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

UNITED STATES COAST GUARD
Complainant

vs.

BLAKE ALEXANDER BERRY
Respondent

Docket Number 2020-0118
Enforcement Activity No. 5778141

DECISION AND ORDER
Issued: December 08, 2021

By Administrative Law Judge: Honorable George J. Jordan

Appearances:

Jennifer Mehaffey, Esq.
N&R National Center of Expertise
Mr. Paul T. Tramm
Sector Puget Sound
For the Coast Guard

Blake Alexander Berry, Pro se
For the Respondent

I. BACKGROUND

The United States Coast Guard (Coast Guard) brought this administrative action seeking to revoke Respondent Blake Berry's Merchant Mariner Credential (MMC) pursuant to 46 U.S.C. § 7703(1)(A) and its underlying regulations at 46 C.F.R. Part 5. On March 4, 2020, the Coast Guard filed a Complaint against Respondent, alleging he violated 46 C.F.R. § 4.06–5 by failing to take a required random drug test. Respondent filed a timely answer, admitting the jurisdictional allegations, denying the factual allegations, and asking for a formal hearing.

On February 16, 2021, I held a hearing using Zoom for Government software.[1] Jennifer Mehaffey, Esq. represented the Coast Guard with assistance from Investigating Officer Paul Tramm, and Respondent represented himself. Following the hearing, I provided the transcript to both parties and gave them the opportunity to file post-hearing briefs containing proposed findings of fact, proposed conclusions of law, and argument supporting their positions. Both parties filed timely briefs.[2] I have carefully reviewed the entire record in this case, including the testimony, exhibits, applicable statutes, regulations, and case law, and find the allegation of a violation of law or regulation **PROVED** and find a **SIX-MONTH OUTRIGHT SUSPENSION** appropriate.

II. FINDINGS OF FACT

1. Respondent is the holder of a Coast Guard-issued MMC. (Ex. CG-01).

2. Respondent worked for the Hat Island Community Association (the Association) intermittently as a relief captain from approximately 2013 to 2019, and full-time as Master of the HAT ISLAND EXPRESS from March 2019 until January 2020. (CG-06, CG-07; Tr. at 89).

3. The HAT ISLAND EXPRESS is a passenger vessel subject to inspection by the Coast Guard under 46 U.S.C. § 3301. (Ex. CG-02).

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[1] The use of Zoom for Government was necessitated by the ongoing COVID-19 pandemic, which precluded an in-person hearing. The parties agreed a video hearing was appropriate in this case.

[2] Respondent's filing was in the form of a letter brief, contained in the body of an email sent to my office, the Docketing Center, and Coast Guard counsel.

4. The Certificate of Inspection for the HAT ISLAND EXPRESS requires it to be operated by a licensed Master. (Ex. CG-02).

5. The Association required Respondent to hold an MMC in order to serve in this position. (Tr. at 19-21).

6. The Association employs Kim Gleason as the Island Manager and Designated Employer Representative (DER), responsible for implementing its drug testing program under 46 C.F.R. Part 16. (Tr. at 60).

7. The Association contracts with Drug Fee Business, a consortium, to randomly select its employees for drug testing in accordance with 46 C.F.R. Part 16. (Tr. at 17, 28; Ex. CG-3, CG-4).

8. On January 7, 2020, Drug Free Business used its proprietary computer software to randomly select an employee of the Association for drug testing. (Tr. at 10-12, 14; Ex. CG-3, CG-4).

9. Drug Free Business sent an email notice to Ms. Gleason instructing her to log into the system to find out which employee had been selected. (Ex. CG-03).

10. Ms. Gleason received the notification and learned Respondent had been selected. (Ex. CG-03; Tr. at 35-37).

11. Ms. Gleason verbally notified Respondent of his selection on January 9, 2020, which was his next scheduled work day after the selection occurred. (Tr. at 37).

12. Ms. Gleason gave Respondent notification on board the HAT ISLAND EXPRESS in front of the Association's Board President, Darla Younce, and the vessel's deckhand, [redacted]. (Tr. at 37, 67-68, 78-79).

13. In the presence of these witnesses, Respondent told Ms. Gleason he would take the drug test that day. (Tr. at 38, 68-69, 73, 79).

14. Respondent knew the collection site's location because he gave specimens there before when directed to test. (Tr. at 91-92).

15. Custody and Control Forms are kept in the HAT ISLAND EXPRESS's wheelhouse and crewmembers generally take one with them to the collection site when directed to test. (Tr. at 92).

16. Later the same day, Respondent told Ms. Gleason in Mr. [redacted] presence that the line at the collection site was too long so he would have to test the following day. (Tr. at 41, 79).

17. Respondent did not return to the collection site within a reasonable amount of time to give a specimen for drug testing. (Tr. at 46).

18. On January 22, 2020, Ms. Gleason emailed Respondent to inquire whether he had taken the drug test because she had not received any results. (Ex. CG-09; Tr. at 46-47).

19. Ms. Gleason also contacted Drug Free Business and the designated collection site, neither of which had any record of Respondent appearing at the testing site on January 9 or 10, 2020. (Tr. at 46).

20. Respondent replied to Ms. Gleason's email on January 22, 2020, stating she had not notified him of selection for a random drug test, and attached a resignation letter. (Ex. CG-09, CG-10).

21. Ms. Gleason reported Respondent's failure to test to the Coast Guard on February 4, 2020. (Ex. CG-08).

III. DISCUSSION

The purpose of Coast Guard suspension and revocation proceedings is to promote safety at sea. 46 U.S.C. § 7701(a). In furtherance of this goal, Administrative Law Judges (ALJs) have the authority to suspend or revoke Coast Guard-issued credentials or endorsements. See 46 C.F.R. § 5.19(b). These proceedings are conducted under the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq*. 46 U.S.C. § 7702(a).

A. Burden of Proof

Section 7(c) of the APA places the burden of proof on the proponent of a rule or order, unless otherwise provided by statute. In a suspension or revocation hearing, the Coast Guard bears the burden of proof. 33 C.F.R. § 20.702(a). Under the APA, the fact-finder must consider the "whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence" before assessing a sanction. 5 U.S.C. § 556(d). The standard of proof in administrative proceedings is the "preponderance of the evidence" standard, meaning a party must prove that "a fact's existence is more likely than not." Steadman v. SEC, 450 U.S. 91, 98 (1981).

`B. Jurisdiction

Respondent admitted to all jurisdictional elements relating to the allegations. However, the burden of establishing jurisdiction nevertheless remains, as "federal courts have an

independent obligation to ensure that they do not exceed the scope of their jurisdiction, and therefore they must raise and decide jurisdictional questions that the parties either overlook or elect not to press." Henderson ex rel. Henderson v. Shinseki, 562 U.S. 428, 434 (2011). See also Appeal Decision 2656 (JORDAN) (holding that even though the respondent admitted the charged offense, an appeal must be granted where jurisdiction is not established).

In a case involving misconduct, jurisdiction is established if the alleged violation occurred while Respondent was "acting under the authority" of a Merchant Mariner Credential. See 46 U.S.C. § 7703. A vessel employee is considered to be acting under the authority of a credential or endorsement when they are required to hold it by either law or regulation, or by their employer as a condition of employment. 46 C.F.R. §5.57(a). Here, the Certificate of Inspection for the HAT ISLAND EXPRESS required it to be manned by a licensed Master. Thus, when Respondent failed to take a required drug test, he was acting under the authority of his MMC and jurisdiction is established.

C. Misconduct

The Coast Guard alleged Respondent failed to take a required drug test in violation of 49 C.F.R. § 40.191. Although failure to submit to a required drug test is a violation of law or regulation, the Coast Guard commonly charges refusals to test as misconduct and the Commandant has approved of this practice. See, e.g., Appeal Decision 2690 (THOMAS) (2010); Appeal Decision 2675 (MILLS) (2008). 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 C.F.R. 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). As the employer for crewmembers working on the Hat Island Ferry, the Hat Island Community Association was required to maintain a drug testing program for covered crewmembers, such as the vessel's Master and mate.

Accordingly, in order to prove its allegation of Misconduct, the Coast Guard must establish by a preponderance of the evidence that (1) Respondent was properly selected for random drug testing, (2) Respondent's marine employer directed him to provide a urine specimen for chemical testing, and (3) Respondent failed to appear for that test within a reasonable time after being directed to do so by the employer. I will address each of these below.

1. Respondent was Properly Selected for a Random Drug Test

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 considers the reason for ordering chemical testing to be part of the Coast Guard's *prima facie* case in a suspension and revocation matter. Appeal Decision 2704 (FRANKS), 2014 WL 4062506, at *6 (2014), citing Appeal Decision 2633 (MERRILL) (2002). Thus, the ALJ is required to consider whether the drug test itself was properly ordered under the regulations. FRANKS at *7; see also Appeal Decision 2697 (GREEN) (2011).

Under 46 C.F.R. 16.105 and 49 C.F.R. 40.347, employers may comply with federal drug testing requirements by either making random selections of their own employees, or joining a consortium which makes the selections. Either way, the selections must be made using a scientifically valid method, and each employee must have an equal likelihood of being chosen each time a selection is made.46 C.F.R. § 16.230(c); see also Appeal Decision 2734 (NELSON) (2021).

The Hat Island Community Association (Association) contracts with Drug Free Business, a consortium, to administer its maritime drug testing program. Ms. Robi Bolton, the director of the medical review office for Drug Free Business, testified about the selection process. She said her company uses a software program that analyzes the company roster to determine how many selections must be made per year. (Tr. at 12; see also Ex. CG-04). The program assigns each person on the roster a unique ID number, shuffles those unique ID numbers, and makes the necessary number of random selections. (Id.) The employer's Designated Employee Representative (DER) then receives an email telling them to log into the secure portal to find out the names of the selected mariners. (Id.)

Although Respondent did not specifically contest the randomness of his selection, the Coast Guard elicited a significant amount of testimony on this topic during the hearing. Given the volume of testimony and the fact that some of the testimony was conflicting, I find I must make a determination as to randomness. See, e.g., GREEN (ALJs must make reasonable allowances to protect the rights of pro se litigants, including ensuring randomness if it might become a contested issue).

The software program Drug Free Business utilized selected Respondent for testing and notified Hat Island's DER on January 7, 2020. (Ex. CG-03). There was conflicting evidence about the number of employees on Hat Island's roster at the time Respondent was selected, as Ms. Bolton testified the Association generally had around 20 employees subject to testing and

were in their own pool, not combined with any other companies. (Tr. at 24-25). However, Kim Gleason, the Island Manager for the Hat Island Community Association, testified they only had two employees subject to federal testing: Respondent and the ferry's first mate. (Tr. at 28-29). Respondent said the crew usually numbered three to five people and [redacted] the deckhand, testified that the largest crew they ever had during his employment was four, but for approximately the last six months of Respondent's employment it was only the two of them. (Tr. at 77, 99).

The documentary evidence, which consists of a mostly-redacted spreadsheet included in Exhibit CG-04, does not resolve this conflict. Ms. Bolton testified it is a continuously-updated document, meaning it does not reflect the roster as it was on January 7, 2020, when the selection occurred. Rather, it reflects the roster as it stood when Drug Free Business printed it on February 18, 2020. Based on the limited information viewable on the spreadsheet, it is not possible to precisely determine how many employees were on Hat Island's roster at the time of selection, though it appears there were very few.

Nevertheless, the information the Coast Guard put forth about the random selection process does show that all of the Association's covered employees were equally likely to be selected for testing whenever a selection was made, and were subject to selection on January 7, 2020. There is also no indication the employees were aware of when a selection would be made. This satisfies the Coast Guard's requirements for randomness. See Appeal Decision 2710 (Hopper) (2015). Respondent has not presented any contrary evidence. I therefore find Respondent was properly selected for a required random drug test.

2. Respondent's Marine Employer Notified Him of the Need to Test

Next, I must consider whether the Association properly notified Respondent he was required to take a Part 16 drug test. Neither DOT nor Coast Guard regulations specifically provide the method by which employers must notify employees that they must take a drug test.

"Therefore, as long as an employer's policy with respect to notification is in accord with the applicable DOT and Coast Guard regulations, the form and manner of notification may be left to the employer's discretion." Appeal Decision 2652 (MOORE) (2005), aff'd sub nom. Collins v. Moore, NTSB ORDER NO. EM-201 (August 30, 2005). In MOORE, the mariner was held to have actual notice of his selection for a required drug test when a third-party administrator left a voicemail telling him to report to a specific facility within 24 hours.

However, in 2016—over a decade after MOORE—the Coast Guard issued a Marine Safety Advisory (MSA) stating:

> 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). The Commandant has not yet addressed whether oral notifications made after this MSA was issued are still considered sufficient. However, as CDOAs are binding on ALJs and the 2016 MSA is a guidance document for employers, for purposes of this decision I find that a DER's "clear, unmistakable unambiguous" oral direction to test satisfies the notification requirements. See Appeal Decision 2690 (THOMAS) (2010).

In this case, the manner of the alleged notification also raises credibility issues, as the Coast Guard argues Ms. Gleason properly notified Respondent of his selection, while Respondent maintains he was not ordered to take a drug test. I must therefore determine whether the Coast Guard or Respondent presented a more credible version of events.

In Coast Guard suspension and revocation proceedings, "[t]he ALJ has broad discretion in determining the credibility of witnesses and in resolving inconsistencies in the record; 'where

there is conflicting testimony, it is the function of the ALJ, as fact-finder, to evaluate the credibility of witnesses and resolve inconsistencies in the evidence.'" Appeal Decision 2711 (TROSCLAIR) (2015) (quoting Appeal Decision 2616 (BYRNES) (2000)). This is because the ALJ "can fully observe the response, character and demeanor of the witnesses in issue." Appeal Decision 2519 (JEPSON) (1991). Some factors traditionally involved in a credibility determination include:

> (1) the demeanor of the witness, (2) the inherent plausibility of the witness's testimony, (3) the consistency of the testimony of the witness with prior statements of the witness, (4) the internal consistency of the witness's statements, (5) the consistency of the testimony with other evidence, (6) the accuracy of the witness's testimony, and (7) the interest of the witness in the outcome of the proceeding. Other factors may also apply but a credibility assessment is commonly made based on the totality of the circumstances after considering any relevant fact that may impact the witnesses [sic] credibility.

St. Claire Marine Salvage, Inc. v. Bulgarelli, No. 13-10316, 2014 WL 3827213, at *6 (E.D. Mich. Aug. 4, 2014), aff'd (6th Cir. 14-2135) (July 22, 2015). The essence of credibility is whether the testimony in the record is well-supported and believable; "[t]he presence of evidence which conflicts with the testimony of a witness is not, in itself, enough to conclusively show a lack of credibility of that witness when there is substantial evidence that supports his account." Appeal Decision 2017 (TROCHE) (1975).

Here, Ms. Gleason testified she did not notify Respondent immediately upon finding out he was selected for testing because he was not on duty. (Tr. at 35-37). Instead, she notified him on his next scheduled workday, when Ms. Gleason and Assocition Board President Darla Younce were on board the HAT ISLAND EXPRESS to interview a candidate for the position of relief captain. (Tr. at 37). Ms. Gleason testified she asked Respondent to get the paperwork for the candidate's pre-employment drug testing, then told him he had been selected for a required random drug test.

Both Ms. Younce and Mr. [redacted] testified they were present and heard Ms. Gleason tell Respondent he needed to take a required random drug test while the ferry was docked on the mainland that day. (Tr. at 67-68, 78-79). After returning to the vessel, Respondent also told Mr. [redacted] that the collection site was too busy to get a test that day so he would have to go back the following day. (Tr. at 79).

In contrast, Respondent testified he never heard Ms. Gleason tell him he had been selected for a random drug test. He recalled her asking him to get the paperwork for the relief captain candidate they were interviewing, but said she did not notify him about his own random drug test. (Tr. at 96-97, 107-08). Respondent denies ever telling anyone he could not test because of long lines at the collection site. (Tr. at 97, 118). He also recalled, in other instances when he was selected for random testing, verbal notification was accompanied by an email or text message. (Tr. at 103). Further, Respondent stated it did not make sense that Ms. Gleason would wait to notify him until the vessel's next run: his job also included boat maintenance so he generally worked seven days a week, and she did not hesitate to contact him for other reasons on days the vessel was not running. (Tr. at 94).

Finally, Respondent asserts maintaining an MMC is important to his livelihood, so he would not refuse to test and has never knowingly failed to take a drug test when ordered. (Resp. Closing Brief). Respondent believes Ms. Gleason instigated this proceeding in retaliation after he resigned as Master due to personnel issues between him, Ms. Gleason, and the head of the Board's Ferry Committee. (Ex. R-C; Tr. at 98-102).

Respondent's witness, [redacted], did not testify about the alleged notification on board the vessel, but instead supported Respondent's theory that he was being targeted due to disagreements with Ms. Gleason and members of the Association Board. (Tr. at 122-34).

After carefully weighing the testimony, I find Ms. Gleason's testimony that she told Respondent about his selection for a random drug test to be credible. While the notification

method she used deviated from the 2016 MSA guidance in three ways—it was not discreet, she did not give written instructions, and there was no means for documenting the mariner's acknowledgment—the fact that witnesses were present lends credibility to Ms. Gleason's version of events. The testimony from all three witnesses was plausible, internally consistent, consistent with their prior statements, and generally supported by most testimony in the record. (Ex. CG-11, CG-12). Although Respondent's testimony indicated he may have been distracted by other duties at the time, credible evidence shows he verbally acknowledged the directive to test.

I do find Respondent's account of the personnel issues he had with Ms. Gleason and some members of the Association Board to be generally credible. I also find it credible that many island residents were upset by Respondent's resignation and wanted him to return as Master of the HAT ISLAND EXPRESS. Despite this, though, the evidence in the record before me does not support Respondent's theory that Ms. Gleason retaliated against him by withholding notification of his selection for drug testing and then falsely reporting his failure to appear to the Coast Guard.

3. Respondent Refused a Mandated Drug Test

Having found that Drug Free Business properly selected Respondent for a random drug test and Ms. Gleason notified Respondent on behalf of the Association about the need to test, it only remains for me to decide whether his failure to appear at the collection facility and take the drug test constitutes a refusal under 49 C.F.R. § 40.191(a)(1) and 46 C.F.R. Part 16. I find it does.

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).

Here, the credible evidence shows Respondent was told he needed to test, knew where to report for the collection, and said he would test that day while the boat was docked in Everett, Washington. Respondent did not give a specimen for drug testing that day, or within a reasonable time thereafter. Under the regulations, this is considered a refusal to test.

The Coast Guard's allegation that Respondent violated 46 C.F.R. § 4.06–5 is **PROVED**.

IV. SANCTION

Having found the allegations in the Complaint proved, I am required to issue a decision and appropriate order against Respondent. 33 C.F.R. § 20.902(a)(2). A refusal to test carries a recommended sanction of 12-24 months outright suspension. 46 C.F.R. § 5.569 (Table). However, the selection of an appropriate order is within the ALJ's discretion, and the recommendations in the table "should not affect the fair and impartial adjudication of each case on its individual facts and merits," see 46 C.F.R. § 5.569(a) and (d). The ALJ should "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 investigating officer and the respondent may offer suggestions, argument, and evidentiary support as to an appropriate order, including aggravating and mitigating circumstances, but this is not binding on the ALJ. 46 C.F.R. § 5.569(a).

In determining an appropriate sanction, an ALJ may consider the following factors: (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). "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)).

Here, the Coast Guard seeks a 24-month outright suspension of Respondent's MMC, which is at the highest end of the recommended sanction in the Table of Average Orders, 46 C.F.R. § 5.569. Considering all the facts and circumstances, I find the requested sanction too severe. Respondent is not a repeat offender and has never been the subject of a Suspension and Revocation proceeding before. Standing alone, this would justify a penalty near the bottom end of the recommended range of 12-24 months, not at the high end. However, I also find other mitigating factors.

As already discussed, the method the employer used when notifying him of the need to test was not technically flawed, but nevertheless fell short of the Coast Guard's recommended best practices. More importantly, it also deviated significantly from the methods the employer previously used to notify employees of required drug tests, which could foreseeably cause confusion. Ms. Gleason also chose to notify Respondent at a time when he was busy with vessel duties and unable to give his full attention to her directive. Finally, it is clear Respondent's failure to test was not designed to undermine the drug testing system; rather, it was the result of a string of shortcomings on the part of both the employer and Respondent. Given the above factors, plus the fact that there was no acknowledged, written notification of the random test, I find this warrants a reduction in the sanction below the recommended range.

Accordingly, I find it appropriate to suspend Respondent's MMC for six months. This sanction is sufficient to deter Respondent from future violations of this nature, while not being unduly punitive.

ORDER

IT IS HEREBY ORDERED that the appropriate sanction in this matter is **180 DAYS of OUTRIGHT SUSPENSION**, reflecting the period the MMC was on deposit with the Coast Guard.

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

George J. Jordan
US Coast Guard Administrative Law Judge

Date: December 08, 2021