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 2017-0140
Enforcement Activity No. 5734803

DECISION AND ORDER
Issued: March 20, 2018

By Administrative Law Judge: Honorable George J. Jordan

Appearances:

Mr. Andrew J. Norris
Suspension & Revocation National Center of Expertise

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

DECISION AND ORDER

I. PROCEDURAL HISTORY

The Coast Guard initiated this proceeding by filing a Complaint seeking to revoke Respondent's Merchant Mariner Credential (MMC). The Complaint alleges Respondent failed to disclose existing medical conditions and medications on his renewal application and refused a chemical test under 46 C.F.R. Part 16 on October 8, 2015.[1] Respondent denied the allegations, asserting that he was not employed at the time of the drug test, that the Coast Guard had no jurisdiction and that the Coast Guard violated his right to due process in subpoenaing his medical records.

I held a hearing on August 29, 2017 at the United States Courthouse in Seattle, Washington. Mr. Andrew Norris represented the Coast Guard. Respondent appeared *pro se*, assisted by his son, Logan Edenstrom. At the close of the hearing, the Coast Guard moved that I retain Respondent's MMC pursuant to 46 C.F.R. § 5.521(b) and Respondent did not object. [Tr. at 207–208]. After the hearing, both parties filed post-hearing briefs including proposed findings of fact and conclusions of law. This matter is thus ripe for decision.

In this Decision, I find Respondent knowingly provided inaccurate information and/or failed to disclose required information about his medical conditions in his 2015 MMC renewal application. I also find Respondent's departure from the drug testing facility constituted a refusal under 49 C.F.R. § 40.191 and 46 C.F.R Part 16. Accordingly, the allegations are **PROVED**.

[1] The Coast Guard brought a substantially similar allegation regarding the October 8, 2015 drug test in a previous case against Respondent, Docket Number 2015-0352. However, the Coast Guard withdrew it at the hearing and it was consequently dismissed without prejudice. The Coast Guard has now decided to revive the allegation as part of this case.

II FINDINGS OF FACT

A. Misrepresentation in MMC Renewal Application

1. The Coast Guard issued Respondent Merchant Mariner Credential (MMC) 000013216 on July 9, 2009. [CG-05].

2. That credential expired on July 9, 2014. [CG-05].

3. On April 21, 2015, Respondent submitted form CG-719B, Application for License as an Officer, Staff Officer, or Operator and Merchant Mariner Document, to the National Maritime Center (NMC) to renew MMC 000013216. [CG-06].

4. In support of his renewal application, Respondent also submitted form CG-719K, Merchant Mariner Credential Medical Evaluation Report, dated March 27, 2015. [CG-07].

5. Form CG-719K requires MMC applicants to disclose whether they have, or have ever suffered from, certain medical conditions, as well as their prescription history for the past 30 days and use of non-prescription medications, dietary supplements, and vitamins in the past 90 days. [CG-07].

6. Respondent reported he had not taken any prescription or non-prescription medication, dietary supplements, or vitamins within the specified time frames when he submitted form CG-719K. [CG-07].

7. Respondent reported that he did not currently have any of the medical conditions listed in Section IV of Form CG-719K, and had not suffered from any of those conditions in the past. [CG-07].

8. The NMC issued Respondent a renewed MMC on May 8, 2015. [CG-01].

9. During the previous proceeding against Respondent's MMC, Docket 2015-0352, Respondent filed a document indicating he had an ongoing medical issue the NMC was previously unaware of. [CG-04; Tr. at 29].

10. Pursuant to a post-hearing review of that case, Coast Guard Investigating Officer Eric A. Bauer noted Respondent's statement and initiated a review of Respondent's most recent MMC application. [Tr. at 29].

11. The medical records obtained for this hearing show that Family Medicine Clinic in Olympia, Washington treated Respondent for a number of conditions listed in section IV of Form CG-719K from 2013 to 2016. [CG-06] *These medical records are subject to a protective order. My findings and discussion regarding the medical records are included in an addendum to this decision, which is also subject to the protective order.*

B. Refusal to Take DOT Drug Test

12. At all relevant times, and specifically between September 22 and October 1, 2015, BT&B employed Respondent as the Master of the HENRY BRUSCO. [CG-02 Finding of Fact (FF) #2; R-A at 50-51, 143].

13. BT&B requires new employees to read and initial the company's drug and alcohol policy, contained in the employee handbook. [CG-02 FF#6; R-A at 30-31].

14. Respondent read and initialed the drug and alcohol policy. [CG-02 FF#7; R-A at 31].

15. BT&B employees must report to the company's preferred collection facility within 24 hours of being notified of a drug test. [CG-02 FF#8; R-A at 37-38].

16. BT&B utilizes whole-boat testing for random drug tests.[2] [CG-02 FF#14; R-A at 51].

17. American Maritime Safety (AMS) administers BT&B's random drug testing program. [Tr. at 140; CG-02 FF#15; R-A at 20, 26-28].

18. AMS uses the Randomware software program to select vessels for whole boat testing. [CG-02 FF#16; R-A at 20].

19. Randomware randomly picks a specified number of items from a list and ensures each item is equally subject to selection. [CG-02 FF#17; R-A at 8, 13-14].

20. Diana Rivera is the vessel operations manager at AMS. [CG-02 FF#18; R-A at 19].

21. Dan Zandell is the compliance manager and Designated Employer Representative (DER) at BT&B. [Tr. at 139; CG-02 FF#19; R-A at 24].

22. On September 22, 2015, Ms. Rivera sent a confidential email to Mr. Zandell, notifying him the HENRY BRUSCO had been selected for testing. [CG-02 FF#20; R-A at 21].

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

23. After receiving the notification on September 22, 2015, BT&B had 45 days to complete the testing and notify AMS [Tr. at 141-142].

24. Once a selected vessel is near a collection facility, Mr. Zandell notifies the captain about the drug testing. [CG-02 FF#22; R-A at 28].

25. On September 22, 2015, the HENRY BRUSCO was at sea with a scheduled return to its homeport in Cathlamet, Washington on the evening of September 30th. [CG-02 FF#23; R-A at 32].

26. Mr. Zandell asked Mr. Joe Bromley, BT&B's port captain, to notify Respondent of the vessel's selection for drug testing, and to keep the crew on board until the following morning when the testing facility opened. [CG-02 FF#25; R-A at 32].

27. Mr. Bromley initially told Respondent by text message on September 30, 2015, to keep the crew aboard for the night after docking, but not to tell them it was for drug testing. [CG-02 FF #26-27; R-A at 79].

28. On the morning of October 1, 2015, Respondent and Mr. Bromley agreed that Respondent would send the crew of the HENRY BRUSCO to the BT&B office to await further instruction regarding the drug test. [CG-02 FF#28; R-A at 80-81].

29. Mr. Bromley did not tell Respondent where the drug test would be performed or the time requirements for reporting to the collection facility. [CG-02 FF#29; R-A at 70, 83].

30. Respondent remained in Cathlamet to wait for his son instead of going to the office with the other crew members. [CG-02 FF#37; R-A at 135].

31. Respondent arrived at the BT&B office mid-morning on October 1, 2015, and met with Mr. Zandell about health insurance paperwork. [CG-02 FF #41; R-A at 38-39].

32. Mr. Zandell never mentioned the need to report for a drug test to Respondent during their conversation. [CG-02 FF#42; R-A at 38-39].

33. Respondent did not ask Mr. Zandell or anyone else at BT&B about the drug test or location of the collection facility. [CG-02 FF#43; R-A at 38-39].

34. Respondent did not report to the drug testing facility on October 1, 2015. [Tr. at 145].

35. BT&B did not have any immediate sailing opportunities following the September 30th return for Respondent, but kept him in the employee pool intending to place him on another crew within the next 45 days. [Tr. at 149-151].

36. Subsequently, Respondent filed for and received Washington State unemployment insurance. [Tr. at 191].

37. On October 8, 2015, Mr. Zandell discovered that Respondent had not taken a chemical test on October 1, 2015. [Tr. at 145-146; CG-11].

38. When Mr. Zandell contacted Respondent on October 8, 2015 to inquire why Respondent had failed to report on October 1, 2015, he offered Respondent a second chance to take the DOT random test and also informed Respondent that if he did not take the test, he would report it to the Coast Guard. [Tr. at 146; CG-11; R-B].

39. Respondent agreed to take the test and reported to Peace Health, the designated testing facility, on the afternoon of October 8, 2015. [Tr. at 147; CG-10, CG-11].

40. The collector, Dana Sorensen, followed the standard protocols and procedures for DOT drug tests, as described in 49 C.F.R. Part 40, when collecting Respondent's sample. [Tr. at 107; CG-10].

41. Respondent provided an initial urine sample at approximately 1430 and 1437. [Tr. at 113, 128; CG-9; CG-10].

42. Respondent's sample registered on the collection bottle as being outside the acceptable temperature range (90-100 degrees F). [Tr. at 108–109, 122; CG-9; CG-10].

43. As an experienced collector, Ms. Sorensen could also feel by touch that the sample was excessively warm. [Tr. 109, 112, 123–124; CG-10].

44. Upon noting the out-of-range specimen, Ms. Sorensen initiated the correct protocol by sealing the provided specimen, having Respondent initial it, and having him immediately attempt to provide a second sample under direct observation. [Tr. at 109–111, 112; CG-10].

45. Respondent, accompanied by a male observer, went back to the toilet area but was unable to provide a second sample. [Tr. at 129; CG-10].

46. Per the DOT shy bladder protocol, Ms. Sorensen provided Respondent with 10 oz. of water and directed him to remain in the facility's waiting room until he was able to provide a second sample. [Tr. at 111; CG-10].

47. At approximately 1437 hours, Respondent departed the facility without giving the required second sample. [Tr. at 112, 113, 133, 137; CG-9; CG-10].

III. DISCUSSION

A. Jurisdiction

1. Misconduct

The Coast Guard alleged two separate charges of Misconduct. Jurisdiction in misconduct cases is established only if the misconduct occurred while the mariner was acting under the authority of his MMC. 46 U.S.C. § 7703; see also Appeal Decision 2615 (DALE) (2000). A mariner acts under the authority of a Coast Guard-issued credential or endorsement when the holding of such credential or endorsement is required either by law, regulation, or by an employer as a condition of employment. 46 C.F.R. § 5.57(a). A mariner does not cease to act under the authority of his or her credential while on shore leave. 46 C.F.R. § 5.57(c).

In his Motion to Dismiss, Respondent raised a number of jurisdictional issues. First, he argued there was no jurisdiction because his credential had expired before he submitted a renewal application. I found that under 46 C.F.R. § 10.205(c), for the sole purpose of renewing a credential, a mariner whose MMC expired within the past 12 months is treated as holding a valid MMC. I also found that under 46 C.F.R. § 5.57(b), a mariner is acting under the authority of his MMC when applying for renewal under 46 C.F.R. § 10.227(h) and (i). Thus, I determined there is jurisdiction for Allegation One. See Order Denying Motion to Dismiss dtd. Aug. 8, 2017.

In challenging jurisdiction for Allegation Two, Respondent argued that he was not employed by BT&B at the time of testing and therefore he was not acting under the authority of his credential when he left the drug testing facility. However, the evidence establishes

Respondent remained part of the BT&B pool of employees during periods when he was not assigned to crew a vessel. During these times, Respondent may have been eligible for Washington State unemployment, but he was not subject to pre-employment testing before he could be assigned to another BT&B vessel. In any event, when the HENRY BRUSCO was selected for a whole-boat random drug test, Respondent was underway as Master of the vessel. The obligation to take the test arose at that time, while he was clearly an employed crew member aboard a BT&B vessel. I therefore find that jurisdiction attaches for purposes of Allegation Two.

2. Constitutional Arguments

Respondent raised a number of constitutional arguments in his brief. First, he states he "took part in these cases only under duress and appeared in a special appearance, as distinguished from a general appearance. The Coast Guard has the burden of showing that respondent is in the military to establish him as their personnel, and they have failed to do so." Next, he argues he signed his credential under reservation of rights, UCC 1-308. Finally, he claims his private rights are protected by the limitation of police power provided in the federal constitution.

Constitutional issues are "the province of the Federal Courts. 46 USC § 7701 et seq." Appeal Decision 2632 (WHITE) (2002); see also Appeal Decisions 2560 (CLIFTON), 2546 (SWEENEY). Suspension and revocation proceedings are administrative, not judicial, and their purpose is to promote safety at sea. Id. ALJs adjudicating suspension and revocation proceedings have no authority to decide constitutional issues, but rather focus on issues of compliance with existing statutes and regulations. Id. Thus, although Respondent has raised these issues and preserved his arguments for appeal, I am unable to consider them here.

As to Respondent's claim that he reserved his rights under the Uniform Commercial Code, thus limiting Coast Guard jurisdiction over his credential, courts routinely dismiss

attempts to challenge actions through the operation of a model civil commercial statute as legally frivolous. See Hanloh v. People of the State of California, 2017 WL 489407 (C.D. Cal. Feb. 6, 2017). The UCC is not a federal law and has no application to merchant mariner licensing; indeed, "an MMC is not valid until signed by the applicant and a duly authorized Coast Guard official." 46 C.F.R. § 10.209(e). Likewise, Respondent has not provided any support for his claim that the Coast Guard has the burden of showing he is in the military to establish jurisdiction. The Coast Guard may issue an MMC to any "qualified applicant," see 46 C.F.R. § 10.201(c), but there is no requirement for merchant mariners to be in the military. I therefore find Respondent's arguments unavailing.

B. Misrepresentation in MMC Renewal Application

1. *Applicable Law*

For purposes of Coast Guard Suspension and Revocation proceedings, 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 Commandant held that a "plain-language reading of the definition of 'misconduct' shows that it includes behaviors that violate statutes." Appeal Decision 2658 (ELSIK) (2006). The Complaint alleged that Respondent violated 18 U.S.C. § 1001 by making false, fictitous, and fraudulent statements in a Merchant Mariner Credential Medical Evaluation Report (CG-719K), which he submitted to the NMC along with his Application for License as an Officer, Staff Officer, or Operator and Merchant Mariner Document (CG-719B). This statute reads:

> **Statements or entries generally**
> **(a)** Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or

> judicial branch of the Government of the United States, knowingly and willfully--
> **(1)** falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
> **(2)** makes any materially false, fictitious, or fraudulent statement or representation; or
> **(3)** makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;
>
> 18 U.S.C.A. § 1001.

Title 18 U.S.C. § 1001 "is an appropriate source of a 'formal, duly established rule'" that may form the basis for a misconduct allegation. Appeal Decision 2610 (BENNETT) (1999); see also Appeal Decisions 2570 (HARRIS) (1995). The fact that the Coast Guard could have sought criminal penalties for the charged offenses does not preclude a suspension or revocation action for those same offenses. See ELSIK.

The requirement for mariners to obtain a medical certificate as part of the MMC renewal process is set forth in Coast Guard regulations at 46 C.F.R. § 10.301. To qualify for a medical certificate, a mariner must provide evidence of meeting the medical and physical standards by filing a Form CG–719K or CG–719K/E, as appropriate. 46 C.F.R. § 10.302. This requirement is therefore a formal, duly established rule and, if violated, can form the basis for a suspension or removal proceeding.

A mariner who commits fraud in order to obtain an MMC violates a law designed to promote maritime safety and also commits a serious act of misconduct. Appeal Decision 2613 (SLACK) (1999). In Appeal Decision 2569 (TAYLOR) (1995), the Commandant made clear that "fraud in the procurement of any license, certificate, or document is a clear threat to the safety of life or property." This is because it is critical that the Coast Guard have truthful information on which to base its determination as to whether to issue a credential. See Appeal Decision 2670 (WAIN) (2007).

A person makes a fraudulent statement if he or she has either actual or constructive knowledge that the statement is false, or intends it to be misleading. See Appeal Decision 809 (MARQUES) (1955). In addition, a statement recklessly made without knowledge of its truth or falsity may be considered a false statement knowingly made. See Cooper v. Schlesinger, 111 U.S. 148 (1884). The Commandant held that if a mariner "had reason to know that the representation he made … was false, then he may be considered to have constructive knowledge of the falsity of the statement made." See Appeal Decision 809 (MARQUES). Specific intent to make a fraudulent statement is not required; rather, the focus is on whether the person making a statement knows it is likely to be false. Id. "Whether Respondent had reason to know, or should have known, that the statement was false, is a determination driven by the specific facts of the case." Appeal Decision 2663 (LAW) (2007) (internal citations omitted).

2. Analysis

The issues I must consider are whether Respondent (1) made a materially false, fictitious, or fraudulent statement or representation; or (2) made a false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry. An MMC application contains a Certification and Oath which must be signed by the applicant, in which the applicant certifies that the information provided in connection with the application is true and correct. Respondent signed the Certification on April 2, 2015, and was therefore aware of this requirement. [EX CG-06].

The record clearly establishes that Respondent prepared and signed a Merchant Mariner Credential Medical Evaluation Report (CG-719K) on March 27, 2015. [EX CG-07]. In Section III of that form, he was required to report all prescription medications prescribed, filled or refilled, and/or taken within 30 days of signing Form 719K as well as all non-prescription medications, dietary supplements, or vitamins used for a period of 30 days or more within 90

days of signing the form. He checked "None" in Section III. [EX CG-07]. There are no medical records in the file from the 90-day period preceding the date he signed Form 719K, and no other evidence about Respondent's use of medication, dietary supplements, or vitamins during that time. Thus, the Coast Guard has not proved by substantial evidence that Respondent misreported his use of such substances on Form CG-719K.

Form CG-719K requires an applicant to indicate whether, to the best of the applicant's knowledge, he or she has, or has ever suffered from, any of the 88 medical conditions listed in Section IV. Respondent marked all listed conditions as "NO." [EX CG-07]. The record established that the Family Medicine Clinic of Olympia, Washington treated Respondent for at least four listed conditions between September 23, 2013 and March 27, 2015. [EX CG-08].

Respondent's principal defense is that the Coast Guard invaded his privacy by issuing the investigatory subpoena to obtain his medical records. I considered this issue when Respondent raised it in his Motion to Dismiss, and found that the Investigating Office appropriately used the subpoena authority granted to him pursuant to 46 U.S.C. § 7705 and 46 C.F.R. § 5.301(b). See Order Denying Motion to Dismiss dtd. Aug. 8, 2017. I also found that Federal and state law did not prevent disclosure of these records pursuant to such subpoena. Id.

At the hearing, Respondent contended that the Coast Guard misused its subpoena authority because that authority only exists in marine casualty investigations. [Tr. at 52-53]. However, Respondent's argument conflates two distinct statutes. Title 46 U.S. Code § 7705(a) grants both investigators and officers presiding at a suspension revocation hearing the authority to administer oaths and issue subpoenas for the testimony of witnesses and the production of documents and other evidence. Section 7705(b) states, "The jurisdictional limits of a subpena[3] issued under this section are the same as, and are enforceable in the same manner as, subpenas issued under Chapter 63 of this title." Title 46 U.S.C. Chapter 77 governs Coast Guard

suspension and revocation proceedings generally, while Chapter 63 governs investigations of marine casualties. The plain language of 46 U.S.C. § 7705 shows that marine casualty investigators have subpoena authority that is separate and distinct from that of hearing officials in suspension and revocation cases is separate and distinct from that of marine casualty investigators. For brevity's sake, rather than restating the jurisdictional limits and enforcement procedures in section 7705(b), Congress simply referred to an earlier section of the statute.

The subpoena authority in both marine casualty investigations and suspension and revocation cases "is co-extensive with that of a district court of the United States, in civil matters, for the district in which the investigation is conducted." 46 U.S.C. § 6304(a). Here, the nexus of the investigation was Olympia, Washington and Astoria, Oregon, where Respondent's medical providers were located. The fact that the NMC is physically located in West Virginia does not shift the location of the investigation, as the NMC is charged with providing services to all Coast Guard-credentialed mariners throughout the United States. I therefore find that the appropriate District Courts to look to are the Western District of Washington and the District of Oregon. Further, I find I can consider these records in reaching my decision in this case.

Each of the four conditions described in Respondent's medical records was potentially disqualifying. Respondent had recently been treated for three of those conditions and, as described in the addendum, knew that his statements on the form denying having any listed medical condition were not true.[4] His representations on Form CG-719K are therefore considered to be fraudulent statements and were clearly material to the Coast Guard's decision about whether to renew Respondent's MMC or subject it to further review by the NMC. See Appeal Decision 809 (MARQUES). The allegation is found **PROVED**.

[3] At the time this statute was drafted, "subpena" was the spelling used in Government Printing Office publications.
[4] As previously noted, a more thorough discussion of Respondent's conditions is provided in an addendum to this Decision, which is subject to a protective order.

C. Drug Test Refusal

1. Applicable Law

The Complaint alleges that Respondent refused to take a required drug test. 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).

Under the rules, "random selection may be accomplished by periodically selecting one or more vessels and testing all crewmembers covered by this section, provided that each vessel subject to the marine employer's test program remains equally subject to selection." 46 C.F.R. § 16.230(c). Marine employers may use contractors to conduct their random chemical testing programs. 46 C.F.R. § 16.230(d).

The Commandant holds that drug test refusals under 49 C.F.R. § 40.191 constitute misconduct. See Appeal Decisions 2690 (THOMAS) (2010); 2675 (MILLS) (2008). An employee refuses to take a drug test if he or she "(2) Fail[s] to remain at the testing site until the testing process is complete." 49 C.F.R. § 40.191(a)(2). 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).

When testing is undertaken by private employers to comply with Federal regulatory requirements under 46 C.F.R. Part 16, the employer acts as an instrument or agent of the Government. See Appeal Decision 2704 (FRANKS) 2014 WL 4062506. "A government-mandated drug test must be both properly ordered (in accordance with 46 C.F.R. Part 16) and properly conducted (in accordance with 49 C.F.R. Part 40). If it is not, the test cannot form the basis for suspension and revocation proceedings." Id. at *7. "Under this rule, when the test was ordered pursuant to the regulations but the justification for it is not consonant with the regulations, or the test is not conducted in accordance with 49 C.F.R. Part 40 and is therefore unreliable, there is no *prima facie* case proved." Id. at *10.

2. The October 8, 2015 Test was a DOT Drug Test

The issues I must consider are whether: 1) the October 8, 2015, test was a DOT drug test, 2) Respondent was acting under the authority of his credential at the time of such a test; and, if so, 3) his failure to remain at the collection facility and complete the drug test constitutes a refusal under 49 C.F.R. § 40.191(a)(2) and 46 C.F.R. Part 16. If each of these conditions is met, his refusal constitutes an act of misconduct as described by 46 U.S.C. § 7703(1)(B) and defined by 46 C.F.R. § 5.27.

BT&B is required under 46 C.F.R. Part 16 to administer random drug testing to its licensed employees. [CG-02 FF #3; R-A at 34-35, 53]. As allowed under 46 C.F.R. § 16.230(d), BT&B engaged a third-party, AMS, to manage its random testing program. BT&B also employs a Designated Employer Representative, who is responsible for notifying employees when they have been selected for random drug testing. The Coast Guard has established 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 my Decision in Docket 2015-0352, dated January 12, 2017, I found that BT&B did not adequately notify Respondent of his responsibility to take a drug test on October 1, 2015. However, it is clear from the evidence here that Mr. Zandell gave Respondent adequate notice to appear on October 8, 2015, to take the drug test for which he had been selected as a crewmember aboard the HENRY BRUSCO on September 22, 2015. I therefore find the October 8, 2015, test was a required random drug test ordered pursuant to 46 C.F.R. Part 16. [5]

3. Respondent Refused to Take a Drug Test

In the Complaint, the Coast Guard has specifically alleged that "Respondent's failure to remain at the collection site until the testing process was complete is a refusal to submit to a required 46 CFR Part 16 drug test, as described by 49 CFR 40.191." The drug testing process begins when the employee--or the collector, in the employee's presence--breaks the seal on the collection container. See 49 C.F.R. § 40.63(c). If the employee leaves at any time thereafter, he will be deemed to have refused to take the drug test. Appeal Decision 2685 (MATT) (2010). The evidence presented in this case clearly shows that the testing process had already begun before Respondent left the site.

The collector credibly testified that Respondent gave an initial urine sample, but it was outside the normal temperature range. The collector then called a male collector, as required by DOT rules, to attempting to collect a sample under direct observation. See 49 C.F.R. § 40.65. The evidence establishes Respondent was unable to provide a sample under direct observation. The collectors subsequently began the procedure used in instances of shy bladder by providing Respondent with liquids. However, at this stage Respondent left the facility without providing an adequate urine sample for the DOT testing procedures to be carried out.

[5] I note that my Decision in Docket 2015-0352 is on appeal to the Commandant. If the Commandant determines that the notification for the October 1, 2015, test was in fact adequate, my findings here as to the October 8, 2015, test would necessarily need to be revisited because it might not be considered a random drug test under Coast Guard and DOT regulations.

The record is clear that a drug test had commenced and Respondent left before it was completed. This meets the requirements of 49 CFR 40.191(a)(2). Accordingly, I find this allegation **PROVED**.

IV. FACTORS CONSIDERED IN DETERMINING AN APPROPRIATE ORDER

Having found both allegations proved, I must now issue an appropriate order in this matter. 33 C.F.R. § 20.902(a)(2). Coast Guard regulations detail the factors to be considered in determining an appropriate order. 46 C.F.R. § 5.569. However, "An Administrative Law Judge has wide discretion to formulate an order adequate to deter the [a mariner's] repetition of the violations he was found to have committed." Appeal Decision 2475 (BOURDO) (1988). "The selection of an appropriate order is the responsibility of the Administrative Law Judge, subject to appeal and review. The investigating officer and the respondent may suggest an order and present argument in support of this suggestion during the presentation of aggravating or mitigating evidence." 46 C.F.R. § 5.569(a). Accordingly, I am not bound by the Coast Guard's recommendations.

The appropriate sanction to be given for a particular offense is dependent on the type and circumstances of the offense. 46 C.F.R. § 5.569. Statutes, regulations and decisions on appeal mandate a particular sanction for certain offenses, whereas other offenses give the ALJ discretion in crafting the appropriate sanction. Id. A number of Commandant Decisions on Appeal have made clear that when fraud in the procurement of a license is proven, revocation is the only appropriate sanction. Appeal Decisions 2205 (ROBLES) (1980); 2346 (WILLIAMS); 2570 (HARRIS); 2569 (TAYLOR); 2613 (SLACK). However, a sanction of less than revocation may be imposed when a mariner made a false statement on his application rather than a fraudulent statement. Appeal Decision 2663 (LAW) (2007).

Except for mandated sanctions, an ALJ may consider the following factors in determining an appropriate sanction: (1) remedial actions which have been undertaken independently by Respondent; (2) the prior record of 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. See 46 C.F.R. § 5.569(b). These rules include a Table entitled "Suggested Range of an Appropriate Order," stating Table 5.569 "is for the information and guidance of Administrative Law Judges and is intended to promote uniformity in orders rendered. This table should not affect the fair and impartial adjudication of each case on its individual facts and merits." 46 C.F.R. § 5.569(d).

The regulations explain how an ALJ may apply the "Suggested Range of an Appropriate Order" Table, noting that:

> The orders are expressed by a range, in months of outright suspension, considered appropriate for the particular act or offense prior to considering matters in mitigation or aggravation. For instance, without considering other factors, a period of two to four months outright suspension is considered appropriate for failure to obey a master's written instructions. An order within the range would not be considered excessive. Mitigating or aggravating factors may make an order greater or less than the given range appropriate. Orders for repeat offenders will ordinarily be greater than those specified.
>
> 46 C.F.R. § 5.569(d).

In Coast Guard suspension and revocation cases, "[t]he sanction imposed in a particular case is exclusively within the authority and the discretion of the ALJ," who is not bound by the scale of average orders. Appeal Decision 2628 (VILAS) (citing Appeal Decisions 2362 (ARNOLD) and 2173 (PIERCE)). "In the absence of a gross departure from the Table of Recommended Awards, the order of the ALJ will not be disturbed on review." Appeal Decision 2628 (VILAS) (citing Appeal Decision 1937 (BISHOP)).

The sanction prescribed in 46 C.F.R. § 5.569 for a refusal to take a drug test is a 12–24 month suspension. When aggravating factors are present, this sanction may be increased up to and including revocation. See Appeal Decision 2702 (CARROLL) (2013) (interpreting Coast Guard policy in light of Commandant v. Moore, NTSB Order No. EM-201 (2005)). However, as previously discussed, the only appropriate sanction where fraud in the procurement of a license is proved is revocation. I found Appellant to have made fraudulent statements in order to procure a renewal of his license and must therefore order that his MMC is **REVOKED**. As I retained Respondent's MMC at the hearing, my office will forward it to the appropriate Marine Safety unit.

ORDER

WHEREFORE:

IT IS HEREBY ORDERED that the Coast Guard's allegations in the Complaint are found **PROVED**; and

IT IS HEREBY FURTHER ORDERED that Respondent's Merchant Mariner's Credential is **REVOKED**.

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: March 20, 2018