

WHAT TO EXPECT IN DANGEROUS DRUGS, DUI, DWI MISCONDUCT PROCEEDINGS

Arnold I. Berschler, Proctor in Admiralty

ORGANIZATION OF BASIC LAWS

The United States Congress created laws that are the basis of all rules applicable to the merchant seafarer's obligations, privileges and remedies concerning applying for a certificate or document, keeping such active and having such suspended or revoked. These laws are called statutes. These statutes appear under separate numbered titles (volumes) of the United States Code ("U.S.C."). Most of those statutes appear in Title 46 U.S.C. or in Title 33 U.S.C. A few appear in Title 49 U.S.C. These statutes grant authority to government departments, including the United States Coast Guard and the United States Department of Transportation, to set out rules and regulations that provide the procedures or benchmarks through which the goals of the statutes are achieved. These regulations or rules generally are known as the Code of Federal Regulations ("CFR"). The statutes of 46 U.S.C. §§2103, 7101, 7301 and 7701 "establish policies for administrative actions [procedures] against mariners' credentials or endorsements issued by the Coast Guard." (46 C.F.R. §5.3). The procedures or rules for prosecuting and defending a misconduct charge are found in Title 33 CFR Part 20 - Rules of Practice, Procedure, and Evidence for Formal Administrative Proceedings of the Coast Guard.

It is fair to say that the ultimate goals of these statutes and these regulations are safety of the public and safety of property. It is fair to say that the U.S. Coast Guard's default position regarding dangerous drug and alcohol usage is that anyone using such at any time potentially has a substance abuse problem needing treatment and potentially poses a danger to public safety or to property. The CFR's sets maximum acceptable amounts of alcohol or marijuana that are acceptable in chemical testing. Additionally, a criminal conviction of DUI, DWI automatically is treated as substance abuse requiring license suspension with rehabilitation or outright revocation.

"Dangerous Drugs" are defined in 46 CFR §16.113 as:

- (1) Marijuana;
- (2) Cocaine;
- (3) Opiates;
- (4) Phencyclidine (PCP); and
- (5) Amphetamines.

The regulations developed by one Department or Agency often are coordinated with the regulations imposed by another Agency. For instance, seen in Title 46 U.S. Code Part E, are the basic laws controlling merchant seamen licenses, certificates, and documents. In Part E, at section § 7505 - Review of Information in National Driver Register - gives the mariner the right to see the records relating

to DUI or DWI upon which the USCG is relying to revoke or suspend the MMC. In Title 49 U.S. Code § 30305, we see that the Department of Transportation can (and does) share with the Coast Guard the records of DWI or DUI from each state. This is how the Coast Guard finds out about that mariner's DUI, which arrest had occurred while on vacation. Additionally, all covered employers must report employee or job applicant substance testing failures to the USCG. 46 CFR, §16.201(c).

U.S. COAST GUARD'S GENERAL APPROACH

The Coast Guard has a general approach to a seafarer's testing "dirty" (positive) during an employer drug test or at a pre-employment physical or because of a DUI, DWI conviction. Basically, the Investigating Officer ("IO") typically demands the mariner voluntarily surrender the USCG document, admit to at least one charge of misconduct, and agree to an actual suspension of one (1) year during which the seafarer must satisfactorily document the completion of a course of rehabilitation that a qualified substance abuse and rehabilitation counselor had recommended. Serious circumstances of the mariner's conduct while intoxicated can motivate the IO to seek outright revocation. Watch out: if an IO asks the seafarer surrender to avoid all hearings permanently, that means: "All rights to the credential or endorsement surrendered are permanently relinquished." (46 C.F.R., §5.203(b)(2).) On the other hand, if the IO asks for surrender only until the investigation is complete or the case is decided, such a surrender might be a benefit later on when it comes time for sentencing. Remember, only in a rare case, such as where a mariner poses an imminent security threat in accordance with 49 CFR § 1572.21 (d)(3), might the Transportation Safety Agency ("TSA") terminate the employee's TWIC; effectively making use of the MMD impossible, and triggering a Coast Guard Misconduct proceeding to revoke an MMC or MMD.

In short, generally there is no obligation to turn in an MMC just because an Investigating Officer asks.

ADMINISTRATIVE LAW JUDGES' APPROACH

A seafarer has the right to challenge the validity of the testing, or to claim that the chain of evidence had been broken. See, 49 CFR part 40 for testing procedure requirements. In either case, the mariner might win because the USCG has the duty to prove that: (1) the substance allegedly found in the test actually was the dangerous drug or alcohol alleged, (2) the amount of the alleged substance actually exceeded threshold limits and (3) that the sample actually is from the seafarer. Additionally, the USCG must prove the accused voluntarily knowingly consumed the dangerous drug or alcohol. Because the mariner is presumed to have knowingly voluntarily consumed the banned substance, the accused must prove there was no voluntary knowing consumption.

Arnold Berschler believes that a positive test for marijuana has the best chance of being defended because it is possible to unknowingly accidentally be given food laced with the drug or to have involuntarily inhaled someone else's smoke. The administrative law judges who hear suspension or revocation cases do not like this defense. Therefore, the evidence would have to be strong in support of the mariner.

Holding a Merchant mariner's Document or Merchant Mariner's Certificate is a privilege, not a right. Administrative law judges consider the protection of the safety of the public and of property when making their decisions.

Berschler & Draluck