 explains “a crewmember (including an officer), pilot, or watchstander not a regular member of the crew...of a vessel other than a recreational vessel” is considered to be “operating” a vessel. 33 C.F.R. § 95.015(b). Evidence of a mariner’s status as a crewmember of an inspected vessel is conclusive evidence of operating the vessel for purposes of 33 C.F.R. § 95.015. Appeal Decision 2551 (LEVENE) (1993), aff’d sub nom. Kime v. Levene, NTSB Order No. EM-177, 1994 WL 475808 (NTSB 1994).

was ordered for purposes of “reasonable cause.”⁴ Nevertheless, the undersigned must determine whether reasonable cause existed for Respondent’s marine employer to order him to submit to alcohol testing. 33 C.F.R. § 95.035(a).

The determination as to whether reasonable cause exists is a factual determination made by the ALJ based on all the evidence available. Appeal Decision 2672 (MARSHALL) (2007) (citing Appeal Decision 2625 (ROBERTSON) (2002); Appeal Decision 2624 (DOWNS) (2001)).

C. Coast Guard’s Argument

The Coast Guard presented evidence that, on March 28, 2013, a junior engineer aboard the M/V KANSAS CITY phoned Mr. Rigney, a personnel manager and supply officer with W.M.S. Marine, and informed him the vessel was “all over the river”. (Tr. at 136). Mr. Rigney phoned the captain of the vessel, Captain Enoch, and relayed this concern. (Tr. at 108, 127). Captain Enoch, in turn, testified the crew woke him up to inform him that Respondent, the pilot at the time, appeared to be having trouble of some kind. (Tr. at 107). As such, Captain Enoch relieved Respondent of his duties. (Tr. at 107-08).

W.M.S. Marine arranged to have the entire crew of the vessel tested for both drugs and alcohol. (Tr. at 161-62). Mr. Jon Smith, a certified breath alcohol technician with Western Kentucky Drug, tested Respondent’s breath alcohol concentration later that same day. (CG Ex. 5) (Tr. at 36, 75). The AlcoSensor, which Mr. Smith testified was properly calibrated, indicated Respondent had a breath alcohol concentration of .152 at 11:26 PM, and a breath alcohol concentration of .138 at 11:44 PM. Both readings exceed an alcohol concentration of .04. (CG Ex. 4). 33 C.F.R. § 95.020(b).

⁴ The Amended Complaint states the Coast Guard edited the Complaint to add a citation to 33 C.F.R. § 95.020(b). However, the Amended Complaint contains additional changes, such as the removal of any reference to “reasonable cause.” Because administrative proceedings require only notice pleadings, the undersigned finds this error to be harmless in nature. See Appeal Decision 2585 (COULON) (1997).

D. Respondent's Argument

Respondent did not testify under oath and was not subpoenaed as a witness by the Coast Guard. However, Respondent did make arguments on his own behalf. Specifically, Respondent stated that after an incident in 2011, he realized he was an alcoholic. Since then, has taken steps to overcome his alcoholism. (Tr. at 192-93).

Respondent asserted he “did not bring” the alcohol aboard the M/V KANSAS CITY on March 28, 2013, but rather “was presented with alcohol...”. (Tr. at 193). He argued he thought he would stop consuming alcohol after one drink, but as a result of his alcoholism, did not stop. (Tr. at 193). Respondent suggested “the persons that called [regarding the suspicion that he was under the influence] [are] the ones that set [him] up with the drink.” (Tr. at 193).

E. Analysis

In the instant case, the Coast Guard presented minimal firsthand evidence as to the existence of reasonable cause. Although the Coast Guard presented testimony from Mr. Rigney indicating Chris Mauterer, a junior engineer aboard the M/V KANSAS CITY, had informed Mr. Rigney of the vessel's erratic movements, the Coast Guard did not call Mr. Mauterer as a witness. See 33 C.F.R. § 95.035(c). The Coast Guard also did not call any of the other crewmembers as witnesses or introduce written statements made by the crewmembers, even though written statements were apparently made post-incident.⁵ (See Tr. at 174, 178). See 33 C.F.R. § 20.608 (explaining either party may request the ALJ to issue a subpoena).

However, applicable Coast Guard regulations allow for the admission of hearsay evidence. 33 C.F.R. § 20.803. Further, the APA expressly allows for the admission of any “oral or documentary evidence” that is not “irrelevant, immaterial, or unduly repetitious.” 5 U.S.C. § 556(d). Richardson v. Perales, 402 U.S. 389 (1971) (explaining hearsay evidence may be

admitted in proceedings under the APA); Bennett v. NTSB, 66 F.3d 1130, 1137 (10th Cir. 1995) (“...even uncorroborated hearsay evidence elicited from [a] witness may constitute substantial evidence in an administrative hearing if found reliable and probative.”). In the instant case, while firsthand accounts were lacking, the Coast Guard nonetheless demonstrated through both hearsay and non-hearsay evidence that W.M.S. Marine had reasonable cause to administer the breath test. 33 C.F.R. § 95.035.

Mr. Rigney, a highly credible witness, stated he received a phone call from a junior engineer regarding the erratic movements of the M/V KANSAS CITY while Respondent served as pilot of the vessel. (Tr. at 136). While Mr. Rigney did not personally witness the maneuvering of the vessel, the information as relayed to him by the junior engineer is probative as to Respondent’s behavior and ability to safely function as a pilot.⁶

Thereafter, Mr. Rigney contacted Captain Enoch and inquired as to Respondent’s condition. Thus, Mr. Rigney, representing W.M.S. Marine, contacted a second person to gather additional information as to Respondent’s behavior and possible use of illicit substances. See 33 C.F.R. § 95.035(c).

Mr. Rigney credibly testified Captain Enoch was “kind of evasive” in providing him information. (Tr. at 136). At first, Captain Enoch informed Mr. Rigney he did not know what was going on; however, he later acknowledged “some of the crew members said that [Respondent] had been drinking.” (Tr. at 137). At one point, Captain Enoch conceded that “all the crew” had informed him Respondent had been drinking. (Tr. at 141).

⁵ Additionally, as discussed herein, the Coast Guard did not list or call Respondent as a witness in the matter. (See Tr. at 9).

⁶ Although Mr. Rigney testified Respondent did not sound like he had been drinking when he spoke with him over the phone, the undersigned notes Mr. Rigney was not physically present on scene to observe Respondent’s behavior or ability to function. (Tr. at 141). Further, “all the crew” indicated to Captain Enoch that Respondent had been drinking. Id.

During the hearing, Captain Enoch was evasive in his testimony. Although he specifically testified he did not notice the odor of alcohol or anything strange about Respondent during the incident, Captain Enoch lacked credibility as a witness. At various points during his testimony, Captain Enoch took exaggerated pauses and avoided providing direct answers to the questions asked of him. (See Tr. at 109).

Captain Enoch also provided inconsistent statements. For instance, Captain Enoch first testified he did not tell Respondent why he was relieving him of duty early. (Tr. at 109). He then later testified it was difficult for him to remember, but he probably did tell Respondent the crew suspected something was wrong. (Tr. 114). However, while Captain Enoch was unable to remember whether or not he told Respondent why he was relieving him, he nonetheless recalled with great specificity that he and Respondent discussed “temperature, current vessel position, mile mark, river and current position, radio current channel and volume check, radar operation, updating on oncoming vessels, other vessels within three miles, [and] updated current weather conditions.” (Tr. at 112).

While Captain Enoch attempted to classify his relief of Respondent as a “general average watch change”, he nevertheless conceded the crew woke him up to indicate Respondent “was having trouble” and possibly under the influence of alcohol. (Tr. at 107, 113, 119-20). He further conceded he had received a call from the office indicating the deck crew had reported Respondent having issues. (Tr. at 108, 127). Thus, contrary to Captain Enoch’s sworn testimony, the evidence indicates the watch change was far from “average.”

Accordingly, based on Captain Enoch’s testimony, Mr. Rigney’s interactions with the junior engineer and Captain Enoch, and the M/V KANSAS CITY daily logs, the undersigned finds W.M.S. Marine had reasonable cause to administer the breath test on Respondent. 33 C.F.R. § 95.035. Prior to ordering the reasonable cause test, W.M.S. Marine, through Mr. Rigney, attempted to gather as much information as possible regarding Respondent’s condition.

After receiving a report of erratic maneuvering from a junior engineer, Mr. Rigney contacted the Captain of the vessel. See 33 C.F.R. § 95.035(c). The Captain, while evasive, nonetheless conceded crew members had reported Respondent had been drinking. (Tr. at 137). It was only at this point that W.M.S. Marine decided to test Respondent for alcohol as Mr. Rigney concluded the vessel “[couldn’t] keep going down the river [with] that kind of problem.” (Tr. at 137).

Notably, Respondent presented no argument either before the hearing or at the hearing to suggest the Coast Guard lacked reasonable cause. For instance, Respondent did not dispute the assertion that the M/V KANSAS CITY had reportedly been “all over the river” while he served as pilot. (Tr. at 136). Instead, Respondent conceded alcohol use aboard the M/V KANSAS CITY and argued he is an alcoholic. (Tr. at 192-93). While Respondent’s argument may be relevant for purposes of sanction, it is not relevant for purposes of assessing whether W.M.S. Marine had reasonable cause to suspect him of alcohol use. Accordingly, the undersigned finds W.M.S. Marine had reasonable cause to test Respondent for alcohol.

Respondent also did not dispute the accuracy of the test. Mr. Jon Smith, a certified breath alcohol technician with Western Kentucky Drug, testified as to the testing process. (CG Ex. 5) (Tr. at 36, 75). Mr. Smith, who was highly credible and informative, explained the AlcoSensor used to test Respondent was both properly calibrated and correctly used. (See CG Ex. 4).

The AlcoSensor indicated Respondent had a breath alcohol concentration of .152 at 11:26 PM, and a breath alcohol concentration of .138 at 11:44 PM. (CG Ex. 4). Both readings exceed an alcohol concentration of .04. 33 C.F.R. § 95.020(b). Accordingly, Respondent committed Misconduct by operating a vessel in violation of the standards set forth at 33 C.F.R. § 95.020(b).

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At all relevant times mentioned herein, Respondent was a holder of Merchant Mariner's License Number 874207 and Merchant Mariner's Credential Number 000177920.
2. Respondent and the subject matter of this hearing are properly within the jurisdiction vested in the Coast Guard under 46 U.S.C. § 7703(1)(B); 46 C.F.R. Parts 5 and 16; 33 C.F.R. Part 20; and the APA codified at 5 U.S.C. §§ 551-59.
3. Respondent operated a vessel in violation of the standards set forth at 33 C.F.R. § 95.020(b).
4. As a violation of 33 C.F.R. § 95.020(b) constitutes Misconduct, the Coast Guard has **PROVED** by a preponderance of reliable, probative, and credible evidence that Respondent committed Misconduct pursuant to 46 C.F.R. § 5.27.

SANCTION

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

The 46 C.F.R. § 5.569 guidelines provide a “Suggested Range of Appropriate Orders” for various offenses. The purpose of the Table is to provide guidance to the Administrative Law Judge and promote uniformity in orders rendered. 46 C.F.R. § 5.569(d); Appeal Decision 2628 (VILAS) (2002), aff'd by NTSB Docket ME-174. While 46 C.F.R. § 5.569 provide guidelines for certain specific types of Misconduct, a violation of 33 C.F.R. § 95.020 is not specifically enumerated.

Title 46 C.F.R. § 5.569, in turn, explains, “[e]xcept for acts or offenses for which revocation is mandatory, factors which may affect the order include: (1) Remedial actions which have been undertaken independently by the respondent; (2) Prior record of the respondent,

considering the period of time between prior acts and the act or offense for which presently charged is relevant; and (3) Evidence of mitigation or aggravation.”

For purposes of evidence of mitigation or aggravation, the regulations explain the prior disciplinary record of a respondent may be introduced, provided it is less than ten (10) years old.

33 C.F.R. § 20.1315(a). A “disciplinary record” is comprised of, inter alia:

Final agency action by the Coast Guard on any S&R proceeding in which a sanction or consent order was entered.

Any agreement for voluntary surrender entered into by the respondent. 33 C.F.R. § 20.1315(a)(2)-(3).

On June 3, 2003, the Coast Guard issued a Complaint against Respondent alleging one count of Use of, or addiction to the use of dangerous drugs pursuant to 46 C.F.R. § 5.35.

Thereafter, Respondent entered into a Settlement Agreement with the Coast Guard. (CG Ex. 8) (Tr. at 184-85). Respondent completed the terms of the Settlement Agreement in 2004, and his credentials were returned. (CG Ex. 8).

Subsequently, on August 11, 2011, the Coast Guard issued another Complaint against Respondent alleging one count of Misconduct pursuant to 46 C.F.R. § 5.27 for having a blood alcohol concentration over the acceptable limit while operating a vessel. On August 12, 2011, Respondent entered into a Voluntary Surrender Agreement with the Coast Guard and voluntarily relinquished his credentials and all associated rights. (CG Ex. 7) (See Tr. at 182-83).

The Coast Guard also sought to introduce evidence regarding a third, 1993 incident in which Respondent voluntarily surrendered his credentials to the Coast Guard. When the undersigned inquired as to why the Coast Guard sought to introduce evidence regarding the 1993 incident, the Coast Guard explained it was being offered to show “foundation of a history.” (CG Ex. 9) (Tr. at 186).

As discussed, the regulations limit a respondent’s prior disciplinary record to the last ten (10) years and grant no exception for “foundation of a history.” Further, based on the argument

made at the hearing, it is clear the Coast Guard intended to use the 1993 incident for purposes of evidence in aggravation. In fact, in its closing brief, the Coast Guard specifically lists the 1993 incident under a subsection entitled “Proposed Sanction”, stating that revocation is appropriate because of “... Respondent’s prior aggravating history and current violation.” Accordingly, the undersigned affords no probative value to CG Ex. 9, a document summarizing the 1993 incident.

As evidence in mitigation, Respondent offered various certificates and letters of recommendation, including a letter from his Alcoholics Anonymous (AA) sponsor. (Resp. Ex. 1- Resp. Ex. 8). In his closing brief, Respondent argued he is an alcoholic, but has been sober for eight (8) months as of December 2013.

However, the undersigned notes that Respondent nonetheless served as crewmember of the M/V KANSAS CITY with a high concentration of alcohol in his system. This fact, combined with two prior incidents with the Coast Guard involving alcohol and drugs, renders revocation appropriate. 46 C.F.R. § 5.5 (“These actions are intended to help maintain standards for competence and conduct essential to the promotion of safety at sea.”). See Appeal Decision 2609 (DOMANGUE) (1999) (upholding the ALJ’s sanction of revocation for Misconduct relating to alcohol even though the mariner had an otherwise unblemished record with the Coast Guard).

WHEREFORE,

ORDER

IT IS HEREBY ORDERED THAT the allegations as set forth in the Complaint are found **PROVED**.

IT IS FURTHER ORDERED THAT Respondent Tony H. Reames’ Merchant Mariner’s License Number 874207 and Merchant Mariner’s Credential Number 000177920 are hereby **REVOKED**.

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

PLEASE TAKE NOTICE that service of this Decision on the parties and/or parties' representative(s) serves as notice of appeal rights set forth in 33 C.F.R. §§ 20.1001 – 20.1004. (**Attachment B**).

SO ORDERED.

Dean C. Metry
U.S. Coast Guard Administrative Law Judge

Date: February 04, 2014

ATTACHMENT A
WITNESS AND EXHIBIT LISTS

WITNESS LIST

COAST GUARD'S WITNESSES

1. Jon Paul Smith
2. Charles Enoch, Jr.
3. John Rigney

EXHIBIT LIST

COAST GUARD'S EXHIBITS

- CG Ex. 1 Respondent's Merchant Mariner's Credential
- CG Ex. 2 Certificate of Documentation for M/V KANSAS CITY
- CG Ex. 3 Daily Logs from the M/V KANSAS CITY
- CG Ex. 3A Additional Daily Log from the M/V KANSAS CITY
- CG Ex. 4 Alcohol Testing Form
- CG Ex. 5 Breath Alcohol Technician Certification
- CG Ex. 6 Breath Alcohol Testing Forms
- CG Ex. 7 August 11, 2011 Complaint and Voluntary Surrender Agreement
- CG Ex. 8 Enforcement Summary for Tony H. Reames referencing June 2003 violation
- CG Ex. 9 Enforcement Summary for Tony H. Reames referencing a 1993 violation
- CG Ex. 10 Subpoena Forms for Jon Smith

RESPONDENT'S EXHIBITS

- Resp. Ex. 1 Denton House Certificate
- Resp. Ex. 2 Certificate of Training
- Resp. Ex. 3 Lalande Towing Operators, LLC Letter
- Resp. Ex. 4 Buddy Welch Letter
- Resp. Ex. 5 Dennis H. Letter
- Resp. Ex. 6 Charles Jones Letter
- Resp. Ex. 7 Captain Steve Bryan Letter
- Resp. Ex. 8 Captain Steve Bryan Letter and Documents

ATTACHMENT B
APPEAL RIGHTS

33 CFR 20.1001 General.

- (a) Any party may appeal the ALJ's decision by filing a notice of appeal. The party shall file the notice with the U. S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022. The party shall file the notice 30 days or less after issuance of the decision, and shall serve a copy of it on the other party and each interested person.
- (b) No party may appeal except on the following issues:
 - (1) Whether each finding of fact is supported by substantial evidence.
 - (2) Whether each conclusion of law accords with applicable law, precedent, and public policy.
 - (3) Whether the ALJ abused his or her discretion.
 - (4) The ALJ's denial of a motion for disqualification.
- (c) No interested person may appeal a summary decision except on the issue that no hearing was held or that in the issuance of the decision the ALJ did not consider evidence that that person would have presented.
- (d) The appeal must follow the procedural requirements of this subpart.

33 CFR 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.

33 CFR 20.1003 Procedures for appeal.

- (a) Each party appealing the ALJ's decision or ruling shall file an appellate brief with the Commandant at the following address: U.S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022, and shall serve a copy of the brief on every other party.
 - (1) The appellate brief must set forth the appellant's specific objections to the decision or ruling. The brief must set forth, in detail, the --
 - (i) Basis for the appeal;
 - (ii) Reasons supporting the appeal; and
 - (iii) Relief requested in the appeal.
 - (2) When the appellant relies on material contained in the record, the appellate brief must specifically refer to the pertinent parts of the record.
 - (3) The appellate brief must reach the Docketing Center 60 days or less after service of the ALJ's decision. Unless filed within this time, or within another time period authorized in writing by the Docketing Center, the brief will be untimely.

(b) Any party may file a reply brief with the Docketing Center 35 days or less after service of the appellate brief. Each such party shall serve a copy on every other party. If the party filing the reply brief relies on evidence contained in the record for the appeal, that brief must specifically refer to the pertinent parts of the record.

(c) No party may file more than one appellate brief or reply brief, unless --

(1) The party has petitioned the Commandant in writing; and

(2) The Commandant has granted leave to file an added brief, in which event the Commandant will allow a reasonable time for the party to file that brief.

(d) The Commandant may accept an amicus curiae brief from any person in an appeal of an ALJ's decision.

33 CFR 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.

ATTACHMENT C
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Coast Guard's Proposed Findings of Fact

1. On March 28, 2013, the towing vessel KANSAS CITY (O.N. 543008) hereinafter KANSAS CITY was underway on the Ohio River near Paducah, KY. **Accepted.**
2. At approximately 3:30 p.m. on March 28, 2013, the Respondent was a crewmember aboard, on watch, and in command and in control of the KANSAS CITY. **Accepted.**
3. At approximately 3:30 p.m on March 28, 2013, the Respondent was operating the KANSAS CITY as defined by 33 CFR 95.015(b) and required by 46 CFR 15.610. **Accepted.**
4. At approximately 11:26 p.m. on March 28, 2013, WMS Marine, Inc., Respondent's marine employer, directed the Respondent to submit to a breath test for alcohol which subsequently measured an alcohol concentration of .152 percent. **Rejected.**
Respondent's first alcohol test was administered at 11:26 p.m.; however, there is no indication in the record W.M.S. Marine, Inc. directed Respondent to undergo the test at 11:26 p.m.
5. At approximately 11:44 p.m. on March 28, 2013, the results of Respondent's second breath test measured an alcohol concentration of .138 percent. **Accepted.**
6. On March 28, 2013, the Respondent committed an act of Misconduct as described by 46 CFR 5.27 by operating a vessel in violation of the standards set out in 33 CFR 95.020(b). **Accepted.**

Coast Guard's Proposed Findings of Law

1. The subject matter of this Administrative Hearing and the Respondent are properly within the Jurisdiction vested in the United States Coast Guard by 46 USC 7703. **Accepted.**
2. The Jurisdictional and Factual Allegations of Misconduct against Respondent in violation of 46 CFR 5.27 are found **PROVED. Accepted.**