UNITED STATES OF AMERICA

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

UNITED STATES COAST GUARD

Complainant

v.

ROBERT RYAN BOUDREAUX

Respondent

Docket No: 2016–0332
CG Enforcement Activity No: 5729916

DECISION & ORDER

Date Issued: October 24, 2017

HON. BRUCE TUCKER SMITH
Administrative Law Judge

Appearances:

For the Coast Guard

Andrew J. Norris, Esq.
LTCDR Megan Clifford, IO

For Respondent:

David W. Kish, Esq.

I. PRELIMINARY STATEMENT

The United States Coast Guard Marine Safety Unit, Morgan City, Louisiana, (Coast Guard) initiated the instant administrative action seeking suspension of Robert Ryan Boudreaux's (Respondent) Coast Guard–issued Merchant Mariner's Credential (MMC) for a period of three months.

On October 18, 2016, the Coast Guard filed a Complaint alleging that on April 9, 2016, Respondent committed Misconduct in violation of 46 U.S.C. §7703(1)(B) and 46 C.F.R. §5.27. The Coast Guard alleged that Respondent's Misconduct was his failure to abide by the terms of his employer's drug and alcohol policy, by refusing to take a company–mandated random alcohol test.[1]

On February 10, 2017, Respondent filed his Answer wherein he admitted the jurisdictional allegations but denied the factual allegations contained in the Complaint.

On July 11, 2017, this matter came on for hearing in the ALJ Courtroom, Hale Boggs Federal Building, New Orleans, Louisiana.

This case was conducted in accord with the Administrative Procedure Act (APA), as amended and codified at 5 U.S.C. §§551 – 59 and the Coast Guard procedural regulations set forth at 33 C.F.R. Part 20. Andrew J. Norris, Esq., and Investigating Officer Megan Clifford, appeared on behalf of the Coast Guard. David W. Kish, Esq., appeared on behalf of Respondent, who was also present at the hearing.

Five witnesses testified as part of the Coast Guard's case-in-chief. The Coast Guard offered eleven documents into evidence, ten of which were admitted.[2]

---

[1] On January 28, 2017, the Coast Guard filed an Amended Complaint which updated Respondent's Merchant Mariner Credential number.

Respondent called two witnesses, and also testified on his own behalf. Respondent offered ten documents into evidence, all of which were admitted into evidence.

At the conclusion of the hearing, the parties rested and the court permitted parties to file written closing arguments. Upon receipt of the parties' respective arguments, the court closed the administrative record and commenced its deliberation. Following a thorough review of all of the testimony and the relevant documentary evidence, the court finds that the Coast Guard **PROVED** Respondent committed Misconduct and hereby imposes a **SUSPENSION of SIXTY DAYS**.

II. FINDINGS OF FACT

These findings of fact are based on a thorough and careful analysis of the documentary evidence, the testimony of witnesses, and the entire record taken as a whole:

1. At all relevant times herein, Respondent was employed as an able seaman by OSG Ship Management (OSG). (Tr. Vol. I at 89, 99; CG Ex. 5).

2. At all relevant times herein, OSG maintained a drug and alcohol policy, entitled "OSG Management System SPM-05 - Drug and Alcohol Enforcement Procedures." (Tr. Vol. I at 69; CG Ex. 1, 2).

3. SPM-05 revisions 1 and 2 were approved by OSG senior management: John Doran and Henry Flinter. (Tr. Vol. I at 23-24; CG Ex. 2).

4. On January 1, 2016, Respondent signed OSG form QR-CRW-27 ("Policy and Vessel Safety Orientation Acknowledgment"), acknowledging that he had read, among other company policies, CP-13 and the updated/revised SPM-05, and that he agreed to comply with the requirements as stated within those policies. (CG Ex 5).

[2]Citations referencing the transcript are as follows: Transcript followed by the volume number and page number (Tr. at __). In this case, proceedings transcribed on April 18, 2013 are referred to as "Vol. I," proceedings transcribed on April 19, 2013, are referred to as "Vol. II," and proceedings transcribed on July 25, 2013 are referred to as "Vol. III." Citations referring to Agency Exhibits are as follows: "CG" followed by the exhibit number (CG Ex. 1, etc.); Respondent's Exhibits are as follows: "Resp." 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.). The court marked six documents as ALJ Exhibits.

5. The OSG drug and alcohol testing policy was in effect the entire time Respondent was employed by OSG. Transcript (Tr. Vol. I at 74: CG Ex. 4).

6. Section 3 of the OSG policy subjected all company employees to random alcohol testing to ensure employee compliance with the OSG policy of no tolerance of alcohol or drug abuse by employees on duty. (Tr. Vol. I at 70, 72; CG Ex 1, 2).

7. The OSG alcohol policy was designed to ensure protection of the environment and the safety of its employees. (Tr. Vol. I at 74; CG Ex. 1).

8. At all relevant times herein, OSG employed the services of a third–party contractor, American Maritime Safety, Inc. (AMS) to administer the OSG random alcohol testing program. (Tr. Vol. I at 77; Tr. Vol. II at 129).

9. At all relevant times herein, AMS initiated a computer-based random selection process whereby OSG vessels (and thus employees), were chosen for testing, utilizing a computer-based software called "RandomWare." (Tr. Vol. I at 78; CG Ex. 11).

10. At all relevant times herein Ms. Irene Perez was employed by AMS. She managed the random selection process for client shipping companies, of whom OSG was one such client. (Tr. Vol. II at 128 – 129). Ms. Perez had no academic background in either mathematics, statistics, or in computer science. Ms. Perez does not know how the computer software, "RandomWare" worked. (Tr. Vol. II at 140 – 141).

11. AMS provided a list of randomly-selected vessels to OSG who, in turn, relied upon another contractor, Anderson Kelly, to hire another third-party (in this instance, All Clear Employee Screening) to conduct the actual alcohol test at issue, here. (Tr. Vol. I at 78; Vol. II at 39).

12. On March 15, 2016, AMD provided OSG with a computer-generated random list containing the names of two OSG vessels (a primary and a secondary vessel) for alcohol and drug testing. The secondary vessel chosen on the AMS list was the OVERSEAS LONG BEACH. (Tr. Vol. I at 81; CG Ex. 3).

13. Upon receipt of the randomly–generated list from AMS, OSG personnel notified Anderson Kelly to initiate the testing process aboard the OVERSEAS LONG BEACH. (Tr. Vol. I at 85, 94; CG Ex. 3).

14. On April 9, 2016, OSG conducted two separate tests on the crewmembers aboard the OVERSEAS LONG BEACH. Crewmembers aboard that vessel had been randomly selected for both

a Department of Transportation (DoT) urinalysis drug test and for an OSG breathalyzer alcohol test. The persons subject to the two separate tests were chosen by the same random selection made by the AMS computer. (Tr. Vol. II at 24).

15. The OSG policy definition of "randomness" contained in its drug and alcohol policy, was incorporated and adopted from the definition of "randomness" contained in 46 C.F.R. §16.230. (Tr. Vol. II at 26).

16. On April 9, 2016, Respondent was employed and on duty aboard the OVERSEAS LONG BEACH and had previously acknowledged his receipt and understanding of the OSG drug and alcohol policy. (Tr. Vol. I at 89, 99; CG Ex. 5).

17. On April 9, 2016, the OVERSEAS LONG BEACH's master, Captain Quinn, "got on the PA and said, drug testing in the hospital." Respondent knew exactly what his captain intended: that the entire crew was to report to the ship's medical facility for drug and alcohol testing. (Tr. Vol. II at 206).

18. At some point during the day of April 9, 2016, Captain Quinn, telephoned his superiors at OSG, relating that Respondent had complied with the mandatory DoT random drug test but that he refused to submit to the random OSG alcohol test. (Tr. Vol. I at 95).

19. Before April 9, 2016, Respondent had complained to OSG that he felt the company's alcohol testing policy was in violation of law and that he would not submit to random alcohol testing. (Tr. Vol. I at 101 – 104; CG Ex. 6, 7).

20. On April 9, 2016, a DoT-certified specimen collector employed by All Clear Employee Screening came aboard the OVERSEAS LONG BEACH to conduct specimen collection for the DoT urinalysis and OSG breathalyzer tests. (Tr. Vol. II at 39, 41, 47; CG Ex. 8).

21. The All Clear Employee Screening collector, Ms. Gurgis, was assigned to collect 21 DoT-mandated urine specimen for drug analysis, and 20 OSG-mandated breath specimen for alcohol analysis aboard the OSG vessel, OVERSEAS LONG BEACH. (Tr. Vol. II at 47, 82; CG Ex. 1).

22. On April 9, 2016, Respondent entered the testing room and asked to see Ms. Gurgis' credentials. (Tr. Vol. II at 48).

23. Ms. Gurgis refused Respondent's request, telling him that she had previously provided her credentials to Anderson Kelly and that she did not possess them at the time of testing. (Tr. Vol. II at 49).

24. Respondent then refused to submit to the OSG-mandated alcohol screen breath testing, but submitted to the DoT urinalysis. (Tr. Vol. II at 49, 52, 82; CG. Ex. 9; Resp. Ex. F).

25. At all relevant times, Captain Michael Quinn was employed by OSG Ship Management of Tampa, Florida and was the master of the OVERSEAS LONG BEACH. (Tr. Vol. II at 86).

26. When Respondent signed aboard the OVERSEAS LONG BEACH in September, 2015, Respondent complained to Captain Quinn that "the company's drug and alcohol policy did not match that of the U.S. Coast Guard." (Tr. Vol. II at 89).

27. Captain Quinn communicated Respondent's concerns to OSG management and that OSG management, subsequently reviewed Respondent's concerns. (Tr. Vol. II at 90; CG Ex. 6).

28. Captain Quinn verified that in January, 2016, Respondent had acknowledged, in writing, his understanding of the OSG drug and alcohol policy. (Tr. Vol. II at 105).

29. On or before April 9, 2016, Captain Quinn's vessel, the OVERSEAS LONG BEACH, had been randomly selected for DoT drug and OSG alcohol testing. (Tr. Vol. II at 94).

30. On the morning April 9, 2016, when both men were standing in line to be tested, Respondent approached Captain Quinn and declared that he would refuse to take the OSG–mandated alcohol test. Thereafter, Captain Quinn, after consultation with OSG management, allowed Respondent additional time within which to consider his decision. Nevertheless, Respondent still refused to take the OSG-mandated alcohol test. Respondent was immediately terminated by OSG for failure to comply with company policy. (Tr. Vol. II at 94 – 96; CG Ex. 10).

31. Captain Quinn did not specifically order Respondent, individually, to submit to the OSG alcohol testing on April 9, 2016. However, Captain Quinn did tell Respondent he would be terminated for cause if he refused the test. (Tr. Vol. II at 110).

III. SUMMARY OF DECISION

The Coast Guard **PROVED** by a preponderance of reliable, probative, and credible evidence that Respondent committed the acts alleged in Specification 4 of the Complaint.

IV. DISCUSSION

A. General

The purpose of Coast Guard Suspension and Revocation proceedings is to promote safety at sea. See 46 U.S.C. §7701. Pursuant to 46 C.F.R. §5.19, an ALJ holds the authority to suspend or revoke a license or certificate in a hearing for violations arising under 46 U.S.C. §7703 and/or §7704.

Determining the weight of the evidence and making credibility determinations of witness testimony 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).

B. Jurisdiction

"The jurisdiction of administrative bodies is dependent upon the validity and the terms of the statutes reposing power in them." Appeal Decision 2620 (COX) (2001) (quoting Appeal Decision 2025 (ARMSTRONG) (1975)). "Where an Administrative forum acts without jurisdiction its orders are void." Appeal Decision 2025 (Armstrong) (1975). Therefore, establishing jurisdiction is critical to the validity of a proceeding. Appeal Decisions 2677 (WALKER) (2008); 2656 (JORDAN) (2006).

In order to establish jurisdiction in a Misconduct case, the Coast Guard must prove that the acts of Misconduct occurred while the mariner was "acting under the authority of his MMC." 46 U.S.C. §7703. Appeal Decision 2425 (BUTTNER) (1986) plainly states that jurisdiction is a question of fact that must be proven by the Coast Guard. "A person employed in the service of a vessel is considered to be acting under the authority…[when a credential 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). Accordingly, if neither of the criteria set forth at 46 C.F.R. §5.57(a) is met, then the Coast Guard has no jurisdiction for a Suspension and Revocation proceeding. Appeal Decision 2620 (COX) (2001) further adds that jurisdiction must be affirmatively shown and will not be presumed. See also Appeal Decision 2025 (ARMSTRONG) (1975).

In this case, the Respondent's Answer admits the jurisdictional allegations contained in the Complaint. Moreover, the Coast Guard proved that on April 9, 2016, Respondent was on his marine employer's payroll; was physically located and serving aboard his marine employer's vessel OVERSEAS LONG BEACH, an inspected oil tanker in excess of 200 gross tons, operating in international waters. (Tr. Vol. I at 75 – 76, 106; Vol. II at 94; CG Ex. 9). Thus, the court agrees with the Coast Guard's assertion that Appeal Decision 2615 (DALE) (2000) finds jurisdiction appropriate in a case such as the one at bar.

Here, the court has jurisdiction over Respondent and the subject matter at hand.

C. Burden of Proof

In this case, like all Suspension and Revocation cases, the Coast Guard bears the burden of proof to establish the requisite facts mandated by the organic statute, 46 U.S.C. §7703, and the implementing regulations, 46 C.F.R. Part 5 and Part 10, Subpart B; 33 C.F.R. Part 20. The Administrative Procedure Act (APA), 5 U.S.C. §§551–559, applies to Coast Guard Suspension and Revocation hearings before United States ALJs. The APA authorizes imposition of 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). The Coast Guard bears the burden of proof to establish the charges are supported by a preponderance of the evidence. 33 C.F.R. §§20.701, 20.702(a). Similarly, a respondent bears the burden of proof in asserting any affirmative defense by a preponderance of the evidence. 33 C.F.R. §§20.701, 20.702; Appeal Decisions 2640 (PASSARO) (2003); 2637 (TURBEVILLE) (2003). "The term substantial

evidence is synonymous with preponderance of the evidence as defined by the U.S. Supreme Court." Appeal Decision 2477 (TOMBARI) (1988) (citing *Steadman v. SEC*, 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 & Products of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 622 (1993) (quoting *In re Winship*, 397 U.S. 358, 371– 72 (1970) (Harlan, J., concurring) (brackets in original)). Therefore, at hearing, the Coast Guard was obligated to prove by credible, reliable, probative and substantial evidence that Respondent more-likely-than-not committed the acts alleged in the Complaint and as amended by this court's Decision and Order, *infra*.

Title 46 U.S.C. §7703(1)(A),(B) provides that a mariner's credential may be suspended or revoked if that mariner has committed a violation of law or regulation or an act of Misconduct. "Misconduct" is defined in 46 C.F.R. §5.27 as "human behavior which violates some formal, duly established rule. Such rules are found in, among other places, statutes, regulations . . . It is an act which is forbidden or a failure to do that which is required."

The OSG Drug and Alcohol Policy

In this case, Respondent is charged with refusing to provide a breath specimen for alcohol testing when ordered to do so by his maritime employer and in violation of his marine employer's written drug and alcohol policy. The Coast Guard contends that the OSG drug and alcohol policy is a "formal, duly established rule." In his Post Hearing Brief, Respondent argues that the OSG policy on alcohol testing is not a "formal, duly established rule" for the purposes of

46 C.F.R. §5.27 and that it is not meant to promote safety at sea. Id. at 19 – 20.[3] Respondent's argument flies in the face of common sense; Section 1 of the policy plainly reads: "Purpose: to ensure that all Company vessels are manned and supported by personnel who are drug and alcohol free."

The use of an employer's policy, manual or directive raises a long-standing question: Whether a marine employer's policy, manual or directive constitutes a "formal, duly established rule," the violation of which constitutes "Misconduct" as that term is defined in 46 C.F.R. §5.27. The Commandant has never provided a bright-line answer. Perhaps it is time he did so. In Appeal Decision 2701 (CHRISTIAN) (2013), however, the Vice Commandant affirmed the notion that "a company policy as to conduct of the crew, relative to matters of safety aboard the ship, is a good norm for judging misconduct." There, the Vice Commandant went on to conclude that a policy "regarding the use of intoxicants present in an employee's system has a clear nexus to vessel safety and thus provides a valid basis for judging misconduct." See also Appeal Decision 2625 (ROBERTSON)(2002). In Appeal Decision 1567 (CASTRO)(1966), the Commandant said a company policy regarding crew conduct and shipboard safety, "is a good norm for judging misconduct" *vis* §5.27. Thus, until directed otherwise by the Commandant, in this case, the Respondent's employer's drug and alcohol policy can constitute a "formal, duly established rule" for the purposes of 46 C.F.R. §5.27. Further illumination of what standards define a "formal, duly established rule" would be of immense value to the bench, bar and the regulated community.

The court notes with particularity that, at trial, Respondent did not object to the Coast Guard's general reliance upon the principle that an employer's drug and alcohol policy can serve as a "formal rule" upon which a charge of Misconduct is based. This omission is material,

[3] Respondent's Post Hearing Brief says: "So even if the OSG Company Policy were meant to promote safety at sea, there was no actual threat to safety in this case." Id. at 20.

because, as the Vice Commandant said in Appeal Decisions 2400 (WIDMAN) (1985), and 2386 (LOUVIERE) (1985), "Any challenge to the adequacy of a specification must be raised at the hearing rather than for the first time on appeal." Moreover, in Appeal Decision 2512 (OLIVIO) (1990), the Vice Commandant noted that even in cases where a specification was legally insufficient, "it is clear that Appellant understood the charges and the context in which they arose, and thus cannot be heard now to complain of their insufficiency." In this case, however, Respondent contended at trial (and in his Post Hearing Brief) that this particular maritime employer's policy was not a "formal, duly established rule" because, among other reasons, it was so poorly drafted or awkwardly crafted.[4]

A Master's Order

Although not specifically pled, the General Maritime Law has traditionally recognized the absolute authority of a ship's captain to give orders reasonably related to the safe operation of the vessel.[5] In *Robertson v. Baldwin*, 165 U.S. 275, (1897), the Supreme Court said that a mariner is obliged to obey whatever lawful order he is given by his captain. From the earliest historical period the contract of the sailor has been treated as an exceptional one, and involving, to a certain extent, the surrender of his personal liberty during the life of the contract. The duty of obedience has not lessened with the passage of time. The Court added that a mariner "must

[4] Respondent's Post Hearing Brief challenges the OSG alcohol policy and the use of employer policy manuals – *vis a vis* 46 C.F.R. §5.27 – on the grounds that a violation of his constitutional equal protection and due process rights are thereby violated. Intriguing as such a constitutional debate may be, it is inappropriate for an administrative agency to pass upon the constitutionality of its own regulation. As the Coast Guard's Post Hearing brief correctly points out, that decision-making authority is vested in the Article III courts. *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975). However, Respondent has properly raised, and thereby preserved, that issue for later determination.

[5] The Order also provides notice to the parties that the court it taking official notice of the General Maritime Law (GML) rule that a captain's orders are generally to be obeyed without question, unless the order is, itself, a violation of law or directs another to violate an existing law. Pursuant to 33 CFR §20.806, the parties are provided an opportunity to object to, or rebut, the official notice or otherwise argue why the GML should not be considered in this case. 46 CFR §5.27.

obey the lawful orders of the master and of his superior officers, and for willfully disobeying the master's commands he may be punished by being clapped in irons." Id. 282, 293.

Respondent correctly points to Appeal Decision 2616 (BYRNES)(2000), for the proposition that a ship's master's order, calculated to ensure safety at sea, is inviolate. And while it may be true that Captain Quinn did not individually order Respondent to submit to his employer's alcohol test, it is equally true that Respondent admitted that on April 9, 2016, Captain Quinn, "got on the PA and said, drug testing in the hospital." Respondent testified he knew exactly what his captain intended, that the crew was to report to the ship's medical facility for drug and alcohol testing. (Tr. Vol. II at 206).

The Coast Guard Complaint did not allege violation of a master's orders as the basis for a charge of Misconduct under 46 C.F.R. §5.27. Thus, the court hereby adds, by amendment, such a violation as an additional element of the extant Complaint. Amendments to conform to proof are permitted under F.R.C.P. 15(b) in order to bring the pleadings into line with the issues actually developed during the trial even though the issues were not adequately presented in the pleadings. *Mongrue v. Monsanto Co.*, 249 F.3d 422 (5th Cir., 2001); *Falls Industries, Inc., v. Consolidated Chemical Industries, Inc.*, 258 F.2d 277 (5th Cir., 1958). A "court may amend the pleadings merely by entering findings on the unpleaded issues." *Galindo v. Stoody Co.,* 793 F.2d 1502, 1513 n. 8 (9th Cir.1986).

V. ANALYSIS

A. The Coast Guard's Case

Michael Blunt serves as a marine labor relations and training specialist with OSG Ship Management (OSG), Respondent's employer. (Tr. Vol. I at 65). Mr. Blunt testified to the existence and content of OSG's drug and alcohol policy, contained at Coast Guard Exhibit 1 and 2, which were in effect on April 9, 2016. (Tr. Vol. I at 69).

Mr. Blunt testified that the OSG policy subjects all company employees to random alcohol testing to ensure employee compliance with the OSG policy of no tolerance of alcohol or drug abuse by employees on duty. (Tr. Vol. I at 70, 72). Mr. Blunt explained that the OSG policy was designed to ensure protection of the environment and the safety of its employees. (Tr. Vol. I at 74).

Mr. Blunt further testified that OSG employs the services of a third–party contractor, American Maritime Safety, Inc. (AMS) to administer the OSG random drug urinalysis and random alcohol breathalyzer programs. (Tr. Vol. I at 77; Tr. Vol. II at 129). AMS generates a computer–based random selection process whereby OSG vessels (and thus employees), are chosen for testing, utilizing a computer–based software called "RandomWare." (Tr. Vol. I at 78; CG Ex. 11).

Ms. Irene Perez testified that at all relevant times, she was employed by AMS and that she manages the random selection of vessels and employees for client shipping companies, of whom OSG was one such client. (Tr. Vol. II at 128 – 129). Ms. Perez testified that AMS utilizes a computer–based software called "RandomWare" to make selections for clients in their respective DoT and corporate drug and alcohol testing programs. (Tr. Vol. II at 130). Ms. Perez testified that she has no academic background in either mathematics, statistics, or in computer science. (Tr. Vol. II at 140). Ms. Perez also testified that she has no idea how "RandomWare" works. (Tr. Vol. II at 141).

Nevertheless, Mr. Blunt explained that after AMS generates a randomly–selected list of vessels for testing, AMS then provides the list of randomly–selected vessels to OSG who, in turn, relies upon another contractor, Anderson Kelly, to hire another third–party (in this instance, All Clear Employee Screening) to conduct the actual drug and alcohol testing. (Tr. Vol. I at 78; Vol. II at 39).

Mr. Blunt explained that on March 15, 2016, he received a computer–generated list containing the names of OSG two vessels (a primary and a secondary vessel) for alcohol and drug testing from AMS. Mr. Blunt further explained that he intervened in the selection process and chose the secondary vessel on the AMS list, the OVERSEAS LONG BEACH, for testing. (Tr. Vol. I at 81; CG Ex. 3). The significance of Mr. Blunt's involvement must be noted. Respondent's post-hearing brief correctly notes, by his own testimony, Mr. Blunt's selection of the secondary vessel "shapes the randomness a little bit…I can choose alternatives if I want. There is nothing stating that I can't." (Tr. Vol. I at 82 – 82). (One must ask: "If a human intervenes in an otherwise 'random' selection, is the selection still truly random?") However, Respondent overstates the case when he says the OSG policy "violates US Coast Guard and DoT regulations." (Resp. Post Hearing Brief at 6). Strictly interpreted, neither the Coast Guard nor the DoT dictate what terms, if any, must be included in a private company's drug and alcohol policy in regard to non-DOT testing of human body fluids or specimen. See 33 C.F.R. Part 95. Respondent's reliance upon the Coast Guard Safety Manual as a standard against which the policy at issue should be judged is improvident. The Marine Safety Manual is not regulatory; it was not the subject of administrative rule making. The Manual is, at best, internal guidance for Coast Guard personnel and is not binding upon private entities. However, OSG did incorporate the definition of "random" from 46 C.F.R. §16.230 for use in its private policy.

Mr. Blunt explained that upon receipt of the randomly-generated list from AMS, he notified Anderson Kelly to initiate the actual on-board testing process. (Tr. Vol. I at 85, 94; CG Ex. 3).

The parties stipulated that on April 9, 2016, OSG actually directed two separate tests on the crewmembers aboard the OVERSEAS LONG BEACH. The parties stipulated that on that date, crewmembers had been randomly selected for a Department of Transportation (DoT) drug test and for a company alcohol test. The parties further stipulated that both the DoT urinalysis

and the OSG breathalyzer tests resulted from the same AMS random selection. (Tr. Vol. II at 24). The Coast Guard further agreed that the OSG definition of "randomness" for its corporate test was incorporated from the definition of "randomness" provided in 46 C.F.R. §16.230. (Tr. Vol. II at 26).

Mr. Blunt testified that on April 9, 2016, Respondent was employed and on duty aboard the OVERSEAS LONG BEACH and that he had previously acknowledged his receipt and understanding of the OSG drug and alcohol policy. (Tr. Vol. I at 89, 99; CG Ex. 5). However, at some point during the day of April 9, 2016, Mr. Blunt received a telephone call from Captain Quinn, the master of the OVERSEAS LONG BEACH, informing him that Respondent complied with the mandatory DoT random drug test but that he refused to submit to the company's random alcohol test. (Tr. Vol. I at 95).

Interestingly, Mr. Blunt testified that Respondent had previously complained to OSG that he felt the company's alcohol testing policy was in violation of law and that he would not submit to random alcohol testing. (Tr. Vol. I at 101 – 104; CG Ex. 6,7).

Ms. Vivian Gurgis testified that on April 9, 2016, she was a co-owner and employee of All Clear Employee Screening as a specimen collector. (Tr. Vol. II at 39, 41). At all relevant times, Ms. Gurgis was a DoT-certified specimen collector. (Tr. Vol. II at 41; CG Ex. 8). Ms. Gurgis testified that on April 9, 2016, she had been tasked by Anderson Kelly to collect 21 DoT-mandated urine specimen for drug analysis, and 20 OSG–mandated urine specimen for non-DoT alcohol analysis aboard the OSG vessel, OVERSEAS LONG BEACH. (Tr. Vol. II at 47).

Ms. Gurgis testified that when it was Respondent's turn to test, Respondent entered the testing room and asked to see Ms. Gurgis' credentials. (Tr. Vol. II at 48). Ms. Gurgis testified that she told Respondent that she had previously provided her credentials to Anderson Kelly and that she did not possess them at the time. (Tr. Vol. II at 49). Ms. Gurgis testified that Respondent refused to submit to the random OSG-mandated breathalyzer test, but he that he then

submitted to the random DoT urinalysis. (Tr. Vol. II at 49, 52, 82; CG. Ex. 9; Resp. Ex. F). In his Post Hearing Brief, Respondent challenges the "randomness" of his selection, but Respondent's challenge must fail. Respondent submitted to the same "random" selection used in the DoT urinalysis as was used in the non-DoT, employer-mandated alcohol testing at issue in this case. The court specifically notes that Respondent did not challenge the "randomness" of his selection for both tests, either on the day of testing nor did he challenge the randomness of his selection during his testimony in this case. He first raised the issue of "randomness" in his Post Hearing Brief.

At all relevant times, Captain Michael Quinn was employed by OSG Ship Management of Tampa, Florida and was the master of the OVERSEAS LONG BEACH. (Tr. Vol. II at 86). Captain Quinn testified that when Respondent signed aboard the OVERSEAS LONG BEACH in September, 2015, Respondent complained that "the company's drug and alcohol policy did not match that of the U.S. Coast Guard." (Tr. Vol. II at 89). Thus, Respondent clearly understood the existence of his employer's policy to test employees for alcohol. Captain Quinn testified that he communicated Respondent's concerns to OSG management and that OSG management, subsequently reviewed Respondent's concerns. (Tr. Vol. II at 90; CG Ex. 6). Captain Quinn also testified that in January, 2016, Respondent had acknowledged, in writing, his understanding of the OSG drug and alcohol policy. (Tr. Vol. II at 105).

Captain Quinn testified that on April 9, 2016, his vessel had been randomly selected for DoT drug and OSG alcohol testing. (Tr. Vol. II at 94). Captain Quinn explained that on the morning when he was standing in line to be tested, Respondent approached him and declared that he would refuse to take the OSG–mandated alcohol test. Thereafter, Captain Quinn, after consultation with OSG management, allowed Respondent additional time within which to consider his decision. Nevertheless, Respondent still refused to take the OSG–mandated alcohol

test. (Tr. Vol. II at 94). Respondent was immediately terminated by OSG for failure to comply with company policy. (Tr. Vol. II at 95 – 96; CG Ex. 10).

The evidence plainly reveals the existence of OSG's alcohol testing policy. Respondent's failure to submit to his employer's alcohol test constituted a violation of a formal, duly established rule and further constituted a violation of his master's order, in violation of the General Maritime Law.

B. The Respondent's Case

Respondent argues that the OSG policy is not a "formal, duly established rule," essentially because it is poorly drafted. In support of his contention, Respondent called two witnesses to establish the inarticulate nature of the employer's policy at issue. Respondent first called Robert Schoening, former program manager of the U.S. Coast Guard's drug and alcohol maritime testing program. (Tr. Vol. II at 151). Mr. Schoening, offered as an expert in the field of drug testing in the maritime environment, testified that in the course of his professional career, he had participated in the formulation of eight-hundred drug and alcohol drug testing policies around the nation. (Tr. Vol. II at 156). Mr. Schoening was particularly critical of the style in which the OSG policy was drafted, describing it as a "European style" policy, but did not explain why that was a deficiency. (Tr. Vol. II at 158). Mr. Schoening admitted that he did not know how the OSG policy manual came into existence, but was generally critical of the document because it did not comport with extant Coast Guard regulations on drug testing. (Tr. Vol. II at 164). He did not elaborate or explain why or how the OSG drug policy was at variance with Coast Guard or DoT regulations pertaining to drug testing. He did, however, criticize the OSG field-testing practice which, apparently, allowed a specimen collector to board a vessel without carrying or producing his/her drug-testing credentials. (Tr. Vol. II at 166).

Although offered to demonstrate that the OSG alcohol testing policy at issue was not a "formal, duly established rule" as per 46 C.F.R. §5.27, Mr. Schoening's testimony did not assail

that standard. He only vaguely suggested that the policy did not conform to Coast Guard regulations; he offered no specifics in support of that contention. Likewise, he provided no evidence whatsoever that the OSG policy was not a "formal, duly established rule." Most noticeably, Mr. Schoening was not particularly critical of the OSG random alcohol testing program. The gravamen of Mr. Schoening's testimony was simply that he didn't like the way the OSG document was written, particularly in regard to drug testing. Thus, the court assigned very little weight to Mr. Schoening's testimony in regard to the purpose for which he was called to testify.

Respondent's next witness was Ms. Luann Ayer, vice president for human resources of Universal Companies. She testified that she has over thirty-years' experience working in the maritime industry, including service in various human resources departments. (Tr. Vol. II at 175 – 178). Ms. Ayer was called as an expert witness, based upon her experience in creating corporate drug and alcohol testing policies for use in the maritime environment. (Tr. Vol. II at 180). Ms. Ayer testified that the chief considerations inherent in the creation of a maritime drug and alcohol testing policy are Coast Guard regulations, fairness and equity. (Tr. Vol. II at 181). In regard to the OSG policy, Ms. Ayer was particularly critical that the document failed to specifically define the term "random," although, by her own admission, the OSG policy (Section 6.2.4) does contain language that all vessels enrolled in the random testing program are selected in accordance with the requirements of 46 C.F.R. §16.230. (Tr. Vol. II at 182 – 183). The court takes notice that 46 C.F.R. §16.230 defines "random," and, thus, by incorporation, that definition is included in the OSG policy. The gravamen of Ms. Ayer's testimony was simply that she, too, didn't like the way the OSG document was written. Admittedly, the OSG policy (CG Ex. 1) is not a work of legal or literary beauty: it contains typographical and syntax errors; it contains numerous errors in logic. Chief among those errors is this important, but nonsensical phrase:

6.2.4 Random Testing

All vessels are enrolled in a random testing program in accordance with the requirements of 46 CFR 16.230 whereby unannounced shipboard testing for drugs and alcohol.(sic)

Nevertheless, Ms. Ayer provided no evidence that the OSG policy was not a "formal, duly established rule." Thus, the court assigned very little weight to Ms. Ayer's testimony in regard to the purpose for which she was called to testify.

Respondent then testified on his own behalf. The court notes that Respondent testified that on April 9, 2016, the ship's master, Captain Quinn, "got on the PA and said, drug testing in the hospital." Respondent testified he knew exactly what his captain intended, directing the crew to report to the ship's medical facility for testing. (Tr. Vol. II at 206). In this case, Respondent violated Captain Quinn's order to report to the hospital and submit to be tested. When a crewmember violates a master's lawful order, he breaches one of the oldest principles of maritime law: that a crew member must obey the lawful orders of his captain, *supra*.

Respondent cites 49 C.F.R. §40.13(a) and argues that the DoT drug urinalysis and the non-DoT OSG alcohol breath tests were illegally conducted, because the personnel subject to both tests were drawn from the same random selection process. Respondent, however, misreads both the spirit and the letter of 49 C.F.R. §40.13(a). The court believes that the cited regulation is designed to protect the sanctity of DoT tests; not non-DoT tests. The regulation's prohibition on comingling a DoT and a non-DoT test is to protect the integrity of the DoT testing process. This is clearly seen in subparagraph (c), where the employer "must not perform any tests on DOT urine or breath specimens other than those specifically authorized by this part or DOT agency regulations." In other words, the employer must NOT perform its own tests on samples obtained for DoT testing, lest the DoT sample become contaminated or adulterated. In this case, the DoT drug test consisted of a urine specimen; the employer's alcohol test consisted of a breath specimen. (Tr. Vol. II at 82). There was never a risk of co-mingling breath samples with urine samples.

The root of Respondent's difficulty in this case is his fundamental misunderstanding of his employer's right to conduct random alcohol testing. Respondent testified that "…the Coast Guard does not authorize random alcohol testing….I have not yet found any enabling verbiage anywhere that would allow a company to test for alcohol on a random basis." (Tr. Vol. II at 199 – 200). Respondent would have been better served had he read 33 C.F.R. Part 95, which, as the Coast Guard's Post Hearing Brief points out, "specifically recognizes the authority of a marine employer to limit or prohibit the use or possession of alcohol aboard its vessels."[6] Although it is clear that Respondent's errant beliefs are the product of a good-faith attempt to understand the relationship between Coast Guard/DoT regulations and his employer's policy – he is, nevertheless, wrong. An employer is free to conduct any reasonable test for alcohol to ensure the fitness and safety of its employees, without Coast Guard or DoT permission to do so.

VI. 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).

The Coast Guard seeks a three-month suspension of Respondent's credential. In determining an appropriate sanction for offenses for which revocation is not mandatory, an ALJ should consider: any remedial actions undertaken by a respondent; respondent's prior records; and evidence of mitigation or aggravation. See 46 C.F.R. §5.569(b)(1)-(3).

Remedial Action: Respondent did not provide any evidence of independent, remedial action undertaken by him which might mitigate the sanction here imposed. See 33 C.F.R. §5.569(b)(1).

[6] 33 C.F.R. §95.001(b).

Respondent's Prior Records: The Coast Guard did not provide any adverse information from Respondent's prior records. As Respondent points out in his Post Hearing Brief, he has never been involved in any suspension/revocation proceeding with the Coast Guard and is, by all accounts, a good seaman. (Tr. Vol. II at 99, 189, 198).

Mitigation or Aggravation: The court notes that Respondent did successfully accomplish the DoT-mandated random urinalysis for drugs on April 9, 2016, just prior to refusing his employer's alcohol screening. The court also notes Respondent's prior, persistent, good faith, but errant, attempts to convince his employer that its alcohol policy violated Coast Guard and/or DoT regulations. (Tr. Vol. II at 201 – 202).

The court believes Respondent is a generally safe and prudent mariner. Nothing in this case suggests that Respondent engaged in a rash act of defiance. Rather, the facts reveal his thoughtful and genuine concerns about the legality of the OSG alcohol testing program. The instant case resulted from his badly misinformed reaction to his employer's lawful alcohol testing policy. In the future, Respondent, and other mariners, would be better served by consulting legal counsel (not the Internet) before acting precipitously. Therefore, based upon the record as a whole, the appropriate sanction is a **SIXTY DAY SUSPENSION** of Respondent's Merchant Mariner's Credential effective from the date of this Decision and Order.

VII. ULTIMATE FINDINGS OF FACT

1. At all times relevant to this litigation, Respondent was acting pursuant to the authority of his Merchant Mariner's Credential.

2. At all times relevant to this litigation, Respondent's maritime employer, OSG, maintained a drug and alcohol policy that required OSG employees to submit to random alcohol testing. OSG's drug and alcohol policy is directly related to safety at sea. A violation of the OSG drug and alcohol policy constitutes Misconduct, per the provisions of 46 C.F.R. §5.27.

3. Violation of a Master's lawful order is Misconduct per the provisions of 46 C.F.R. §5.27.

4. On April 9, 2016, Captain Quinn, the master of the OVERSEAS LONG BEACH ordered and directed Respondent and the crew of that vessel to report for drug and alcohol testing.

5. On April 9, 2016, Respondent refused to submit to his maritime employer's mandated random alcohol testing, in violation of that policy and of his mater's order.

6. Respondent's refusal to comply with his maritime employer's policy regarding random alcohol testing is Misconduct, as was his failure to obey his master's lawful order, per the provisions of 46 C.F.R. §5.27.

VIII. CONCLUSION

For the foregoing reasons, I find the Coast Guard has **PROVED** its allegations that Respondent committed Misconduct by violating his maritime employer's drug and alcohol testing by refusing to submit to random alcohol testing, as alleged in the Complaint and by his refusal to obey his master's lawful order, as found in this Decision and Order.

IX. ORDER

IT IS HEREBY ORDERED, that the Merchant Mariner's Credential issued by the U.S. Coast Guard to Robert Ryan Boudreaux is **SUSPENDED** for a period of **SIXTY DAYS**.

IT IS FURTHER ORDERED, that Respondent Robert Ryan Boudreaux is hereby prohibited from serving aboard any vessel requiring a Merchant Mariner's Credential issued by the U.S. Coast Guard for a period of **SIXTY DAYS** commencing upon the issuance of this Decision and Order.

PLEASE TAKE NOTE, that issuance of this Decision and Order serves as notice of the parties' right to appeal under 33 C.F.R. Part 20, Subpart J. A copy of Subpart J is provided as

Attachment B.

Done and dated this the 24th day of October, 2017,
at New Orleans, Louisiana.

Bruce Tucker Smith
US Coast Guard
Administrative Law Judge

Date: October 24, 2017