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

UNITED STATES COAST GUARD
Complainant

vs.

THEODORE BRUCE EDENSTROM
Respondent

Docket Number 2015-0352
Enforcement Activity No. 5719095

DECISION AND ORDER
Issued: January 12, 2017

By Administrative Law Judge: Honorable George J. Jordan

Appearances:

LCDR Benjamin Robinson
Mr. Travis J. Nolen
Marine Safety Unit Portland OR

For the Coast Guard
THEODORE BRUCE EDENSTROM, Pro se
For the Respondent

DECISION AND ORDER

The Coast Guard initiated this proceeding by filing a Complaint seeking to revoke Respondent's Merchant Mariner Credential (MMC) for refusing chemical tests under 46 C.F.R. Part 16 on October 1 and 8, 2015. Respondent denied the allegations, asserting that he was not properly notified of a drug test and was not employed at the time of the test. At the hearing, the Coast Guard withdrew the allegation concerning the October 8, 2015 test, so I dismissed Allegation Two without prejudice. In this Decision, I find that Respondent's employer did not properly notify him that he was required to take a drug test on October 1, 2015, thus his failure to appear for the test did not constitute a refusal under 49 C.F.R. § 40.191 and 46 C.F.R Part 16. I also find his actions did not constitute failure to cooperate with the employer's drug testing policy, as set out in its employee handbook. Accordingly, I find the charges NOT PROVED.

I. PROCEDURAL HISTORY

The Coast Guard filed a Complaint seeking to revoke Respondent's MMC on November 23, 2015, and Respondent filed a timely Answer denying the allegations on December 16, 2015. On March 7, 2016 at 12:00 p.m. PST, I held a prehearing conference in this matter. The Coast Guard's representatives were present at the prehearing conference, but Respondent was not present. The Coast Guard made an on-the-record motion for default due to Respondent's failure to appear at the conference, pursuant to 33 C.F.R. § 20.310. I issued a show cause order under 33 C.F.R. § 20.705 on March 14, 2016. Respondent filed a response on March 23, 2016, asserting that he was heavily medicated by pain medication he had been taking for Sciatica and also providing evidence to support his previous argument that he was not employed at the time of the drug test. On April 25, 2016, I issued an Order Denying Default Motion because Respondent provided good cause for failing to appear, and finding that a hearing in this matter was appropriate.

On June 21, 2016, Respondent filed a Motion to Dismiss for lack of jurisdiction, claiming he was not a Brusco Tug & Barge (BT&B) employee at the time of the alleged failure to test, and also asserting several Constitutional arguments. The Coast Guard responded on June 22, 2016, requesting that I deny the motion as premature and contrary to the rules of procedure. I denied the Respondent's Motion to Dismiss because I determined that genuine issues of material fact existed and a hearing was therefore necessary.

The hearing took place on June 28, 2016 in Olympia, Washington. LCDR Benjamin Robinson and Mr. Travis Nolen represented the Coast Guard. Respondent appeared *pro se*. After the conclusion of the hearing, the parties filed proposed findings of fact, conclusions of law, and arguments in support of their positions. This matter is now ripe for decision.

II FINDINGS OF FACT

1. At all times relevant to this matter, Respondent held a Merchant Mariner Credential. [Tr. p. 148; MMC provided at hearing].
2. At all relevant times, and specifically between September 30 and October 1, 2015, BT&B employed Respondent as the Master of the HENRY BRUSCO. [Tr. pp. 50-51, 143].
3. BT&B is subject to the Coast Guard drug testing regulations found in 46 C.F.R. Part 16. [Tr. pp. 34-35, 53; EX CG-14].
4. All new hires at BT&B are required to undergo pre-employment drug testing. [Tr. p. 39; EX CG-14].
5. Respondent provided his pre-employment drug test sample at a facility located in Olympia, Washington. [Tr. p. 147].
6. At the time BT&B hires employees, they are required to read and initial the company's drug and alcohol policy, which is a section of the employee handbook. [Tr. pp. 30-31; EX CG-14].
7. Respondent read and initialed the drug and alcohol policy. [Tr. p. 31; EX CG-04].
8. BT&B expects all employees notified of a drug test to report to the company's preferred collection facility within 24 hours. [Tr. pp. 37-38].
9. The BT&B handbook does not explain how the company accomplishes notification for random drug tests. [EX CG-14].
10. The BT&B handbook does not give location details for the company's preferred collection sites. [EX CG-14].
11. The preferred collection facility for BT&B employees who are in the vicinity of the home office in Longview, Washington is PeaceHealth, which is located a few city blocks from the office. [Tr. pp. 40-41].
12. BT&B employees called for testing when they are away from the home port are directed to various other collection facilities. [Tr. pp. 27-28].

13. BT&B requires all employees to comply with the rules in its handbook but holds Masters to a higher standard because they are charged with the safety of the vessels and crew. [Tr. pp. 35-36].
14. BT&B utilizes whole-boat testing for random drug tests.[1] [Tr. p. 51].
15. American Maritime Safety (AMS) administers BT&B's random drug testing program. [Tr. pp. 20, 26-28]
16. On September 22, 2015, AMS selected thirteen vessels for whole-boat testing using software called Randomware. [Tr. p. 20].
17. Randomware was designed to randomly pick a specified number of items from a list and ensure each item is equally subject to selection. [Tr. p. 8, 13-14].
18. Diana Rivera is the vessel operations manager at AMS. [Tr. p. 19].
19. Dan Zandell is the compliance manager and Designated Employer Representative (DER) at BT&B. [Tr. p. 24].
20. On September 22, 2015, Ms. Rivera sent a confidential email to Mr. Zandell, notifying him that two of his company's boats, including the HENRY BRUSCO, had been selected for testing. [Tr. p. 21].
21. After receiving the notification on September 22, 2015, Mr. Zandell looked to see where the selected vessels were, to determine whether they were in close enough proximity to a collection facility. [Tr. pp. 27-28].
22. Once a selected vessel is near a collection facility, Mr. Zandell notifies the captain about the drug testing. [Tr. p. 28].
23. Late in the evening on September 30, 2015, the HENRY BRUSCO was coming into its home port in Cathlamet, Washington. [Tr. p. 32].
24. Joe Bromley is BT&B's port captain in Cathlamet, Washington. [Tr. p. 64-65].
25. Mr. Zandell asked Mr. Bromley to notify Respondent that the vessel had been selected for drug testing, and to keep the crew on board until the following morning when the testing facility opened. [Tr. p. 32].
26. On September 30, 2015, Mr. Bromley sent Respondent a series of text messages including two that read: "K don't Decrew get some sleep h guys have random tomorrow" and "And I am not supposed to tell u but now u know so do t leave (sic)[.]" [EX R-E].
27. Respondent obeyed Mr. Bromley's order not to decrew the vessel until further notice. [Tr. p. 79].
28. During a phone call at approximately 0800 hours on the morning of October 1, 2015, Respondent and Mr. Bromley agreed that Respondent would send the crew to the BT&B office, and they would be further instructed when they arrived there. [Tr. pp. 80-81].
29. Mr. Bromley did not give Respondent directions to the testing facility when they spoke on the phone because he assumed that as a "semi-new employee," Respondent had been to the collection facility recently. [Tr. p. 70, 83].
30. Tim Hayward was the engineer on board the HENRY BRUSCO during the trip that ended on October 1, 2015. [Tr. p. 92].
31. Mr. Hayward intended to fly to his home in Arizona immediately after decrewing, and had arranged for the company driver to take him to the airport. [Tr. pp. 94, 96-97].
32. The company driver met Mr. Hayward at the dock and took him to the collection facility before dropping him off at the airport. [Tr. p. 97-98].

[1] A whole-boat test is when all crewmembers aboard a vessel are selected from random testing rather than an individual mariner. See 46 C.F.R. § 16.230(c).

33. Mr. Hayward and Mr. Zandell spoke on the phone twice that morning, first during Mr. Hayward's ride to the collection facility and again while he was waiting to give his sample. [Tr. p. 98, 100].
34. John Degner was a mate aboard the HENRY BRUSCO during the trip that ended on October 1, 2015. [Tr. p. 112].
35. After leaving the HENRY BRUSCO, Mr. Degner drove himself and another crewmember, David Brusco, to the BT&B office to drop off some paperwork and talk to Mr. Zandell about the drug test. [Tr. p. 114].
36. It was not standard practice to go to the office prior to a drug test, but Mr. Degner did not know where the collection facility was in Longview so he needed to get directions. [Tr. pp. 114-15].
37. Respondent remained in Cathlamet instead of riding with Mr. Degner because he had already arranged for his son to pick him up. [Tr. p. 135].
38. Mr. Bromley sent Respondent a text at 1102 hours on October 1, 2015, saying "call me ASAP"; he recalled this was because Mr. Zandell asked whether Respondent had taken the drug test yet and Mr. Bromley did not know. [Tr. pp. 67, 87-89, EX R-E].
39. Respondent texted Mr. Bromley that he could not call because his phone was roaming and Mr. Bromley responded with a text saying "Call Zandell." [EX R-E].
40. After receiving Mr. Bromley's texts, Respondent called Mr. Zandell from the place where he was having breakfast and got instructions to come by the office before he went home. [Tr. p. 147].
41. Respondent met with Mr. Zandell at the BT&B office mid-morning on October 1, 2015 about health insurance paperwork. [Tr. pp. 38-39].
42. Mr. Zandell never mentioned anything about the drug test, including the location or time for reporting, to Respondent during their conversation. [Tr. pp. 38-39].
43. Respondent did not inquire about the drug test or location of the collection facility. [Tr. p. 38-39].
44. Respondent had never participated in a whole-boat drug test before; he had always been individually notified of drug testing by his previous employers. [Tr. p. 149].

III. APPLICABLE LAW

The Coast Guard alleged that Respondent failed to take a required drug test in violation of 49 C.F.R. § 40.191. Although this is a violation of law or regulation, the Coast Guard commonly charges refusals to test as misconduct, and has done so here. Misconduct is defined 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." 46 C.F.R. § 5.27.

The Coast Guard's rules for chemical testing are located in 46 C.F.R. Part 16 and incorporate 49 CFR Part 40, the Department of Transportation (DOT) drug testing procedures. See 46 C.F.R. § 16.201. The DOT regulations require marine employers to establish programs to randomly administer drug tests to crewmembers on uninspected vessels who:

> (1) Are required by law or regulation to hold a license or MMC endorsed as master, mate, or operator in order to perform their duties on the vessel;
> (2) Perform duties and functions directly related to the safe operation of the vessel;
> (3) Perform the duties and functions of patrolmen or watchmen required by this chapter; or,
> (4) Are specifically assigned the duties of warning, mustering, assembling, assisting, or controlling the movement of passengers during emergencies.
>
> 46 C.F.R. § 16.230(b).

The Commandant has held that drug test refusals under 49 C.F.R. § 40.191 constitute misconduct. Appeal Decision 2690 (THOMAS) (2010); Appeal Decision 2675 (MILLS) (2008). An employee refuses to take a drug test if he or she "(1) Fail[s] to appear for any test … within a reasonable time, as determined by the employer, consistent with applicable DOT agency regulations, after being directed to do so by the employer." 49 C.F.R. § 40.191(a)(1). DOT rules also state that "if you refuse to take a drug test, you incur the consequences specified under DOT agency regulations for a violation of those DOT agency regulations." 49 C.F.R. § 40.191(c).

Under 46 C.F.R. Part 16, marine employers must have a drug testing program. These programs are intended to "provide a means to minimize the use of intoxicants by merchant marine personnel and to promote a drug free and safe work environment." 46 C.F.R. § 16.101(a). The Commandant has held that violations of "an employer's drug and alcohol policy can form the basis for a charge of Misconduct under 46 C.F.R. § 5.27." Appeal Decision 2701 CHRISTIAN (2012). Similarly, Appeal Decision 1567 CASTRO (1966) states: "A company policy as to conduct of the crew, relative to matters of safety aboard the ship, is a good norm for judging misconduct."

IV. DISCUSSION

The fact that Respondent did not take a drug test on October 1, 2015 is not in dispute. The issues I must consider are: 1) was Respondent properly notified of such a test; and, if so, 2) does his failure to appear at the collection facility and take the drug test constitute a refusal under 49 C.F.R. § 40.191(a)(1) and 46 C.F.R. Part 16 and an act of misconduct as described by 46 U.S.C. § 7703(1)(B) and defined by 46 C.F.R. § 5.27.

1. Was Respondent Properly Notified of the October 1, 2015 Drug Test?

At all times relevant to this Complaint, BT&B employed Respondent as the Master of an uninspected towing vessel. BT&B engages a third-party, AMS, to manage its random testing program. The company also employs a DER, who is responsible for notifying employees when they have been selected for random drug testing. The Coast Guard has shown, and Respondent has not disputed, that AMS selected the HENRY BRUSCO for drug testing while Respondent was acting as Master of that vessel, thus under BT&B's whole-boat testing program, the company was obligated to drug test Respondent and the other members of his crew.

In the Complaint, the Coast Guard has specifically alleged that "the Respondent failed to appear at the collection site to provide a urine sample within a reasonable time, as determined by the Designated Employee Representative (DER), *after being directed to do so by the DER*" (emphasis added) and accordingly "Respondent wrongfully refused to take a required drug test as described by 49 CFR 40.191(a)(1)." However, the question of what constitutes proper notification of a drug test has rarely arisen in Coast Guard suspension and revocation proceedings. The most relevant case is one where the ALJ determined the mariner did receive actual notice when a third-party administrator left a voicemail telling him to report to a specific facility within 24 hours for DOT-required drug testing; the Commandant affirmed the ALJ's

decision and the NTSB discerned no basis to disturb those holdings. See Collins v. Moore, NTSB ORDER NO. EM-201 (August 30, 2005).

This issue has arisen more often in FAA proceedings. As both the FAA and the Coast Guard utilize the same DOT drug testing procedures, those cases provide appropriate guidance insofar as they analyze and interpret DOT regulations. The D.C. Circuit has interpreted 49 C.F.R. § 40.191 when considering when proper notification of a random drug test occurred. See Duchek v. Nat'l Transp. Safety Bd., 364 F.3d 311 (D.C. Cir. 2004). In that case, the court vacated the NTSB decision revoking an airman's certificate where a third-party administrator notified the airman that he was selected for testing, but he was obligated to schedule his own test because he was also the company DER. [2] Id. The D.C. Circuit noted that Duchek's failure to schedule the test fell under his role as DER, not as an airman, and that "a selection notice and a blank form from a C/TPA cannot be considered a 'direct[ion] ... by the employer' equivalent to an order from a DER given — along with a form that has been filled in to indicate a specific date and time — to an employee." Id. at 315-16.

Subsequently, FAA ALJs noted that the D.C. Circuit had "paid significant attention to the uncertainty as to date/time when notification of a requirement of drug testing was actually delivered, and lack of a date/time certain for when such testing was to be accomplished." See, e.g., Blakey v. Ordini, 2005 WL 1349864, at *5 (ALJ Order Granting Administrator's Motion to Dismiss Respondent's Appeal as Untimely, July 29, 2003); Blakey v. Tu, 2004 WL 2365219, at *4 (ALJ Order Granting Administrator's Motion to Dismiss Respondent's Appeal as Untimely, July 29, 2003). In a later case, an FAA ALJ found proper notification was given where the personnel department employee tasked with giving notification made "an individual package for

[2] Duchek was the owner, chief pilot, and flight instructor of a helicopter operation, as well as its antidrug program manager and (DER). When he received word from a third-party administrator that he and another employee had been selected for testing, he scheduled the test for the other employee but allegedly forgot to schedule his own. Duchek argued that he was not "called" for testing as required by 49 C.F.R. § 40.191(a)(1) and could not have "refused" to take a drug test because no date and time for the test were ever scheduled.

each one of the selected individuals so that their privacy is not disturbed and . . . then contact[ed] each one of the individuals and [gave] them a document, which gives them the address of the collection site, the date that they are supposed to appear . . .” The personnel department employee also spoke to the selected employee in person and offered to drive him to the testing location, but he refused her offer and did not appear for testing. See Babbit v. Tong Lee, 2011 WL 2602147, at *3 (ALJ Decision, May 18, 2011, as edited June 10, 2011).

It is clear that, under 49 C.F.R. Part 40, proper notification of a random drug test requires an employer to tell an employee not only that he or she has been selected for testing, but also the details regarding the location of the test and the time for reporting to the testing facility. As discussed further below, the evidence here shows that Respondent was informed about his selection for a test, but not about the location or time for taking that test.

At the time of the alleged failure to test, Respondent had recently been hired at BT&B and, as part of the hiring process, signed a document acknowledging the Company Handbook and its drug testing policy. BT&B’s employee handbook contains the following description of its drug testing policy:

> All applicants or employees engaged to serve as a crewmember aboard any vessel will be, as a condition of employment, required to submit to post-offer, pre- employment drug and alcohol testing as well as random drug and/or alcohol testing during employment.
>
> * * * * * *
>
> Such testing will be performed in accordance within the requirements of state and federal laws.
> • Persons who’s [sic] test results are positive and persons who refuse to submit to a required drug test will be reported to the U.S. Coast Guard in accordance with federal regulation, and will be considered in violation of this policy.
> • Any failure to submit to a random or for-cause drug test shall be considered a violation of this policy and shall be subject to disciplinary action up to and including termination.
> • BT&B also reserves the right to conduct unannounced searches of employees and their personal effects for illegal drugs or other unauthorized items based on reasonable cause.

> • Cooperation in any investigation, search or screen test is a condition of employment.

EX CG-14. Respondent underwent post-offer, pre-employment drug testing at a facility in Olympia, Washington, not at the PeaceHealth facility near the company's office in Longview where the October 1, 2015 test was supposed to take place. [Tr. p. 147]. At the time of the alleged failure to test at issue here, he had not yet taken any random drug tests as a BT&B employee. [Id.]

Both the DOT and the Coast Guard have prepared guidance for employers who are required to maintain substance abuse testing programs. The Coast Guard's document addresses a number of areas a plan must include in order to be effective and to meet the requirements of the regulations. *Marine Employers Drug Testing Guidance (What Marine Employers Need to Know about Drug Testing)*, available at https://www.uscg.mil/nmc/drug_testing/pdfs/employers_drug_testing_guide-2009.pdf. One of those requirements is to designate a primary collection facility:

> - This is the collection facility the marine employer will use for the majority of the drug test specimen collections. Obviously, other sites may need to be used, but the primary facility will likely be the one where all pre-employment testing will be conducted, as well as the bulk of random testing.
> - The collection site shall have qualified collection personnel.
> - The designation is the name, address and phone number of the collection facility.
> - The personnel designated to perform collection services shall meet the qualification requirements stated in 49 CFR part 40.31

Id. at 19. The DOT guidance to employers states that "Every employer should have procedures in place to ensure that each employee receives no advanced notice of selection. But, be sure to allow sufficient time for supervisors to schedule for the administration of the test and to ensure

that collection sites are available for testing." *Best Practices for DOT Random Drug and Alcohol Testing* at 4, available at https://www.transportation.gov/sites/dot.gov/files/docs/ODAPC_Random%20Testing%20Brochure.pdf. The same document provides that it is a best practice for the company's policies to "spell-out exactly what [an employee who is notified of a random drug test while away from the company's offices] must do before resuming safety-sensitive functions. That way there is no misunderstanding among employees about what is expected." Id. at 5.

DOT also publishes a guidance document for employees who are subject to drug testing. *What Employees Need to Know About Drug and Alcohol Testing*, available at https://www.transportation.gov/sites/dot.gov/files/docs/Employee_Handbook_Eng_2014_A.pdf. In the section regarding random testing, it states "Just prior to the testing event, you will be notified of your selection and provided enough time to stop performing your safety sensitive function and report to the testing location. Failure to show for a test or interfering with the testing process can be considered a refusal." Id. at 5.

DOT rules define 'collection site" as a "place selected by the employer where employees present themselves for the purpose of providing a urine specimen for a drug test." 49 C.F.R. § 40.3. BT&B's operations involve many vessels traversing through several states, thus the company cannot designate all possible collection facilities in its handbook. However, the record establishes that the company uses the PeaceHealth facility a few blocks from its Longview office for all testing near its home port, and has done so for many years. This facility could have been identified in BT&B's drug testing plan, but was not. I therefore find that, at the time of Respondent's alleged failure to test, BT&B employees could not be presumed to know where to report for drug testing. Instead, the company needed to specify the location of the appropriate collection facility every time it notified an employee that he or she was selected for drug testing.

The method used for the alleged notification here was text message. Longstanding Coast Guard policy has been that oral notification of a drug test is sufficient, but while this case was pending, the Coast Guard issued a Marine Safety Advisory (MSA) to employers stating, in part:

> Notification to the mariner must be done discreetly and in writing, with a means to document mariner acknowledgement of notification. Mariners are required to cooperate in the testing process and to proceed immediately to the testing location when instructed to do so by the [marine employer/sponsoring organization]. Failure of an ME/SO to conduct their random chemical testing program as described above, or failure of a mariner to cooperate in the process, undermines the integrity of the random chemical testing process.

MSA, Random Chemical Testing Requirements for Marine Employers, Sponsoring Organizations and Mariners (June 29, 2016). It appears that notification by text message, such as occurred in this case, would be considered discreet, written notification and is thus permitted and not inherently problematic, particularly if the employee responds to the text message to show that he or she actually received the notification. However, in this case the text message the Coast Guard argues contained Respondent's initial notification about the test clearly fell short of the notification requirements, since it did not include any details about the collection facility location and the time to appear for the test.

Additionally, the timing of this purported notification did not comply with DOT's best practices guidelines, which advise employers that "When an employee is notified, he or she must proceed immediately to the collection site. Contrary to the urban legends circulating among some employees, immediately does not mean two hours. Immediately means that after notification, all the employee's actions must lead to an immediate specimen collection."
Best Practices for DOT Random Drug and Alcohol Testing at 5. Similarly, the Coast Guard published a brochure in September 2009 entitled "Marine Employers Drug Testing Guidance (What Marine Employers Need to Know About Drug Testing)." This brochure is still in use, and

was available to marine employers at the time of the incident here. Regarding notifications to mariners, the brochure states,

> It is not specified in the regulations, but the following should be used as a general guiding policy: The marine employer must notify the employee of the random drug test requirement, ONLY after the employer is sure that the collection site is available and the employee schedule allows enough time for the specimen collection to take place. Once notified, the employee must report immediately. **No more than two to fours hours should lapse from the time of employee notification to the time that the employer reports to have a specimen collected.**

Guidance (2009 Edition) at 28 (emphasis in original). Whether under the highly restrictive DOT standards or the Coast Guard's slightly looser standards, the timing of Mr. Bromley's text message was problematic, as it was sent around 1444 hours on September 30, 2015 and the test could not be conducted until at least 0700 hours the following morning.[3]

The evidence shows that Mr. Bromley, the Port Captain, ordered Respondent by text message to hold the crew on board after docking. Respondent complied with this order, and did not release the crew until after he spoke with Mr. Bromley around 0800 hours on October 1, 2015. The record also shows that Mr. Bromley advised Respondent that the reason for holding the crew was a drug test, but then stated he was not sure if he was supposed to give Respondent that information.

The testimony clearly established that Mr. Bromley did not tell Respondent the location of the testing facility or the deadline for reporting for testing during their text message conversation, and the documentary exhibits confirm this. One text advised that the lab opened at 0700 hours, but Respondent and his crew did not leave the vessel until after Respondent spoke with Mr. Bromley around 0800 hours. Respondent and Mr. Bromley both testified that

[3] In fact, the crew could have been tested immediately upon arrival at the Cathlamet dock, but the company chose not to utilize this option. Mr. Zandell testified that "the facility we test at in Longview just happens, it's -- they can do after hours testing, but it's a total pain for them, so we just held our guys overnight on the vessel, and then report in the morning to, to test." [Tr. p. 32]. Thus, the crewmembers themselves could not be expected to take the random drug tests until sometime after the facility opened in the morning.

Mr. Bromley did not give any additional instructions about reporting for the drug test during that conversation; he told Respondent to direct his crew to go to the BT&B office after leaving the vessel and they would receive further instructions when they arrived there.

The evidence is inconclusive as to what, specifically, Respondent told the crew members about the reason for their delayed dismissal from the vessel. Mr. Hayward could not remember whether Respondent actually told him about the drug test, but said the company driver knew to bring him to the collection facility prior to driving him to the airport. [Tr. pp. 93-94, 97-98]. Mr. Zandell confirmed that he had spoken to the company driver that morning. [Tr. p. 106]. Mr. Degner, on the other hand, said Respondent had told him that the crew would be drug tested after Respondent got off the phone with someone. [Tr. p. 113]. Respondent claimed he was speaking with a person named David Hollantine about paperwork, and Mr. Degner could have overheard him telling Mr. Hollantine that the crew would bring the paperwork to the BT&B office when they went to get notified about the drug test. [Tr. p. 117]. However, Mr. Hollantine did not testify to either confirm or deny Respondent's account of their conversation.

Mr. Degner testified he was unaware of the testing facility location until he and another crew member spoke to Mr. Zandell at the BT&B office on the morning of October 1, 2015.[4] [Tr. p. 118]. Based upon Mr. Degner's credible testimony, I find that Respondent directly or indirectly informed the crew members they should expect a drug test. However, Respondent did not have any information about where or when to report and therefore could not pass that information on to the crew. Consequently, Respondent did not notify his crew of the drug test, as the Coast Guard argued. Mr. Hayward received actual notification of the test from the company van driver and/or during his phone conversations with Mr. Zandell. Mr. Degner and Mr. Brusco

[4] While Mr. Zandell could not remember having spoken to Mr. Degner and Mr. Brusco that morning, I find Mr. Degner's testimony credible and find that the conversation did, in fact, take place.

received actual notification of the test from Mr. Zandell when they spoke to him at the company office after they had left the vessel.

There is no evidence in the record to establish that anyone from BT&B directed Respondent where or when to appear for the collection. Mr. Bromley credibly testified that he did not give this information to Respondent. Both Mr. Zandell and Respondent testified that, during their meeting, Respondent was not given directions to PeaceHealth and did not ask for them. In fact, they did not discuss drug testing at all during their half-hour, in-person conversation. Furthermore, Respondent testifed that whenever he was notified of random drug testing by previous employers, he was given a DOT Custody and Control Form (CCF) to take with him to the collection facility. [Tr. pp. 149, 152]. These forms generally contain the location of the collection facility. However, Mr. Zandell testifed that BT&B sends its CCFs directly to the collection facility instead of providing the forms to employees at the time of notification. [Tr. pp. 42-43]. Mr. Bromley assumed Respondent would know where to go [Tr. p. 77], but as the DER Mr. Zandell should have been aware that Respondent completed his pre-employment drug testing in Olympia and had not been to the PeaceHealth facility in Longview during his employment at BT&B.

Based on the evidence presented here, I cannot find that BT&B properly notified Respondent of the October 1, 2015 drug test. As the D.C. Circuit noted in Duchek, notice of selection is not equivalent to a direction to test, which includes information necessary for the employee to locate the testing site and arrive at the appointed time. Id. at 315-16.

2. Did Respondent Refuse to Take a Drug Test Under 49 C.F.R. § 40.191(a)(1)?

In light of the fact that BT&B did not properly notify Respondent of the October 1, 2015 drug test, I cannot cannot find that Respondent wrongfully refused to take that test under 49 C.F.R. § 40.191(a)(1). As I previously stated, this regulation requires employees to appear for

drug testing "within a reasonable time, as determined by the employer, consistent with applicable DOT agency regulations, after being directed to do so by the employer." 49 C.F.R. § 40.191(a)(1). Only after all these conditions are met is an employee deemed to have refused a drug test.

At no point on September 30 or October 1, 2015 did Respondent's employer direct him to test in a manner consistent with DOT regulations. Mr. Bromley's text messages did not constitute notification. Neither did his telephone conversation with Respondent the following morning; he acknowledged that he did not provide and additional information about the test or directions to the testing site. Finally, the DER did not mention the drug test when he spoke to Respondent in person later that morning. Thus, Respondent did not refuse to take a drug test under the DOT drug testing regulations.

3. Did Respondent Commit Misconduct by Refusing to Cooperate With BT&B's Drug Testing Program?

Finding that Respondent did not refuse a federal drug test under 49 C.F.R. § 40.191 means that there was a defect in the factual allegations in this Complaint. However, defects in a complaint's specification do not necessarily demand dismissal of an action; "[t]he purpose of pleadings is to provide notice and not to make a ritualistic recitation of the details." Appeal Decision 2585 (COULON) (1997); see also Appeal Decision 2545 (JARDIN) (1992). Since the adoption of the Rules of Practice, Procedure, and Evidence in 1999, a few Coast Guard cases have considered whether an ALJ may amend pleadings to conform to the proof. In Appeal Decision 2630 (BAARSVIK) (2002), the Commandant held that the ALJ does have such authority, but that under 33 C.F.R. § 20.305, no amendment "may broaden the issues without an opportunity for any other party or interested person both to reply to it and to prepare for the broadened issues." Another recent appeal decision reiterated the ALJ's authority to amend pleadings to conform to proof, holding that even where the complaint did not include the specific

regulatory cite for the violation found proved, the respondent had adequate notice for due process purposes because the complaint identified the substance of the alleged violation. See Appeal Decision 2687 (HANSEN) (2010).

Here, Respondent was clearly aware of the Coast Guard's Complaint because he filed an answer denying jurisdiction and denying that he had notice of the drug tests at issue. The record therefore establishes that he had adequate notice that of the Coast Guard's allegation that he committed misconduct by failing to appear for a drug test. Striking "in violation of 49 CFR 40.191" from the Complaint does not inappropriately broaden the issues; the requirement to take a drug test is present in both regulation and in company policy. Such an amendment therefore does not prejudice Respondent. Accordingly, I may consider whether Respondent committed misconduct by refusing to take a required drug test by failing to cooperate with the company's drug testing policy, which he was required to do as a condition of employment. [EX CG-14].

I have already determined that, for purposes of 49 C.F.R. § 40.191, Respondent was not properly directed to take a drug test on October 1, 2015. The remaining question is whether he otherwise committed misconduct by refusing to cooperate with BT&B's drug testing program; in other words, whether a mariner who has been informed that he or she is subject to a drug test, but has not been effectively notified of where or when to appear for that test, has a duty to inquire and obtain proper notification from his or her employer.

As noted above, BT&B required that any employee engaged to serve as a crewmember aboard any vessel is required to submit to random drug and/or alcohol testing and "Any failure to submit to a random … drug test shall be considered a violation of this policy and shall be subject to disciplinary action up to and including termination." [EX CG-14]. It also mandated "Cooperation in any investigation, search or screen test" as a condition of employment. Id. However, the handbook does not lay out any specific details about what does or does not

constitute “cooperation” for purposes of investigations, searches, or testing. The policy incorporates federal regulations in its testing procedures.

The drug testing procedures established in 49 C.F.R. Part 40 and adopted by the Coast Guard in 46 C.F.R. Part 16 establish the general responsibilities of employers, collectors, laboratories, Substance Abuse Professionals (SAPs), and Medical Review Officers (MROs), but establish very few responsibilities for employees. In addition to establishing that refusal to take a drug test occurs when an employee fails to appear for a test when directed to do so, 49 C.F.R. § 40.191also classifies an employee’s failure “to cooperate with any part of the testing process (e.g. refuse to empty pockets when directed by the collector, behave in a confrontational way that disrupts the collection process, fail to wash hands after being directed to do so by the collector)” as a refusal. See 49 C.F.R. § 40.191(a)(8). However, the regulations do not speak to an employee’s responsibility prior to receiving actual notice of a drug test. Similarly, the Coast Guard’s website contains a page entitled “Drug and Alcohol Testing Overview,” which summarizes the responsibilities of the employee as follows: “Employees must provide a urine sample for drug testing, and a blood or breath sample for alcohol testing, when directed by their marine employer.” See https://www.uscg.mil/d8/prevention/DAPI.asp.

Here, the record establishes that Respondent was aware that a drug test would be forthcoming because Mr. Bromley texted “u guys have a random.” Even though the other crew members aboard the HENRY BRUSCO did not receive this exact information, they all assumed the reason they were held on the vessel was for a drug test. This includes Respondent, who testified at the hearing that he thought it a “high probability” that the reason they were detained on the vessel overnight was to take a drug test the following morning. [Tr. p. 159]. He also told his son, who picked him up in Cathlamet and drove him to the BT&B office, that he had received hints about having to take a drug test that day. [Tr. p. 135]. The other members of the crew were eventually properly notified and went to the collection site to submit to testing. Despite reporting

to the BT&B office and having a half-hour conversation with the DER about unrelated issues, though, Respondent did not take any steps to determine whether he was, in fact, required to take a drug test.

Again, I find Duchek particularly relevant to this question. In the NTSB decision, the Board reasoned that "as the DER, and owner of the company, Duchek had a clear responsibility to comply with the letter and spirit of the antidrug program." See 364 F.3d at 314. However, the D.C. Circuit disagreed that Duchek's responsibilities as DER and owner extended to his duties as an employee, clearly articulating that "the employer is "responsible for all actions of [its] officials, representatives, and service agents" in carrying out the FAA and DOT drug testing requirements" and "the governing regulations — and analogous precedent — indicate that employers should bear the responsibility for carrying out the FAA's drug testing requirements." Id. at 317, 318 (D.C. Cir. 2004) (quoting 14 C.F.R. Part 121, App. I ¶ I.C (2002)).[5] The D.C. Circuit said the NTSB decision "ignore[d] the distinction between Duchek and his company" and failed to recognize "the legally significant distinction between Duchek's airman certificates and Midwest's operating certificate." Id. at 317.

None of the drug testing regulations, whether in 49 C.F.R. Part 40 or 46 C.F.R. Part 16, establish a duty on the part of a mariner to cure an employer's flawed notification. It is clear from Duchek that, under the DOT's current regulatory scheme, this burden rests solely on the employer, and mariners have no heightened responsibility under the Coast Guard's own regulations. Thus, any formal duty on the employee's part would have to be established in company policy.

Here, BT&B's company policies are not clear enough for me to find that Respondent violated them by failing to ask for details when he suspected a drug test was imminent. The

written policies require mariners to take drug tests when directed and to cooperate in such screenings, but the initial burden of establishing the fact of a test, along with the time and place, still rests with the company. [EX CG-14]. The policy does not describe the notification methods the company considers acceptable, or the methods of drug testing the company uses (i.e. whole-boat testing). [Id.] At the hearing, when Respondent asked Mr. Zandell whether the company expected him to know where to go for random drug testing, Mr. Zandell responded, "It's expected that if you don't know you would ask." [Tr. at 45]. However, the written policy does not make this expectation clear, and there was no evidence that BT&B employees received additional training that would put them on notice of this expectation. [See Tr. pp. 29-30].

I do not condone Respondent's actions in this matter. Respondent exploited a loophole in the system by reporting to the office and not asking for additional details, even though he believed there was a high probability he was supposed to take a drug test. These are not the acts of a prudent, responsible Master. In consequence, he was terminated by BT&B after the incidents that gave rise to this Complaint. However, I cannot find this constituted misconduct because there is no formal, duly established rule—whether in statute, regulation, common law, or express company policy—that addresses whether a mariner must cure the employer's defective notification of a random drug test. While Respondent did not act in accordance with the spirit of the drug testing program, the facts of this case do not establish that he committed any misconduct warranting suspension or revocation of his MMC.

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 and the undersigned in accordance with 46 U.S.C. § 7703, 46 C.F.R. Part 5, and 33 C.F.R. Part 20.

[5] The Coast Guard regulation mirrors the language of the FAA regulation. See 46 C.F.R. § 16.203(a)(2) ("Employers are responsible for all the actions of their officials, representatives, and agents in carrying out the requirements of this part").

2. Respondent is the holder of a United States Coast Guard-issued Merchant Mariner's Credential.
3. On September 22, 2015, the UTV HENRY BRUSCO was properly selected for a random drug test of its crew.
4. Under 49 C.F.R. Part 40 and 46 C.F.R. Part 16, marine employers bear the burden of giving employees effective notification of random drug tests, including the location of the testing facility and the time for reporting to take the test.
5. On September 30, 2015 through October 1, 2015, Respondent was acting under the authority of his MMC as Master of the UTV HENRY BRUSCO.
6. On September 30, 2015, the Port Captain informed Respondent by text message that the crew was to be held aboard until the following morning, rather than decrewing upon arrival, and that the reason was a random drug test.
7. No representatives of BT&B ever informed Respondent of the location of the testing facility or the time he was scheduled to report there.
8. Respondent did not seek any additional information about the suspected drug test.
9. Respondent did not violate 49 C.F.R. § 40.191(a)(1) because his employer did not properly notify him of the random drug test, and he was not obligated to report until he received such notification.
10. A violation of company policy can constitute misconduct.
11. The company drug policy requires cooperating in the testing process, but does not address the issue an employee's duties in the event of flawed notification.
12. In the absence of a company policy obligating him to do so, Respondent did not commit misconduct by failing to cure his employer's defective notification.

WHEREAS,

ORDER

Allegation One of the Complaint is found **NOT PROVED**. Allegation Two was withdrawn at the hearing and dismissed without prejudice.

IT IS ORDERED that service of this Decision and Order upon Respondent will serve as notice to Respondent of appeal rights as set forth in 33 CFR Subpart J, Section 20.1001.

George J. Jordan
US Coast Guard Administrative Law Judge

Date: January 12, 2017