UNITED STATES OF AMERICA
DEPARTMENT OF HOMELAND SECURITY
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	:	DECISION OF THE
	:	VICE COMMANDANT
v.	:	
	:	ON APPEAL
	:	
	:	NO. 2710
MERCHANT MARINER DOCUMENT	:	
	:	
	:	
Issued to: NELSON GREG HOPPER	:	

APPEARANCES

For the Government:
Gary F. Ball, Esq.
LT Takila S. Powell, USCG

For Respondent:
William B. Hidalgo, Esq.

Administrative Law Judge: Bruce Tucker Smith

This appeal is taken in accordance with 46 U.S.C. Chapter 77, 46 C.F.R. Part 5, and the procedures in 33 C.F.R. Part 20.

By a Decision and Order (hereinafter "D&O") dated September 10, 2014, an Administrative Law Judge (hereinafter "ALJ") of the United States Coast Guard dismissed with prejudice the Coast Guard's Complaint seeking revocation of the Merchant Mariner Credential of Mr. Nelson Greg Hopper (hereinafter "Respondent"). The Complaint charged Respondent with use of, or addiction to the use of, dangerous drugs. The Complaint alleged that Respondent participated in a random drug test and his samples tested positive for cocaine metabolites. The ALJ found that the Coast Guard had failed to establish a *prima facie* case because it did not prove that Respondent had been ordered to test in accordance with 46 C.F.R. Part 16. Although

the record shows that the service agent for Respondent's employer used a computer-based random number generator to produce a list of vessels for drug testing, which included the vessel in which Respondent served, the ALJ found that the Coast Guard had failed to prove that the selection was random because it did not establish that the selection was made by a scientifically valid method.

PROCEDURAL HISTORY OFAPPEAL

The ALJ issued his D&O on September 10, 2014.

The Coast Guard filed its Notice of Appeal, dated September 22, 2014, in accordance with 33 C.F.R. § 20.1001. The Coast Guard's appellate brief was due by close of business November 10, 2014, in accordance with 33 C.F.R. 20.1003(a)(3). The Coast Guard filed a request for an extension of time to file its appellate brief, dated November 17, 2014, after the deadline for filing the appellate brief had passed. The Coast Guard request stated that the extension was requested "due to an error in calculating the appropriate date" for filing its appellate brief. Respondent opposed the request for an extension of time. The Coast Guard's request for an extension of time was denied on the ground that the Coast Guard had failed to show that an error in calculating the filing date was an excusable reason for requesting an extension after the filing date had already passed, in accordance with 33 C.F.R. § 20.306(c)(1).

On November 26, 2014, the Coast Guard requested reconsideration of its request for an extension of time. There, the Coast Guard argues that the Commandant should consider the appeal, as: (1) it presents novel policy considerations; (2) doing so would not prejudice Respondent; and (3) excusable neglect is a proper consideration. As to the latter, the Coast Guard claims that it did not receive a September 23, 2014, letter advising that the Coast Guard's appellate brief was due by November 10, 2014, and that an electronic version of the information was corrupted and unreadable.

No ruling has been made on the Coast Guard's request for reconsideration, which was forwarded along with appellate briefs filed by the Coast Guard and Respondent.

THE COAST GUARD'S FAILURE TO TIMELY FILE ITS APPELLATE BRIEF

In this case the Coast Guard filed its notice of appeal in a timely manner, in accordance with 33 C.F.R. § 20.1001(a). However, the Coast Guard failed to perfect its appeal by filing a timely appellate brief. In accordance with 33 C.F.R. § 20.1001(d), an appeal is perfected by following the procedural requirements in 33 C.F.R. Part 20, Subpart J, which includes the requirement to timely file an appellate brief.

The appellate briefs from the Coast Guard and Respondent have now been forwarded to the Commandant. With the full administrative record before me, the first matter to consider is whether the appeal should be heard despite the Coast Guard's failure to perfect its appeal in accordance with 33 C.F.R. Part 20, Subpart J.[1]

Precedents suggest that timeliness in filing appellate materials in Suspension & Revocation proceedings is jurisdictional. *Appeal Decision 2631 (SENGEL)* (2002); *Appeal Decision 1161 (DOROBA)* (1960). Hence it is appropriate to consider whether I have jurisdiction to consider this appeal. Since those decisions were issued, the United States Supreme Court has "made plain that most time bars are nonjurisdictional." *U.S. v. Kwai Fun Wong*, 135 S.Ct. 1625, 1632 (2015) (*citing*, *e.g.*, *Sibelius v. Auburn Regional Medical Center*, 568 U.S. __, __, 133 S.Ct. 817, 825 (2013)). Rather, filing deadlines are usually claim-processing rules that "do not deprive a court of authority to hear a case." *Id.* (citing *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011), among other cases).

The claim-processing time limits that are based solely on regulations in 33 C.F.R. Part 20, Subpart J, certainly have no claim to be jurisdictional,[2] and the regulation requiring that an appellate brief be filed sixty days or less after service of the ALJ's decision itself allows the Docketing Center to authorize an extension of time for filing the brief. This case does not involve a failure to timely file a notice of appeal, but only a failure to timely file an appellate brief. Accordingly, there is no reason to believe the Coast Guard's missed deadline is a

[1] The Coast Guard's request for reconsideration of the denial of an extension of time to file its appellate brief provides additional arguments for consideration of its appeal, but does not otherwise affect the posture of the case or the standard for deciding if the appeal should be considered.

[2] To the extent that *Appeal Decision 2631 (SENGEL)* (2002) suggests that regulatory claim-processing time limits for filing appellate briefs are jurisdictional, it is overruled.

jurisdictional defect.

Pursuant to 33 C.F.R. § 20.1003(a)(3), a brief is untimely if it does not reach the Docketing Center 60 days or less after service of the ALJ's decision, "or within another time period authorized in writing by the Docketing Center." The Docketing Center presumably will not authorize a different time period unless first requested by the party, and, in fact, parties are also instructed by 33 C.F.R. § 20.306(c) that they may seek "additional time to file a response" when a case is on appeal by filing an extension request with the Hearing Docket Clerk, pursuant to Table 20.306(c)(2). Although Section 20.1003(a)(3) does not specify when a request for extension should be filed, Table 20.306(c)(1) allows a request for extension after the response period has expired "by motion describing why the failure to file was excusable." Where a party has failed to timely file the appellate brief and later moves for an extension, the Chief Administrative Law Judge, who oversees the Docketing Center, may consider the motion pursuant to Sections 20.306(c) and 20.1003(a)(3).[3]

Even if the time limits in 33 C.F.R. Part 20, Subpart J, are not jurisdictional, they are mandatory processing rules that should not be lightly relaxed when they are exceeded without a prior request for extension. No party, especially the Coast Guard, should expect that these time limits will be routinely relaxed in those circumstances.[4] In the past, an untimely brief was considered only in cases of "extraordinary or extenuating circumstances." *Appeal Decision 2654 (HOWELL)* (2005), (citing *Appeal Decision 2631 (SENGEL)* (2002); *Appeal Decision 2553 (ROGERS)* (1993)). In *HOWELL*, mishandling of the respondent's appeal mailed to the Coast Guard "prevented the timely submission" of the Coast Guard's Reply brief, and was sufficient extenuation. *SENGEL*, on the other hand, found extraordinary circumstances in the content of the appeal, holding, "Extraordinary circumstances exist '[w]hen some clear error appears in the record or when the case presents some novel policy consideration.' 46 C.F.R. § 5.705(b)(2)." Under 46 C.F.R. § 5.705(b), when a mariner appellant against whom a charge was proved failed to file a brief on appeal, the Commandant could either terminate the case or decide it on the merits when it met the standard in Section 5.705(b)(2). That rule was removed in 1999 (*see*

[3] If it is doubted that those sections actually provide for such a request, 33 C.F.R. § 20.309 allows for it.
[4] A respondent may receive relief by way of a review in accordance with 46 C.F.R. Part 5, Subpart K, despite failing to perfect an appeal.

64 Fed. Reg. 28054-01 (May 24, 1999)). At that time, 33 C.F.R. § 20.306(c) was added, specifying that the standard to be applied is whether the failure to file was excusable.

Meeting the former standards of "extraordinary or extenuating circumstances" satisfies the new "excusable" standard. As to lesser circumstances, we can be guided by the Federal Rules of Civil Procedure (Federal Rules, or Fed.R.Civ.Pro.) in construing the term pursuant to 33 C.F.R. § 20.103(c). Rule 6(b) of those rules requires a showing of "excusable neglect" to extend the time for an act required under the rules after the time has expired (*see also* Fed. R. Civ. Pro. 13(f) and 60(b)(1)).[5] The Supreme Court has explained in *dicta*:

> there is no indication that anything other than the commonly accepted meaning of the phrase was intended by its drafters. It is not surprising, then, that in applying Rule 6(b), the Courts of Appeals have generally recognized that "excusable neglect" may extend to inadvertent delays. Although inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute "excusable" neglect, it is clear that "excusable neglect" under Rule 6(b) is a somewhat "elastic concept" and is not limited strictly to omissions caused by circumstances beyond the control of the movant.

Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership, 507 U.S. 380, 391-392 (1993) (footnotes omitted). In defining the term "excusable" in an analogous bankruptcy rule, the Court observed that the determination is "an equitable one, taking account of all relevant circumstances surrounding the party's omission," including "whether it was within the reasonable control of the movant." *Id*. at 395.

In this case, the Chief Administrative Law Judge declared that the Coast Guard's explanation that it committed an error in calculating the correct date for filing its appellate brief was not sufficient to show that its failure to file was excusable. I agree with the Chief Administrative Law Judge that the Coast Guard has not shown that its failure to file was excusable. The Coast Guard's failure to file on time was simple negligence and timely filing was entirely within its control. The Coast Guard has pointed to no circumstance that justified the error or that would make it excusable. *Compare Stronach v. Virginia State University*, 577

[5] While the Federal Rules allow for extension upon a showing of excusable neglect, Part 20 allows an extension when the delay is excusable, which implies that extension may be granted in cases not just involving neglect. In short, our regulations allow for an extension in cases where the Federal Rules might not.

F. Supp.2d 788 (E.D. Va. 2008) (mistaken calculation of due date not excusable neglect).

The Coast Guard's strongest argument on the basis of extraordinary circumstances, as our earlier cases provide, is that the appeal presents novel policy considerations, in that the Coast Guard argues that the ALJ misinterpreted 46 C.F.R. § 16.230(c) by requiring additional proof of scientific validity for the method of selecting crewmembers for random drug testing, when the service agent for the employer used a computer-based random number generator to make the selection. I decline to find that this amounts to an extraordinary circumstance that should excuse the Coast Guard's failure to file on time. I therefore deny the Coast Guard's request for reconsideration and I will not consider the Coast Guard's brief on the merits.

Nevertheless, I will comment on the issue of compliance with 46 C.F.R. § 16.230(c) when a computer-based random number generator is used to select crewmembers for drug testing.[6] *Cf. Appeal Decision 2240 (PALMER)* (1981).

RANDOMNESS OF SELECTION OF CREWMEMBERS FOR RANDOM DRUG TESTING

Appeal Decision 2704 (FRANKS) (2014) reaffirmed that proof of compliance with 46 C.F.R. Part 16 is one of the requirements for establishing a *prima facie* case that a mariner is a user of, or is addicted to the use of, a dangerous drug, based on government-mandated drug testing. That opinion observed:

> [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.

FRANKS at 9. As a result, in such a case, the Coast Guard is required to present some evidence of compliance with Part 16. If the case involves random drug testing, there must be some evidence of compliance with 46 C.F.R. § 16.230(c) (notably, "The selection of crewmembers for random drug testing shall be made by a scientifically valid method . . . each covered

[6] A brief from American Maritime Safety, Inc. was accepted as *amicus curiae*, in accordance with 33 C.F.R. § 20.1003(d). That brief was supportive of the Coast Guard's arguments for finding error in the ALJ's D&O.

crewmember shall have an equal chance of being tested each time selections are made . . .").[7]

In a case where no one questions whether there was a properly ordered drug test of the crewmember, it may be sufficient for the Coast Guard to present the testimony of a person, with knowledge of the employer's drug testing procedures, that the person is familiar with the requirements of 46 C.F.R. § 16.230, and that crewmembers were selected for random drug testing in accordance with those procedures. *See, e.g., Drake v. Delta Air Lines, Inc.*, 2005 WL 1743816 (E.D.N.Y. 2005), *aff'd*, 216 Fed.Appx. 95, 2007 WL 449478 (2d Cir. 2008) (Plaintiff's evidence was not sufficient to raise a genuine factual dispute regarding randomness). The witness's testimony can be probed on cross-examination or by questions from the ALJ to ensure that it is well-founded and reliable.

Where evidence of the randomness of selection is not sufficient to address legitimate concerns about the random selection process, additional evidence will be necessary to address those concerns. The facts of a particular case might raise any number of matters concerning compliance with 46 C.F.R. § 16.230, but mere speculation, without some support, is not a good reason to require the Coast Guard to adduce more evidence.

Specifically regarding the "scientific validity" of the selection method used by an employer or its service agent, 46 C.F.R. § 16.230(c) provides in pertinent part:

> The selection of crewmembers for random drug testing shall be made by a scientifically valid method, such as a random number table or a computer-based random number generator that is matched with crewmembers' Social Security numbers, payroll identification numbers, or other comparable identification numbers. . . . As an alternative, 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.

There is no fair reading of this except that the regulation specifically identifies random number tables and computer-based random number generators as methods of random selection

[7] To be clear, the requirement for evidence of compliance with Part 16 applies to Suspension and Revocation proceedings under 46 U.S.C. Chapter 77. It does not affect other administrative actions, such as the initial issuance or the renewal of merchant mariner credentials.

that meet the regulation's requirement for scientific validity. Generally, there should be no question about the scientific validity of the selection method if the method is either a random number table or a computer-based random number generator. Something more than unsupported speculation would be necessary to raise doubts that would justify further probing the issue of scientific validity of such software. For instance, producing some evidence that the employer selected a computer-based random number generator of doubtful provenance that could be manipulated to make one crewmember more likely than others to be selected would justify further probing of the issue.

Where it is necessary to consider the meaning of words in 46 C.F.R. § 16.230 like "random," "scientifically valid," and "equal chance," it is important to look at them in the context of the regulation and the goals they are meant to achieve. *See United States v. Proceeds of Sale of 9,312 Lbs. of Scallops, to Wit, $31,938.84*, 738 F.Supp. 598 (D. Mass. 1990) (giving "at random" as used in a regulation its ordinary meaning rather than a technical scientific meaning, where regulation did not use a more particularized phrase such as "according to scientifically random sampling procedures."). Ultimately, the procedures for random drug testing in Part 16 have two main purposes: to protect public safety by deterring the use of dangerous drugs by mariners in safety-sensitive positions, and to protect the Fourth Amendment rights of mariners by limiting the discretion of personnel who make selections for drug testing. The opinion in *Franks* observed:

> Clearly, the procedures in 46 C.F.R. Part 16 were established not only to protect public safety interests, but also to ensure that the constitutional rights of the mariner were safeguarded throughout the drug testing process.

FRANKS at 7.

The purposes of 46 C.F.R. § 16.230 can be achieved without interpreting its terms to require absolute or pure randomness. Too rigid an interpretation of those terms could, instead, frustrate the purposes of 46 C.F.R. Part 16.

From a public safety point of view, randomness in selecting crewmembers for drug

testing is a means of detecting and deterring the use of dangerous drugs. To the extent that drug testing is "random" and that crewmembers have an "equal chance" of being selected, employees will have a real expectation that they may be selected for random drug testing each time the testing is ordered. If the selections are random enough to be unpredictable to crewmembers in general, and the crewmembers or their vessels are returned to the pool for each selection, then those crewmembers who can be deterred by the fear of drug testing likely will avoid dangerous drugs, and the public safety purpose of random drug testing will be achieved. Even if a crewmember was tested the last time random drug testing was conducted, that crewmember cannot be certain they will not be randomly selected the next time. The selection method need only be "scientifically valid" to the point that reasonable employees will, indeed, have the expectation that they could be selected for random drug testing each time the testing is ordered.

The randomness necessary to protect Fourth Amendment rights addresses a different purpose but is not necessarily more demanding. For this purpose, the discretion of the personnel making the selections must be limited so as to prevent them from abusing the drug testing process to discriminate against or harass certain crewmembers.

In *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602 (1989), the Supreme Court addressed the constitutionality of regulations requiring railroads to conduct drug testing of their employees in certain circumstances. The Court analyzed these drug tests as warrantless, suspicionless searches that were reasonable because of a special government need. *Id.* at 619-20. The Court noted that the regulations governing the drug testing limited the discretion of employers in conducting the testing and ensured that the intrusion on the employees' privacy was limited in scope and objective. *Id.* at 621-22. In that way, the limitations on the drug testing program serve some of the same purposes as a search warrant. *Id.* The regulations in 46 C.F.R. Part 16 place similar restrictions on the discretion of employers of crewmembers but, like a search warrant, the limitations are not meant to frustrate the purpose of the search.

In *American Federation of Government Employees, AFL-CIO v. Skinner*, 885 F.2d 884 (D.C. Cir. 1989), the court upheld the Department of Transportation's employee drug testing program. The court noted the arguments for and against the reasonableness of random drug

testing programs. It recognized that random drug testing "may increase employee anxiety and the invasion of subjective expectations of privacy," but that "it also limits discretion in the selection process and presumably enhances drug-use deterrence." *Id.* at 891 (footnote omitted). The random drug testing program under review there required that each employee have an equal statistical chance of being selected for testing within a specified time frame. *Id.* at footnote 9. The court did not further discuss what degree or methods of assuring randomness would be required to appropriately limit discretion in the selection process and enhance deterrence in a random drug testing process. The important question appears to be not whether the selection method is scientifically random but whether it is sufficiently random to limit discretion and insure against manipulation of the results.

Cases involving prison inmates further support that the selection process of a random drug testing program should limit discretion to protect subjects from being harassed or discriminated against. In *Lucero v. Gunter*, 52 F.3d 874 (10th Cir. 1995), the court determined that random drug testing of inmates does not violate the Fourth Amendment, so long as the selection process is truly random. *Lucero*, 52 F.3d at 877 (citing *Spence v. Farrier*, 807 F.2d 753 (8th Cir. 1986)). The court observed:

> Selection procedures are not truly random and thus violate the Fourth Amendment when the procedures leave "the exercise of discretion as to selected targets in the hands of a field officer with no limiting guidelines." *Shoemaker v. Handel*, 795 F.2d 1136, 1143 (3d Cir.), *cert. denied*, 479 U.S. 986, 107 S.Ct. 577, 93 L.Ed.2d 580 (1986); *see Storms*, 600 F.Supp. at 1223 (enjoining procedure whereby watch commander is aware of the identity of the inmates to be tested while he is choosing them).

Id.[8]

The purpose of the regulations in 46 C.F.R. Part 16 is stated in 46 C.F.R. § 16.101. Among other things, they are "to promote a drug free and safe work environment;" they "prescribe the minimum standards, procedures, and means to be used to test for the use of

[8] For another example of how a genuine issue of randomness might be raised, see *Northington v. Furlong*, 113 F.3d 1246 (10th Cir. 1997) (unpublished) (inmates raised a genuine issue of fact as to whether selection method for drug testing was truly random because there was evidence that they were tested more often than other inmates and were tested in retaliation for lawsuits filed against prison officials).

dangerous drugs." The regulations must be interpreted in a way that harmonizes those objectives, not in such a way that one objective defeats the other.

A too restrictive interpretation of words like "random," "scientifically valid," and "equal chance," in 46 C.F.R. § 16.230, would tend to defeat the ability of the Coast Guard to promote a drug-free and safe work environment for mariners and the public through the Suspension and Revocation process. The words should be interpreted in a manner that is consistent with the purposes of random drug testing of mariners, to protect public safety by deterring the use of dangerous drugs by mariners in safety-sensitive positions, and to protect the Fourth Amendment rights of mariners by appropriately limiting the discretion of the personnel who make selections for drug testing to prevent abuse of the process.

CONCLUSION

The Coast Guard's late filing of its appellate brief is not excused. The Coast Guard's appeal was not perfected and is not properly before me for consideration.

ORDER

The Coast Guard's request for reconsideration of its motion for an enlargement of time is DENIED. The Coast Guard's Appeal of the ALJ's Decision & Order dated September 10, 2014 is NOT ACCEPTED.

Charles D. Michel
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C., this 13th day of October, 2015.