

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

UNITED STATES COAST GUARD,

Complainant

v.

NANCY RENEE FOWLER,

Respondent

Docket Number 2013-0417
Enforcement Activity No. 4747700

DECISION & ORDER

Date Issued: September 25, 2014

Issued By: Honorable Bruce Tucker Smith
Administrative Law Judge

Appearances:

For the Complainant

Jim Wilson, Esq.
U.S. Coast Guard Marine Safety Unit Morgan City

For the Respondent

Nancy Renee Fowler, pro se

I. STATEMENT OF THE CASE

On November 7, 2013, the United States Coast Guard (Coast Guard) filed a Complaint against Respondent Nancy Renee Fowler (Respondent), seeking revocation of her Coast Guard-issued Merchant Mariner's Credential (credential). The Complaint charged Respondent with one count of use of, or addiction to the use of, dangerous drugs pursuant to 46 U.S.C. §7704(c) and 46 C.F.R. §5.35. The Complaint further charged Respondent with three counts of Misconduct pursuant to 46 U.S.C. §7703(1)(B) and 46 C.F.R. §5.27.

On December 5, 2013, Respondent filed an Answer denying all jurisdictional and factual allegations.

On December 20, 2013, the Chief Administrative Law Judge (CALJ) assigned the matter to the undersigned for adjudication.

On March 31, 2014, the court convened a telephonic pre-hearing conference with the parties and advised Respondent of her procedural rights in suspension and revocation cases.

On April 11, 2014, the Coast Guard filed an Amended Complaint correcting dates and verbiage in its Original Complaint.

On May 20, 2014, the court convened a second telephonic pre-hearing conference with the parties to ensure Respondent understood the revised charges set forth in the Amended Complaint.

Respondent filed an Answer dated June 2, 2014, to the Amended Complaint denying all jurisdictional and factual allegations.¹

On June 30, 2014, the hearing of this matter commenced in New Orleans, Louisiana. Jim Wilson, Esq., appeared on behalf of the Coast Guard; Respondent appeared on her own behalf.

¹ The court notes that Respondent dated her Answer to the Amended Complaint as June 2, 2014; however the postmark indicates the pleading was mailed on June 14, 2014.

At hearing, the Coast Guard presented the testimony of five witnesses and offered ten exhibits, all of which were admitted into the record.² Respondent testified on her own behalf and offered one exhibit, which was admitted into the record.

After careful review of the entire record, including witness testimony, applicable statutes, regulations, and case law, the court finds the Coast Guard **PROVED** that on or about October 1, 2013, Respondent used, or was addicted to the use of, dangerous drugs pursuant to 46 U.S.C. §7704(c) and 46 C.F.R. §5.35. Further, the court finds the Coast Guard **PROVED** that on or about October 1, 2013, and October 2, 2013, Respondent committed three acts of Misconduct while acting under the authority of her credential pursuant to 46 U.S.C. §7703(1)(B) and 46 C.F.R. §5.27.

II. FINDINGS OF FACT

1. At all times relevant herein, Respondent held a Coast Guard-issued Merchant Mariner's Credential. (ALJ Ex. I).
2. At all relevant times herein, Candy Fleet, L.L.C. employed Respondent as Captain and Master of the crew boat CANDY COTTON. (Tr. at 28, 46, 135).
3. Candy Fleet, L.L.C. is a marine employer as defined at 46 C.F.R. §16.105 and thereby required to abide by chemical testing regulations as set forth at 46 C.F.R. Part 16, Subpart B. (Tr. at 51).
4. On or about October 1, 2013, the second captain (or mate) aboard the crew boat CANDY COTTON, Captain Joe Goldman, and deckhand Thomas Brandon Parker suspected Respondent was smoking marijuana aboard the vessel. (Tr. Vol. at 27, 64-65).
5. Mr. Parker suspected Respondent was smoking marijuana aboard the vessel because he smelled the distinct odor of marijuana coming from the immediate area where Respondent was standing in the engine room. (Tr. at 83-85).
6. Mr. Parker immediately reported the smell of marijuana to Captain Goldman. (Tr. at 64).

² Citations referencing the transcript are as follows: Transcript followed by the volume number and page number (Tr. at __). Citations referring to Agency Exhibits are as follows: CG followed by the exhibit number (CG Ex. 1, etc.); Respondent's Exhibits are as follows: Respondent followed by the exhibit letter (Resp. Ex. A, etc.); ALJ Exhibits are as follows: ALJ followed by the exhibit Roman numeral (ALJ Ex. I, etc.). A list of all exhibits offered and admitted, together with the names of the parties' respective witnesses, are set forth in Attachment A.

7. Captain Goldman then entered the engine room and smelled the distinct odor of marijuana. (Tr. at 64).
8. Respondent was not present in the engine room when Captain Goldman smelled the odor of marijuana. (Tr. at 65).
9. On or about October 1, 2013, Captain Goldman telephoned Denise Baisden, Health, Safety and Environmental Resources Director for Candy Fleet, L.L.C., and told her that he and another crewmember suspected Respondent was smoking marijuana aboard the vessel. (Tr. Vol. at 27, 64-65).
10. On or about October 1, 2013, Ms. Baisden directed that a “random” drug screening be conducted on all crewmembers aboard the CANDY COTTON based upon the information she received regarding Respondent’s alleged drug use. (Tr. at 28).
11. Ms. Baisden’s characterization of the October 1, 2013 test as “random” was false and motivated by her desire to “just go down and get the drug test on the crew,” when, in fact, she wanted to test Respondent only. (Tr. at 28).
12. On October 1, 2013, at approximately 10:00 p.m., Lafayette Veals, a Department of Transportation (DoT)-certified urine specimen collector, boarded the CANDY COTTON to conduct “random” drug screening of all crewmembers (Tr. at 28, 96; CG. Ex. 7, 8).
13. Mr. Veals set up the drug test collection kits and accompanying paperwork in the galley of the CANDY COTTON. (Tr. at 110).
14. As Mr. Veals was preparing to administer the specimen collection process, Respondent went to the engine room and asked crewmember Aurelio Alcocer to “piss in this bottle.” (Tr. at 136).
15. Captain Goldman, who was in the engine room at the time, witnessed Respondent ask Mr. Alcocer to provide her with his urine. (Tr. at 66, 74).
16. Captain Goldman saw Respondent give Mr. Alcocer a bottle to urinate into. (Tr. at 74-75).
17. Mr. Alcocer entered the generator room, located adjacent to the engine room, and urinated into the bottle given to him by Respondent. (Tr. at 137).
18. Captain Goldman did not see Mr. Alcocer give Respondent a urine-filled bottle. (Tr. at 76).
19. Respondent provided a urine specimen to Mr. Veals. (Tr. 101-103; CG Ex. 9).
20. Upon receiving Respondent’s urine specimen, Mr. Veals noted the specimen temperature to be “perfect. It was 98 degrees.” (Tr. at 112).

21. Mr. Veals documented Respondent's collection process on a Custody Control Form (CCF) bearing the unique specimen identification number: 57496449. (Tr. Vol. I at 101-103; CG. Ex. 9).
22. Mr. Veals identified Respondent by her "picture ID card." (Tr. at 102).
23. Mr. Veals divided Respondent's urine specimen into specimen bottles, labeled "A" and "B", and shipped the samples to Alere Toxicology, Services in Gretna, Louisiana, via FedEx. (Tr. at 112-113; CG Ex. 9).
24. Mr. Veals witnessed Respondent sign the CCF bearing the unique specimen identification number: 57496449, the same number that was affixed to Respondent's "A" and "B" specimen bottles. (Tr. at 102-103; CG Ex. 9).
25. After Mr. Veals departed the vessel, Respondent bragged to other crewmembers that "she got away with it." (Tr. at 67).
26. On October 2, 2013, Captain Goldman contacted Ms. Baisden and informed her about the conversation he witnessed between Respondent and Mr. Alcocer in the engine room the previous evening. (Tr. 29-30, 68).
27. On October 2, 2013, Mr. Alcocer admitted to Mr. Parker that he provided urine to Respondent for the drug test. (Tr. at 90).
28. On October 2, 2013, Mr. Alcocer contacted Ms. Baisden and admitted "I had done something wrong;" Ms. Baisden told him that "she already knew about it." (Tr. at 139).
29. On October 2, 2013, Ms. Baisden directed that a second, or "reasonable suspicion" drug screening, be conducted on all crewmembers aboard the CANDY COTTON in response to information provided by Captain Goldman and Mr. Alcocer. (Tr. at 28; CG Ex. 1, 2, 3, 4, 5).
30. On October 2, 2013, Mr. Veals boarded the crew boat CANDY COTTON to conduct a "reasonable suspicion" drug test. (Tr. at 96).
31. On October 2, 2013, Respondent refused to submit to the "reasonable suspicion" drug testing. (Tr. at 31, 71, 92-93, 105-106; CG. Ex. 10).
32. Because Respondent refused to submit to the October 2, 2013, "reasonable suspicion" test, Mr. Veals did not identify Respondent by her "picture ID card;" however, Mr. Veals did recognize Respondent from the October 1, 2013, testing. (Tr. at 105).
33. On October 2, 2013, Respondent admitted to Ms. Baisden that "if I test, I'll be dirty." (Tr. at 31).

34. On October 2, 2013, Respondent admitted to Ms. Baisden that she had smoked marijuana at home. (Tr. at 93).

35. On October 2, 2013, Mr. Veals documented Respondent's refusal on a CCF bearing the unique specimen identification number: 502393926. (Tr. at 104-106; CG. Ex. 10).

III. PRINCIPLES OF LAW

A. Suspension & Revocation Proceedings

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, Administrative Law Judges (ALJs) have the authority to suspend and/or revoke a mariner's credential for violations arising under 46 U.S.C. §7703, §7704. See 46 C.F.R. §5.19(b).

B. Jurisdiction

In the instant matter, the Coast Guard brought charges against Respondent under the authority of 46 U.S.C. §7704(c) and 46 U.S.C. §7703. Title 46 U.S.C. §7704(c) provides:

If it is shown that a holder has been a user of, or addicted to, a dangerous drug, the license, certificate of registry, or merchant mariner's document shall be revoked unless the holder provides satisfactory proof that the holder is cured.

See also 46 C.F.R. §5.35.

Alleged violations of 46 U.S.C. §7704(c) are "holder offenses" in that the mariner need not have been acting under the authority of his credentials in order to be subject to the Coast Guard's jurisdiction. Jurisdiction is established for the purposes of suspension and revocation proceedings when the use of a dangerous drug is charged, so long as respondent is a current holder of any Coast Guard-issued credential. See Appeal Decision 2668 (MERRILL) (2007). Here, it is uncontested that Respondent is the holder of a credential and thus jurisdiction for the §7704(c) charge is established.

Title 46 U.S.C. §7703 provides that jurisdiction is appropriate in a Misconduct case only if the Misconduct occurred while the mariner was acting under the authority of their credential. Id.; see also Appeal Decision 2615 (DALE) (2000). The conditions under which a mariner acts under the authority of a Coast Guard-issued credential are found at 46 C.F.R. §5.57 and include when the holding of such credential or endorsement is: (1) required by law or regulation; or (2) required by an employer as a condition for employment. 46 C.F.R. §5.57(a).

The record clearly establishes Respondent was the holder of a credential and served as Master of the CANDY COTTON at all times relevant to these allegations. The evidence establishes the CANDY COTTON is an inspected vessel and that its Certificate of Inspection requires the vessel's crew to include a Master. Accordingly, Respondent was acting under the authority of her credential at all times relevant to these allegations and thus jurisdiction is established for the §7703 charges.

C. Burden of Proof

The Administrative Procedure Act (APA), 5 U.S.C. §§551-559, applies to Coast Guard Suspension and Revocation proceedings. 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 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 Products 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 must prove by

credible, reliable, probative, and substantial evidence that Respondent more likely than not committed the violation(s) charged.

Determining the weight of the evidence and making credibility determinations as to the evidence is within the sole purview of the ALJ. See Appeal Decision (2640) (PASSARO) (2003). Additionally, the ALJ is vested with broad discretion in resolving inconsistencies in the evidence, and findings do not need to be consistent with all of the evidence in the record as long as there is sufficient evidence to reasonably justify the findings reached. Id.; Appeal Decision 2639 (HAUCK) (2003).

IV. ANALYSIS

A. Use, or Addiction to the Use of, Dangerous Drugs

Congress enacted 46 U.S.C. §7704 with the express purpose of removing those individuals possessing and using drugs from service in the United States merchant marine. House Report No. 338, 98th Cong., 1st Sess. 177 (1983); Appeal Decision 2634 (BARRETTA) (2002). As defined at 46 U.S.C. §2101(8a), “‘dangerous drug’ means a narcotic drug, a controlled substance, or a controlled substance analog (as defined in section 102 of the Comprehensive Drug Abuse and Control Act of 1970 (21 U.S.C. §802)).” Marijuana is included among those controlled substances and is one of the five drugs that Coast Guard regulations mandate be tested for in a mariner’s specimen. See 46 C.F.R. §16.113(b).

In accordance with 46 U.S.C. §7704(c), “[a] Coast Guard license ‘shall’ be revoked if ‘it is shown that a holder has been a user of, or addicted to, a dangerous drug . . . unless the holder provides satisfactory proof that the holder is cured.’” Appeal Decision 2653 (ZERINGUE) (2005).

1. Count 1: Use, or Addiction to the Use of, Dangerous Drugs: Possession & Use of a Dangerous Drug Aboard a Vessel

Count 1 of the Amended Complaint alleges violations of 47 U.S.C. §7704(c) and 46 C.F.R. §5.35, to wit: “between [] September 24, 2013 and [] October 1, 2013, the Respondent possessed and used a dangerous drug, marijuana, onboard the Candy Cotton.”

In this case, the Coast Guard’s proof is circumstantial. At hearing, the Coast Guard relied upon the testimonies of Captain Joe Goldman and deckhand Thomas Brandon Parker to prove Respondent’s drug use. Mr. Parker testified that on October 1, 2014, he saw Respondent standing on the port side of the engine room by an open porthole. (Tr. at 85). Both Captain Goldman and Mr. Parker testified that they then smelled marijuana in the same area of the vessel where Respondent was standing. (Tr. at 63-64; 83-85). Both witnesses testified they are “familiar” with the smell of marijuana. (Tr. at 64, 84). Both witnesses testified that they had personally used marijuana in high school. (Tr. at 64, 84). Although neither witness directly observed Respondent possessing and/or using marijuana, the court finds their testimony as both probative and credible, based upon their observations of Respondent, the odor they perceived and their prior personal experiences with marijuana. (Tr. at 72, 85).

Respondent countered by testifying, “I was not smoking marijuana on that boat.” She then explained that the crew contrived the story about her smoking marijuana because she wanted to end a sexual relationship with Captain Goldman and have him removed from the vessel. Respondent also testified the “lie” was motivated by Mr. Alcocer’s irritation that she (Respondent) would no longer provide him with transportation from Texas to the boat launch. (Tr. at 123-126). The court does not accept Respondent’s explanation, which is at variance with the facts.

In Appeal Decision 2340 (JAFFEE) (1984), the Commandant held “eyewitness testimony is not required. Circumstantial evidence may form a proper basis for a finding.” Id. quoting Appeal Decision 1930 (CRUZ) (1970).

Given the credible circumstantial evidence of Respondent's drug use, coupled with her behavior in the drug tests described below, the court believes it is more likely than not that on October 1, 2013, Respondent used marijuana.

Therefore, based upon the testimony presented and the credibility of the respective witnesses, the court finds that the Coast Guard **PROVED** that on or about October 1, 2013, Respondent possessed and used a dangerous drug while aboard the CANDY COTTON.

B. Misconduct

“Misconduct is 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.” 46 C.F.R. §5.27. In the instant matter, the Coast Guard alleges Respondent committed Misconduct by violating her marine employer's drug policy.

Respondent's marine employer, Candy Fleet, L.L.C., placed Respondent on notice of its policy that “[a]ll employees are subject to drug and alcohol testing at any time” (CG Ex. 5). Respondent further “consent[ed] to submit to alcohol and drug testing and agree to comply with all requirements of the Company. . . .” (CG Ex. 1, 2, 3, 4).

1. Count 2: Misconduct: Substituted Specimen

On October 1, 2013, Denise Baisden, the Health, Safety and Environmental Resources Director for Candy Fleet, L.L.C., directed that a “random” drug screening be conducted on all crewmembers aboard the CANDY COTTON after she learned that Respondent was using marijuana aboard the CANDY COTTON. Ms. Baisden testified she “called it a random test so that we could just go down and get the drug test on the crew.” (Tr. at 28). Clearly any such test

is not a test within the meaning of 46 C.F.R. Part 16, since the reference to a “random” test was merely a ruse by the marine employer in order to obtain Respondent’s urine.³

At approximately 10:00 p.m., on October 1, 2013, Lafayette Veals, a Department of Transportation (DoT)-certified urine specimen collector, boarded the CANDY COTTON to conduct the “random” drug screening of all crewmembers (Tr. at 28, 96; CG. Ex. 7, 8).

Mr. Veals set up the drug test collection kits and accompanying paperwork in the galley (i.e., kitchen area) of the CANDY COTTON. (Tr. at 110).

Captain Goldman testified that after Mr. Veals boarded the vessel he (Captain Goldman) went to the engine room to alert engineer Aurelio “Leo” Alcocer about the drug test. (Tr. at 66). Captain Goldman then saw Respondent enter the engine room and in the presence of Captain Goldman, said to Mr. Alcocer:

I want you to piss in this bottle. . . . [P]lease—can you please—can you piss for me, please.

(Tr. at 66, 136).

Captain Goldman then observed Respondent give Mr. Alcocer a bottle in which to urinate. (Tr. at 74-75). Captain Goldman testified he saw Mr. Alcocer go “in the generator room to do that.” (Tr. at 66-67). However, Captain Goldman did not see Mr. Alcocer give Respondent a urine-filled bottle. (Tr. at 76).

At approximately 10:24 p.m. on October 1, 2013, Mr. Veals documented Respondent’s collection process on a Custody Control Form (CCF) bearing the unique specimen identification

³ This court defers to the judgment of the Commandant whether the employer’s false characterization of the October 1, 2013, test as “random” vitiates Respondent’s subsequent attempt to circumvent the testing process. (The October 1, 2013 test should have been characterized as a “reasonable suspicion” test by the employer per the dictates of 46 C.F.R. §16.250(a)). Nevertheless, the Amended Complaint alleges that by substituting the engineer’s urine for her own, Respondent committed Misconduct by “violating Candy Fleet, L.L.C.’s company policy.” 46 C.F.R. §5.27. Coast Guard Exhibit 5 is a one-page declaration of Candy Fleet L.L.C.’s “Drug Free Workplace.” That document states, “All employees are subject to drug and alcohol testing at any time . . . Presumably, in this case, drug testing performed under the employer’s policy is not done pursuant to either 46 C.F.R. Part 16 or 49 C.F.R. Part 40, because apparently, per the policy, the employer can test an employee at any time and for any reason. Thus, drug tests performed pursuant to the employer’s policy would not trigger the Constitutional considerations articulated in

number: 57496449. (Tr. Vol. I at 101-103; CG. Ex. 9). Mr. Veals identified Respondent by her “picture ID card.” (Tr. at 102). Thereafter, Respondent provided a urine specimen to Mr. Veals. (Tr. 101-103; CG Ex. 9). It is assumed that Respondent entered the restroom and pretended to urinate into a specimen cup. However, the Coast Guard failed to elicit testimony in this regard.

Upon receiving Respondent’s urine specimen, Mr. Veals noted the specimen temperature to be “perfect. It was 98 degrees.” (Tr. at 112). Mr. Veals then divided Respondent’s urine specimen into specimen bottles, labeled “A” and “B”, and shipped the two bottles to Alere Toxicology Services in Gretna, Louisiana, via FedEx. (Tr. at 112-113; CG Ex. 9). Mr. Veals then witnessed Respondent sign the CCF bearing the unique specimen identification number: 57496449, the same unique number that was affixed to Respondent’s “A” and “B” specimen bottles. (Tr. at 102-103; CG Ex. 9).

The court specifically finds that the urine specimen Respondent provided for testing was actually Mr. Alcocer’s. Thus, by her actions, Respondent clearly attempted to subvert the testing process.

Captain Goldman testified that after Mr. Veals departed the vessel, Respondent was essentially “bragging” that “she got away with it.” (Tr. at 67).

On October 2, 2013, Captain Goldman contacted Ms. Baisden to report that Respondent provided a substituted specimen and related the conversation between Respondent and Mr. Alcocer. (Tr. at 68-69).

Crewmember Brandon Parker testified that on October 2, 2013, “Leo confessed to [me] to peeing for [Respondent].” (Tr. at 90). Mr. Alcocer thereafter “called Denise [Baisden], the HR. . . and said I had done something wrong.” (Tr. 139).

At hearing, Respondent testified, “I did not falsify nothing. . . . That’s impossible. The [] specimen that I gave [the collector] was the correct, and it was mine.” (Tr. at 123). In support of her testimony, Respondent provided the court with a copy of the Medical Review Officer’s Report indicating the specimen associated with Respondent’s unique specimen identification number: 57496449, tested negative. (Resp. Ex. A). The court notes that a negative drug test does not disprove Respondent’s perfidy.

Despite the marine employer’s improper description of the test as “random,” Respondent violated the express terms of Candy Fleet, L.L.C.’s policy by failing to submit to drug testing and attempting to deceive her employer by providing a substituted specimen.

This court takes particular guidance from the Commandant, who said in Appeal Decision 2694 (LANGLEY) (2011), “[s]ubstitution of a specimen is an intentional act and constitutes a refusal to test. Such interference with the integrity of the testing process creates a risk of an impaired mariner continuing to serve in a safety sensitive position.” Id.

Accordingly, the court finds the Coast Guard **PROVED** that on or about October 1, 2013, Respondent committed an act of Misconduct, while acting under the authority of her credential, by providing a substituted urine specimen in contravention of her marine employer’s drug testing policy.

2. Count 3: Misconduct: Failure to Provide Specimen

As discussed above, on October 2, 2013, Captain Goldman telephoned Ms. Baisden and told her that Respondent “was able to supply the tester with some urine from someone else.” (Tr. at 29). Shortly thereafter Ms. Baisden received a telephone call from Mr. Alcocer, who admitted to giving Respondent his urine. (Id.). Based upon this information, Ms. Baisden ordered a “reasonable suspicion drug test” be conducted aboard the CANDY COTTON. (Tr. at 30).

A marine employer may test an employee, who is required to hold a Coast Guard issued credential, for dangerous drugs if the employee is reasonably suspected of using a dangerous drug. See 46 C.F.R. § 16.250(a). The employer's decision to test the employee must be based on a reasonable and articulable belief that the individual has used a dangerous drug. See 46 C.F.R. § 16.205(b). This reasonable and articulable belief may be based on direct observation, physical, behavioral or performance indicators of probable use. Id. The information provided to Ms. Baisden by Captain Goldman and Mr. Alcocer more than justified Ms. Baisden's reasonable and articulable belief that Respondent had used drugs.

On October 2, 2013, at approximately 2:00 p.m., Ms. Baisden, Mr. Veals (and two other Candy Fleet employees) boarded the CANDY COTTON for the purpose of conducting a second urine test. (Tr. at 30-31). Respondent then "announced she was not going to test." (Tr. at 31). Ms. Baisden testified that Respondent admitted that she was refusing to test "because if I test, I'll be dirty." (Tr. at 31).

Ms. Baisden further testified that Respondent had admitted that she had smoked marijuana at home. (Tr. at 93). Ms. Baisden testified she then advised Respondent of her options: "test and let's see what happens or don't test and you have to pack your bags and leave because it's a violation of company policy." (Tr. at 32). Respondent advised Ms. Baisden that she would pack her bags. (Id.). At the hearing Respondent explained her refusal saying that, "I just felt that I didn't have to prove myself because I've already taken a test the night before." (Tr. at 127-128).

Further, Ms. Baisden testified that on October 2, 2013, she asked Respondent how she supplied the urine for a previous test, to which Respondent responded she "carried [urine] on board in her bags." (Tr. at 32).

Based upon the information provided by the several crewmembers of the CANDY COTTON, it was appropriate for Ms. Baisden to reasonably suspect Respondent had recently

used drugs. It was also appropriate for Ms. Baisden to direct Respondent to submit to a reasonable cause drug test. 46 C.F.R. §16.250. Respondent's refusal to comply with the terms of her marine employer's drug policy constitutes Misconduct.

Therefore, the court finds the Coast Guard **PROVED** that Respondent committed an act of Misconduct, while acting under the authority of her credential, by refusing to submit to drug testing, in contravention of her marine employer's drug policy.

3. Count 4: Misconduct: Violation of Employer's Drug Free Workplace Policy & 21 U.S.C. §844

In Count 4, the Coast Guard alleged "Between about September 24, 2013 and about October 1, 2013, the Respondent possessed and smoked marijuana in the machine room onboard the Candy Fleet vessel Candy Cotton while the vessel was underway in the Gulf of Mexico, in violation of the Company Drug Free Workplace policy, and in violation of 21 United States Code 844." [sic]

As discussed above in Count 1, the Coast Guard proved that Respondent possessed and used drugs while aboard the CANDY COTTON. Accordingly, Respondent violated the terms of her marine employer's Drug Free Workplace by alleging she possessing and using drugs while aboard the CANDY COTTON. Respondent further violated the terms of her marine employer's Drug Free Workplace agreement by failing to comply with the express provision that "[a]ll employees are subject to drug . . . testing at any time" by not properly submitting to testing on October 1, 2013, and October 2, 2013. (CG Ex. 5).

With regard to the Coast Guard's charge that Respondent violated 21 U.S.C. §844, the court will not address that allegation as that statute relates to criminal penalties and this forum is not empowered to impose such a sanction.

The court finds the Coast Guard **PROVED** that Respondent committed an act of Misconduct by violating the terms of her marine employer's Drug Free Workplace policy by not properly submitting to drug testing on October 1, 2013, and October 2, 2013, when directed.

However, a finding of "PROVED" in Count 4 is multiplicitious with a finding of "PROVED" in Count 1. Thus, the court will not consider the finding in Count 4 for purposes of determining an appropriate sanction.

V. ULTIMATE FINDINGS OF FACT

1. At all relevant times herein, Respondent was a holder of Coast Guard-issued Merchant Mariner's Credential.
2. At all relevant times herein, Respondent was acting under the authority of her Coast Guard-issued Merchant Mariner's Credential.
3. On October 1, 2013, Respondent used marijuana aboard the CANDY COTTON.
4. Ms. Baisden's characterization of the October 1, 2013 test as "random" was false and motivated by her desire to test Respondent only.
5. On October 1, 2013, Respondent submitted Aurelio "Leo" Alcocer's urine specimen as her own during a "random" urinalysis, thus violating the terms of her marine employer's drug testing policy.
6. On October 2, 2013, Respondent refused to submit a urine specimen during a "reasonable suspicion" urinalysis when she was properly directed to do so, thus violating the terms of her marine employer's drug testing policy.
7. On October 1, 2013 and October 2, 2013, Respondent violated the terms of her marine employer's Drug Free Workplace policy by not properly submitting to drug testing when directed.

VI. ULTIMATE CONCLUSIONS OF LAW

1. 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), 7704(c); 46 C.F.R. Part 5; 33 C.F.R. Part 20; and the APA codified at 5 U.S.C. §§551-59.
2. On October 1, 2013, Respondent was a user of, or addicted to the use of, dangerous drugs. 46 U.S.C. §7704(c); 46 C.F.R. §5.35.

3. Respondent committed an act of Misconduct, while acting under the authority of her credential, by providing a substituted urine specimen in contravention of her marine employer's drug testing policy. 46 U.S.C. §7703(1)(B); 46 C.F.R. §5.27.
4. Ms. Baisden's decision to test Respondent for drugs on October 2, 2013, was based upon a reasonable and articulable belief that on or about October 1, 2013, Respondent had used marijuana while serving as Master of the CANDY COTTON. 46 C.F.R. §16.250(a).
5. On October 2, 2013, Respondent committed an act of Misconduct, while acting under the authority of her credential, by refusing to submit to "reasonable suspicion" drug testing, in contravention of her marine employer's drug policy. 46 U.S.C. §7703(1)(B); 46 C.F.R. §5.27.
6. On October 1, 2013, and October 2, 2013, Respondent, while acting under the authority of her credential, committed an act of Misconduct by violating the terms of her marine employer's Drug Free Workplace policy by not properly submitting to drug testing when directed. 46 U.S.C. §7703(1)(B); 46 C.F.R. §5.27.

VII. SANCTION

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

The 46 C.F.R. § 5.569 guidelines provide a "Suggested Range of Appropriate Orders" (Table) for various offenses. The purpose of the Table is to provide guidance to the ALJ 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.

Title 46 C.F.R. §5.569 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." Id.

In the instant matter, Respondent did not introduce any evidence or testimony suggesting independent remedial action(s) or any evidence or testimony in mitigation. Likewise, the Coast Guard did not introduce any evidence or testimony regarding Respondent's prior record, if any.

As discussed in detail above, the Coast Guard **PROVED** that on October 1, 2013, Respondent committed one act of use of, or addiction to the use of, dangerous drugs, and that on October 1 and 2, 2013, while acting under the authority of her credential, Respondent committed three acts of Misconduct. As per the dictates of 46 U.S.C. §7704(c), the court must **REVOKE** Respondent's credential.

With regard to the Misconduct charges, the Table does not provide a specific sanction for the acts committed by Respondent. "Failure to perform duties related to vessel safety" is likely the most similar offense to Respondent's Misconduct offenses, i.e., failure to comply with her employer's policy and her employer's prohibition against illicit substances aboard its vessels. Despite the suggestion by the Table that such conduct warrants a period of suspension, the court **REVOKES** Respondent's credential for each of the three acts of Misconduct committed by Respondent while acting under the authority of her credential. The court finds revocation is appropriate for Respondent's multiple acts of Misconduct as Respondent's course of conduct reveals a mendacity and a willingness to intentionally subvert her marine employer's drug policy—twice within a 24-hour period. The court further notes that revocation is warranted as Respondent, in her capacity as Master (the highest authority on a vessel), enlisted the help of a subordinate mariner in her scheme to subvert her marine employer's drug testing policy. See Commandant v. Moore, NTSB Order No. EM-201 (2005).

WHEREFORE,

VII. ORDER

IT IS HEREBY ORDERED, that all allegations pled in the Coast Guard's Amended Complaint are found **PROVED**.

IT IS FURTHER ORDERED, that Respondent's Coast Guard-issued credential is **REVOKED** for the reasons discussed above.

PLEASE TAKE NOTICE, that the court shall immediately transmit Respondent's Coast Guard-issued credential to Jim Wilson, Esq., U.S. Coast Guard Marine Safety Unit Morgan City, for appropriate handling.

PLEASE TAKE FURTHER 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**).

IT SO ORDERED.



Bruce Tucker Smith
US Coast Guard
Administrative Law Judge

Date:

ATTACHMENT A: LIST OF WITNESSES & EXHIBITS

ALJ Exhibit

1. Respondent's Coast Guard-issued credential

Coast Guard Exhibits

1. Signed Employee Certificate of Understanding and Agreement dated 5/16/05
2. Signed Employee Certificate of Understanding and Agreement dated 1/20/09
3. Signed Employee Certificate of Understanding and Agreement dated 6/02/10
4. Signed Employee Certificate of Understanding and Agreement dated 6/15/12
5. Signed Drug Free Workplace directive dated 6/15/12
6. CANDY COTTON Certificate of Inspection
7. Certificate of Completion issued 9/05/13 to Lafayette Veals
8. Certificate of Training issued 9/06/13 to Lafayette Veals
9. Federal Drug Testing Custody and Control Form: Specimen ID Number 57496449 dated 10/01/13
10. Federal Drug Testing Custody and Control Form: Specimen ID Number 502393926 dated 10/02/13

Coast Guard Witnesses

1. Denise Baisden
2. Joseph Goldman
3. Thomas Brandon Parker
4. Lafayette Veals
5. Aurelio Alcocer

Respondent Exhibits

- A. Medical Review Officer results of October 1, 2013, random drug test

Respondent Witnesses

1. Nancy Fowler

ATTACHMENT B: SUBPART J, APPEALS

33 C.F.R. §20.1001 General.

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

33 C.F.R. §20.1002 Records on appeal.

- (a) The record of the proceeding constitutes the record for decision on appeal.
- (b) If the respondent requests a copy of the transcript of the hearing as part of the record of proceeding, then, --
 - (1) If the hearing was recorded at Federal expense, the Coast Guard will provide the transcript on payment of the fees prescribed in 49 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 C.F.R. §20.1003 Procedures for appeal.

- (a) Each party appealing the ALJ's decision or ruling shall file an appellate brief with the Commandant at the following address: U.S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022, and shall serve a copy of the brief on every other party.
 - (1) The appellate brief must set forth the appellant's specific objections to the decision or ruling. The brief must set forth, in detail, the --
 - (i) Basis for the appeal;
 - (ii) Reasons supporting the appeal; and
 - (iii) Relief requested in the appeal.
 - (2) When the appellant relies on material contained in the record, the appellate brief must specifically refer to the pertinent parts of the record.
 - (3) The appellate brief must reach the Docketing Center 60 days or less after service of the ALJ's decision. Unless filed within this time, or within another time period authorized in writing by the Docketing Center, the brief will be untimely.
- (b) Any party may file a reply brief with the Docketing Center 35 days or less after service of the appellate brief. Each such party shall serve a copy on every other party.

- If the party filing the reply brief relies on evidence contained in the record for the appeal, that brief must specifically refer to the pertinent parts of the record.
- (c) No party may file more than one appellate brief or reply brief, unless --
 - (1) The party has petitioned the Commandant in writing; and
 - (2) The Commandant has granted leave to file an added brief, in which event the Commandant will allow a reasonable time for the party to file that brief.
 - (d) The Commandant may accept an amicus curiae brief from any person in an appeal of an ALJ's decision.

33 C.F.R. §20.1004 Decisions on appeal.

- (a) The Commandant shall review the record on appeal to determine whether the ALJ committed error in the proceedings, and whether the Commandant should affirm, modify, or reverse the ALJ's decision or should remand the case for further proceedings.
- (b) The Commandant shall issue a decision on every appeal in writing and shall serve a copy of the decision on each party and interested person.