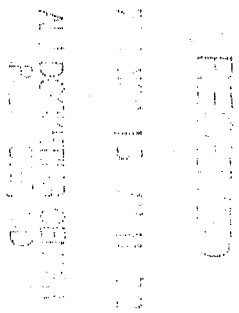
UNITED STATES OF AMERICA
DEPARMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	Docket No. CG S&R 01-0118
vs.	Case No. PA00001665
DOMINIC MCDONALD	**DECISION AND ORDER**
Respondent	

BEFORE:

THOMAS E. MCELLIGOTT
Administrative Law Judge



APPEARANCES:

FOR THE COAST GUARD
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Investigating Officer Thomas Johnson
United States Coast Guard
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P.O. Box 0149
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FOR THE RESPONDENT
Mandell & Wright, P.C. by
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PRELIMINARY STATEMENT

From the outset and during Respondent's attorney Eliot Tucker's Opening Statement at the beginning of the first day of hearings, Respondent's Trial Counsel promised to prove by DNA evidence that Respondent's urine sample was not a "substituted" sample produced by Respondent for drug testing as alleged in the official Complaint by the two (2) Investigating Officers. He promised to prove it was Respondent's own urine sample, only influenced by Respondent's drinking excessive liquids and taking about three (3) medicines before giving his sample.

I had taken a judge's course on Scientific Evidence and Expert Witnesses at the National Judicial College, on the campus of the University of Nevada at Reno, that included DNA evidence. I also obtained at this Judge's National Judicial College, affiliated with the American Bar Association, a book that summarized the results of about twenty-eight (28) jury convictions and appeals to Federal and State Courts. The twenty-eight (28) appeals involved DNA evidence.

After being convicted by juries and sentenced for serious crimes such as murders, rapes and manslaughter, these U.S.A. citizens served an average of seven (7) years in Federal or State prisons before appeals to higher courts involving DNA evidence overturned these jury convictions and set these citizens free.

Since about twenty-eight (28) appellate courts accepted DNA evidence in these serious criminal charges' cases and set the twenty-eight (28) people free because of DNA evidence, I was waiting and anxious to see if in this case Respondent's attorney could establish by DNA evidence that the urine sample submitted by this Respondent

on July 31, 2000, was his urine sample. It was to be compared to his DNA found in his hair, saliva, blood or some other such substance to prove that indeed and in truth the laboratory report finding Respondent's urine sample was reported as substituted, because it was found by tests to be not normal human urine, was in fact wrong.

If the DNA laboratory in Houston, Texas by its written report and testimony could convince me that by DNA evidence it was in fact Respondent's true urine sample, I was prepared to dismiss the Investigating Officer's Complaint and this case.

However, as detailed below, Respondent's attorney, after being given at least two (2) postponements that he requested to produce such DNA evidence and waiving any further postponements for DNA evidence by the end of the case, Respondent's attorney, an experienced and certified civil trial attorney by the State Bar Association, chose not to offer any DNA report and testimony at the fifth day of the hearings. Experienced Respondent's trial attorney chose to rest his case without any offer of DNA evidence at all.

The book or report is entitled "Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial" by the U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, Research Report by Edward Connors, Thomas Luudregan, Neal Miller and Tom McEwen, published in June 1996. It contains an approving introduction entitled "Message from the Attorney General" by Janet Reno, then the U.S. Attorney General.

In discharge of its duty to promote safety of life and property at sea, the United States Coast Guard ("Coast Guard"), by its said Investigating Officers ("I.O.s"), initiated

this administrative action by serving Respondent with an official Complaint seeking revocation of Merchant Mariner's License ("License") Number 788349 and Merchant Mariner's Document ("Document") Number 466-76-9713, both issued to Respondent Dominic D. McDonald.

This action is brought pursuant to the legal authority contained in 46 U.S. Code Chapter 77, 46 Code of Federal Regulations ("C.F.R.") Parts 5 and 16, and 49 C.F.R. Part 40.

In an Amended Complaint dated April 6, 2001, the Coast Guard Investigating Officer alleges that Respondent McDonald committed Misconduct in violation of 46 U.S.C. § 7703 and 46 C.F.R. § 5.27. More specifically, the Coast Guard alleges that Respondent McDonald, while acting under the authority of his license and document, wrongfully refused to submit to required chemical testing for dangerous drugs by providing a substituted urine specimen during a pre-employment drug test on July 31, 2000.[1]

The factual allegations in the Amended I.O.'s Complaint read as follows:

1. On July 31, 2000, Respondent took a pre-employment drug test.
2. Pat Rodriguez of Concentra Medical Center collected the urine specimen.
3. The Respondent signed a Federal Drug Testing Custody and Control Form.
4. The urine specimen was collected and analyzed by Quest Diagnostics using procedures approved by the Department of Transportation.

[1] The Coast Guard filed an initial complaint on February 23, 2001, identifying the collector's employer as Quest Diagnostics when, in fact, the collector Pat Rodriquez was an employee of Concentra Medical Centers. In addition, both complaints (i.e., the initial and the amended complaint) state that Respondent's Merchant Mariner's License Number is 799349. Respondent's true Merchant Mariner's License Number is 788349. (*Transcript ("Tr.") 102*).

5. Specimen was returned Specimen Substituted: Not consistent with human urine.

6. Laboratory findings constitute a refusal to test as per 46 C.F.R § 16.105.

7. The Respondent wrongfully refused to submit to a pre-employment drug test as required by Masters, Mates & Pilots Union.

On April 25, 2001, Respondent McDonald, by and through his attorney Eliot P. Tucker of the law firm of Mandell & Wright P.C., filed a timely Answer to the Coast Guard's Amended Complaint. The Respondent admitted all jurisdictional allegations, but denied all factual allegations and requested a hearing on the Coast Guard's proposed order of revocation, before an Administrative Law Judge.[2]

An evidentiary hearing was conducted before U.S. Administrative Law Judge Thomas E. McElligott in Houston, Texas on May 16 through May 18, 2001, June 7, 2001, and July 12, 2001. The hearing was conducted in accordance with the Administrative Procedure Act, as amended and codified at 5 U.S.C. §§ 551-559, and Coast Guard procedural regulations codified at 33 C.F.R. Part 20.[3]

At the hearing, Investigating Officers Kenneth M. Bellino and Thomas Johnson for the port and region of Galveston, Texas, entered appearances on behalf of the United States Coast Guard. Attorney Eliot P. Tucker of Houston, Texas, represented Respondent Dominic McDonald.

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[2] Paragraph 3 of the jurisdictional allegations in the Respondent's Answer to the Investigating Officer's Complaint states that the pre-employment drug screen test occurred on July 31, 2001. The true date is July 31, 2000 as correctly stated in the Coast Guard's Complaint and as established during the hearing.

[3] The Transcripts ("*Tr.*") for the five days of hearings are referred to as follows: (*Tr. Vol I*) May 16, 2001; (*Tr. Vol II*) May 17, 2001; (*Tr. Vol III*) May 18, 2001; (*Tr. Vol IV*) June 7, 2001; (*Tr. Vol V*) July 12, 2001.

During the hearings, there were 9 witnesses and 30 exhibits offered in evidence. The Coast Guard offered the testimony of 5 witnesses and introduced 12 exhibits into evidence. Judicial notice was taken of *I.O. Exhibit 10* and the remaining exhibits were all admitted into evidence. The Respondent testified in his own behalf and offered the testimony of 3 additional witnesses. Eighteen (18) Respondent exhibits were introduced and admitted into evidence by Administrative Law Judge McElligott. At the conclusion of this hearing, this case was taken under advisement.[4]

After careful review of the transcripts, exhibits, facts and applicable law in this case, the allegations in the Coast Guard's Amended Complaint are found proved by a preponderance of reliable, probative, substantial and credible evidence produced at the hearings. However, for reasons stated herein, revocation of Respondent's merchant mariner's license and document is not an appropriate order. Respondent's license and document are both subject to outright suspension for a 12-month period, followed by an additional 12 months on probation.

Respondent's attorney during his Opening Statement, and several times later during the hearings, promised to offer proof by DNA evidence from a DNA laboratory in Houston that would prove that the urine specimen sent to this Quest Diagnostics Laboratory was not substituted but was indeed and in reality Respondent's urine sample. After giving Respondent and Respondent's attorney several postponements to produce such testimony and/or evidence, his attorney declined to offer any such DNA evidence on the grounds that there was some delay by his DNA laboratory and he did

[4] A complete exhibit list is provided in Attachment I

not think it would help Respondent's case anyway. He finally asked for no more delays. He initially stated this DNA laboratory in Houston would only need about 2 weeks to produce its results. I gave him postponements well beyond that 2 to 3-week delay. However, he declined to later offer any such evidence.

So that Respondent's attorney could produce such DNA evidence early during the hearings, I granted his filed written motion and I signed a written Order that a portion or aliquot from the urine sample in the requested amount would be sent directly from the Quest Diagnostics Laboratory to the Respondent's attorney's chosen DNA laboratory in Houston, Texas. This was done. Nevertheless, subsequently no such DNA evidence was ever offered into this record by Respondent or Respondent's attorney.

After careful review of the facts and applicable law in this case, the allegations in the I.O.'s Amended Complaint are found proved by a preponderance of reliable, probative, substantial and credible evidence produced at the hearing. The Respondent has failed to rebut or discredit the Coast Guard's prima facie case establishing that Mr. McDonald refused to submit his urine sample for certified laboratory testing on July 31, 2000. Throughout most of the hearings, the Respondent's attorney declared that he would prove with DNA evidence that the urine specimen collected on July 31, 2000 by Concentra Medical Centers was not substituted; but, was, in fact, Mr. McDonald's urine specimen. The Respondent's attorney was provided continuances on May 18, 2001 and on June 7, 2001 so that he could secure the testimony and reports of DNA experts. On July 12, 2001, the fifth day of the hearings, I again invited Respondent's attorney to offer

his DNA evidence and even asked if he needed more time. The Respondent's attorney decided to abandon the use of such DNA evidence. He stated that he would not use any DNA evidence because: (1) he was dissatisfied with the DNA testing laboratory in Houston and their numerous delays in analyzing the Respondent's urine specimen; and (2) the Coast Guard I.O. Kenneth M. Bellino had successfully convinced him that even if the DNA evidence came back as Respondent's urine, it would not prove that all of the urine belonged to Mr. McDonald.

Nevertheless, Respondent's attorney did not offer any DNA evidence to prove that all or any of it sent to the Houston DNA laboratory was Respondent's urine. Its DNA components were going to be compared to Respondent's hair or saliva DNA composition for positive DNA evidence. However, no such comparisons were ever finally offered into this record by Respondent.

Thus, the Coast Guard has proved by a preponderance of reliable, probative, substantial and credible evidence that Respondent Dominic McDonald committed misconduct in violation of 46 C.F.R. Parts 4, 5 and 16, including section 5.27 and applicable statutes by providing a urine specimen that was subsequently reported by the federally certified drug testing laboratory and the Medical Review Officer as being "Substituted Specimen: Not consistent with normal human urine," thus constituting a refusal to test under 46 C.F.R. Part 16, including 16.105. However, for the reasons stated herein, including that Respondent has not been shipping since giving this urine sample since July 31, 2000 as a result of the urine testing laboratory's findings and report, revocation of Respondent's merchant mariner's license and document is not found an

appropriate order. Instead, Respondent's Coast Guard issued license and document will be suspended outright for a continuous 12-month period, followed by an additional 12 months on probation, which if proved violated, will result in twelve (12) additional months of outright suspension of his U.S. Coast Guard license and document.

FINDINGS OF FACT

1. Respondent Dominic D. McDonald is the holder of Merchant Mariner's License Number 788349 and Merchant Mariner's Document Number 446-76-9713. He has been the holder of Coast Guard credentials for approximately 26 years, and he does not have a prior history of any violations of U.S. laws and/or regulations with the Coast Guard. (*Tr. Vol I: 102-103; Tr. Vol II: 257*).
2. Respondent McDonald is an employee member of the Master, Mates & Pilots Union ("MM&P"). He currently has 19.35 years of pension credit and only needs 0.65 more years of pension credit to retire with a full pension. (*Investigating Officer ("IO") Exhibit 6; Tr. Vol I: 40, 47-48, 61; Tr. Vol II: 256*).
3. MM&P is an international organization that provides members with employment opportunities to bid on union contract jobs with various shipping companies. MM&P also provides members with health benefits (including payment for drug testing), Coast Guard legal aid benefits, and a pension or individual retirement account. (*Tr. Vol I: 39-43*).

4. In order to bid on union contract jobs and as a condition of employment, a member must have a drug-free certificate issued by MM&P after the union member passes a drug test of his urine. (*Tr. Vol I: 63-64*).

5. Since the Department of Transportation began its drug-testing program in 1989, Respondent McDonald has never tested positive for dangerous drugs nor had it ever been reported prior to these allegations that Respondent McDonald's urine specimen was substituted. (*Tr. Vol II: 258-260*).

6. Since 1989, MM&P has issued 13 drug-free certificates to Respondent. His last drug-free certificate was issued in July of 1999 and was valid until January 25, 2000. (*Respondent's ("R.") Exhibit 6; Tr. Vol I: 40, 46; Tr. Vol II: 265*).

7. On the date in which the most recent drug-free certificate expired, Respondent was completing a voyage aboard the vessel SEALAND CONSUMER upon which he was serving as Third Mate where was subject to random drug testing. However, he was not selected for, nor did he submit to, drug testing during the voyage. Respondent McDonald's tour of duty aboard the SEALAND CONSUMER commenced on December 2, 1999 and ended on March 23, 2000. (*Tr. Vol I: 49, 63-68; Tr. Vol II: 265-266*).

8. Following completion of his tour aboard the vessel SEALAND CONSUMER, Respondent went on vacation from March 23, 2000 until July 31, 2000 and, to date, he has not been able to return to work in the maritime industry since the laboratory and MRO reported that he submitted a substituted urine specimen for a drug test on July 31, 2000. (*Tr. Vol I: 63; Tr. Vol II: 256-257, 266*).

9. On the morning of July 31, 2000, Respondent went to a Concentra Medical Center in the port of Houston, Texas (i.e., the contract collection company for MM&P) to give a urine sample for a pre-employment drug test so that he could obtain a drug-free certificate from MM&P and then be eligible to obtain a union contract job as an officer or mate in the U.S. Merchant Marine. (*Tr. Vol II: 283-284*).

10. Before reporting for drug testing, Respondent testified he had been taking and took the following medications: (a) 20 milligrams of Prozac, which is an antidepressant; (b) 1,500 milligrams of Niacin, which is just another name for Vitamin B; and (c) eye drops Timolol Maleate, which is a beta-blocker used for glaucoma. He may have also taken Deconamine SR, which is a decongestant/antihistamine, before he reported for drug testing by giving his urine sample. (*Tr. Vol II: 137-138, 185-189; 279-280*).

11. The Vitamin B and Timolol Maleate eye drops would not have caused Respondent to experience any urinary problems. (*Tr. Vol II: 138-139*).

12. The Deconamine SR and Prozac are both medications that, as a side effect, may make it difficult for Respondent to urinate on demand. Nevertheless, Respondent was capable of producing urine at normal required amounts on July 31, 2000. (*R. Exhibit 12, 13, 17; Tr. Vol II: 132-133, 138-139, 145-151*).

13. Because Respondent testified he usually had problems urinating on demand, he testified he drank plenty of liquids (such as juice, coffee, Coke, and water) before reporting to give a urine specimen for laboratory drug testing on the morning of

July 31, 2000. (*Tr. Vol II: 268-270, 283-284*). Respondent chose this date to go and give his urine sample, July 31, 2000.

14. Overhydration or water loading (i.e., drinking excessive amounts of water or other liquids) would not have substantially reduced the normal human urine specimen's combined "creatinine concentration" and "specific gravity" to the point in which it would have been determined by the laboratory and MRO as a "substituted urine specimen." (*I.O. Exhibit 9, 10, 11*).

15. On the morning of July 31, 2000, Respondent arrived at Concentra Medical Centers and presented an MM&P Authorization for Examination or Treatment Form to the front desk clerk. (*I.O. Exhibit 7; Tr. Vol I: 65-66*).

16. Respondent then signed Concentra Medical Centers' Consent for Substance Abuse Screening Form, agreeing to submit his urine sample to a pre-employment drug screening test by a laboratory, and authorizing release of the drug test results to his employer. (*I.O. Exhibit 8*).

17. After completing and submitting all necessary drug testing documents and forms, Respondent waited in the lobby for approximately 30 minutes before meeting with the trained and experienced urine sample collector, Ms. Patricia M. Rodriguez. She testified credibly at the hearing. (*Tr. Vol II: 284-285*).

18. While he waited to be tested, Respondent did not drink any liquids. (*Tr. Vol II: 285*).

19. In the interim, the front desk clerk forwarded the drug testing authorization forms, together with copies of Respondent's State of Texas driver's license and Coast

Guard Merchant Mariner's Document ("MMD") and License, to Ms. Rodriguez. The Texas driver's license and MMD contained his facial picture for his identification along with other identification data. (*Tr. Vol I: 101, 103-106*).

20. At the outset of the collection process, Ms. Rodriguez identified Respondent McDonald by his photo identification on his Texas State driver's license and verified his social security number, which is also his MMD number. (*Tr. Vol I: 113-114*).

21. After positively identifying Respondent McDonald, Ms. Rodriquez initiated the official Federal Drug Testing Custody and Control Form ("CCF"), or collection form, by matching and reporting Respondent's social security number with specimen identification number 1213480, by placing an "X" in the box marked "pre-employment", indicating the reason for the test, and by marking an "X" in the box indicating the test to be performed, which indicated testing for "THC, Cocaine, PCP, Opiates and Amphetamines." (*I.O. Exhibit 2, 3*).

22. Respondent then washed his hands, as instructed, in a sink just outside of the restroom. (*Tr. Vol II: 285-286*).

23. After washing his hands, Ms. Rodriguez gave Respondent an open, empty, clean specimen container, which he took, went into the restroom, and, while behind closed doors, and out of her sight, he was supposed to have provided his urine specimen by filling the collection cup to the minimum desired amount. (*Tr. Vol I: 120; Tr. Vol II: 286*).

24. Respondent McDonald then came out of the restroom and gave the filled urine specimen holding container to Ms. Rodriguez, who then observed that the urine specimen looked like human urine; and she noted on step 2 of the official collection form, the CCF, that the temperature of the urine specimen was within normal range. (*I.O. Exhibit 2, 3; Tr. Vol I: 117-118*).

25. Ms. Rodriguez took the urine specimen container and poured it into two smaller specimen bottles, which were both sealed in Respondent's presence with tamper-proof seals. Respondent McDonald then initialed the tamper-proof seals. (*Tr. Vol II: 288-289*).

26. Respondent then signed step 4 of the CCF, certifying that he provided his unadulterated urine specimen to the collector and that each specimen bottle used was sealed with a tamper-evident seal in his presence and that the information provided on the CCF and on the label affixed to each bottle is correct. (*I.O. Exhibit 2,3; Tr. Vol I: 118-119*).

27. Respondent also signed the bottom half of the Concentra Medical Centers' Consent for Substance Abuse Screening Test Form, acknowledging ownership of the urine samples and that he observed the samples being sealed in the two bottles, which he initialed. (*I.O. Exhibit 8; Tr. Vol I: 119*).

28. Ms. Rodriguez then signed step 5 of the collection form, the CCF, certifying that Respondent provided the specimen, which was collected, labeled and sealed in accordance with Federal requirements. Ms. Rodriguez also signed step 6 of the CCF acknowledge receipt of the Respondent's urine specimen, which was

subsequently released to a courier for direct delivery to the contract federally certified testing laboratory, Quest Diagnostics. (*I.O. Exhibit 2, 3*).

29. Quest Diagnostics is a federally inspected and certified drug-testing laboratory. (*I.O. Exhibit 5*).

30. On August 1, 2000, Octavio Aceves in Central Processing at Quest Diagnostics laboratory received Respondent's urine specimen ID number 12134840 from the courier. Upon receipt, Quest Diagnostics assigned lab accession number S0200297792 to Respondent McDonald's urine specimen. (*I.O. Exhibit 3, 5; Tr. Vol I: 128, 139*). This is the third identifying number for Respondent's urine sample.

31. Later an initial screening test was performed by the laboratory on the urine specimen for the presence of drugs, creatinine, nitrite, and pH. However, since the laboratory test and analysis revealed that Respondent's urine "creatinine concentration" was 3 milligrams per deciliter ("mg/dL") and also his urine "specific gravity level" was 1.001, the laboratory's certifying scientist, Fernando C. Medina, finally reported on the CCF that the laboratory determined and reported: "Specimen Substituted: Not consistent with normal human urine." (*I.O. Exhibit 3-5, 9; R. Exhibit 10; Tr. Vol I: 126-168*). If a testing laboratory finds the creatinine level is 20 milligrams per deciliter or less, which Respondent's was, then the laboratory automatically also does a specific gravity test. (Tr. Vol I: 127).

32. The U.S. Department of Health and Human Services ("DHHS") published Program Document #35, which requires drug testing laboratories to mark the "Test Not Performed" box on the CCF; this indicates that the second confirmatory

test was not performed, and find that a urine specimen is "substituted" (i.e., the specimen does not contain the laboratories' clinical signs or characteristics found in normal human urine) if the creatinine concentration is equal to or less than (≤) 5 mg/dL and the specific gravity is equal to or less than (≤) 1.001 or equal to or greater than (≥) 1.020. Respondent's urine sample was outside normal limits for both. (*I.O. Exhibit 9;R. Exhibit 10*).

33. The "substituted" urine specimen criteria requirement was established by DHHS in careful and deliberate consultation with U.S. Department of Transportation ("DOT"), only after an extensive review and study of medical, clinical and forensic toxicology literature and review and study of recommendations from the Substance Abuse and Mental Health Services Administration Drug Testing Advisory Board was conducted. (*Id.*).

34. The relevant medical or scientific studies, including random clinical studies, studies on medical conditions (such as diabetes insipidus) resulting in severe overhydration or polyuria, and water loading studies, establish that the "substituted" urine specimen criteria established by DHHS and/or DOT is scientifically or medically valid and reliable. (*I.O. Exhibit 9-11*).

35. According to Respondent's paid expert's unsupported opinion, only approximately 2.5% of the population, who have not tampered or substituted their urine specimen, will produce a creatinine concentration ≤ 5 milligrams per deciliter and a specific gravity level ≤ 1.001 or ≥ 1.020. In cases where a very low urine creatinine concentration and urine specific gravity is produced which satisfy

the DHHS "substituted" urine specimen criteria, the donor is often suffering from advanced stages of disease. (*Id.*; *R. Exhibit 18; Tr. 156-157, 178-181, 227, 290*).

36. On August 9, 2000, Dr. David M. Katsuyama, M.D. of Greystone Health Science Corp. ("Greystone"), serving as the assigned contract Medical Review Officer ("MRO"), reviewed the collection document and laboratory reports and results of this specimen with identification number 12134840 and Respondent's social security number.. Pursuant to DOT's memorandum dated September 28, 1998 concerning MRO Guidance for Interpreting Specimen Validity Test Results, Dr. Katsuyama, M.D. and MRO reported on the CCF in the remarks section that the urine specimen was "substituted-refused to test." This MRO signed this document also. He is a trained and experienced MRO who has testified before me in many prior cases. I find his reports as an MRO credible and reliable. (*I.O. Exhibit 3; R. Exhibit 9; Tr. Vol II: 20-32, 110, 122*).

37. Since the laboratory's initial test revealed that the urine specimen was substituted, Dr. Katsuyama, in accordance with the applicable rules and regulations at the time, did not interview Respondent McDonald. (*Tr. Vol II: 28, 111, 122*). The Doctor was following the usual rules and regulations in effect at the time, following such laboratory test results.

38. Thereafter, Mr. George M. Ellis, Jr., the President of Greystone Health Sciences Corporation, reported Respondent's substituted urine specimen test results by the laboratory and the assigned MRO to the Coast Guard in a letter dated August 9, 2000. (*I.O. Exhibit 1; Tr. Vol II: 20).*

39. On August 31, 2000, just one month later after submitting his first urine sample, Respondent McDonald submitted his second urine sample for another drug test in which he produced a normal creatinine concentration. His creatinine concentration was recorded as 54 mg/dL and the results for the presence of drugs were negative. This was while he admitted he was generally taking the same medicines. (*R. Exhibit 7-8; Tr. Vol I: 153-154, Tr. Vol II: 120, 148, 260-262*).

40. On March 12, 2001, in preparation for litigation and these hearings before the Administrative Law Judge, Respondent McDonald was interviewed, tested, and assessed by a substance abuse professional ("SAP"). The SAP stated after interviewing and questioning Respondent that Respondent McDonald had a low probability of having a substance abuse dependence problem and it is very unlikely that Respondent McDonald will develop a substance abuse problem in the future. (*I.O. Exhibit 12; R. Exhibit 1, 5; Tr. Vol III: 21-28, 44-45*).

41. During the substance abuse interview, Respondent McDonald did not reveal to this SAP that Respondent was on any type of medication, such as Prozac, eye drops or antihistamine. As a matter of fact, Respondent denied to the SAP being on any medication which was not what he testified to at this hearing. These contradictory statements show and demonstrate a lack of credibility by Respondent. (*Tr. Vol III: 37-39, 43-44*).

42. In addition, this SAP failed to consider that Respondent McDonald scored fairly high during the SAP's test on the "defensiveness" component of the Substance Abuse Subtle Screening Inventory ("SASSI-3"). Respondent's elevated

defensiveness score on the SASSI-3 again calls into serious question the veracity and credibility of his responses to this SAP and at this hearing under oath before the Administrative Law Judge. (*I.O. Exhibit 12; Tr. Vol III: 28-29*).

43. Respondent McDonald is and has been in fairly good health and does not suffer from any advance stage of disease such as diabetes, chronic coronary disease, or any other disease. Consequently, there is no medical explanation for Respondent McDonald to produce a very unusual urine sample with non-human urine creatinine concentration of 3 mg/dL and also a non-human urine combined specific gravity of 1.001. (*Tr. Vol II: 132-133, 145-151, 290*). He was so found on July 31, 2000, when tested for employment as an officer in the U.S. Merchant Marine. Yet only one month later in his attempt to later show no substitution, he tests normally on August 31, 2000.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent Dominic D. McDonald and the subject matter of this hearing are properly within the jurisdiction of the United States Coast Guard in accordance with 46 U.S.C. Chapter 77, including § 7703.
2. At all relevant times, Respondent McDonald was acting under the authority of his Coast Guard issued license and document as the term is defined in 46 C.F.R. § 5.57 when he took a required pre-employment drug test by providing his urine sample for tests by a federally certified laboratory on July 31, 2000 in order to obtain a

drug-free certificate from MM&P and bid on union contract jobs as an officer or mate on U.S. Merchant ships shipping to various ports throughout the world and the U.S.A.

3. Respondent McDonald's urine specimen was collected by a trained and experienced collector on July 31, 2000 and subsequently analyzed by Quest Diagnostics certified laboratory in accordance with 49 C.F.R. Part 40 and other federal requirements and guidelines.

4. The Coast Guard has **PROVED** by a preponderance of reliable, probative, substantial and credible evidence that Respondent McDonald committed misconduct in violation of 46 C.F.R. § 5.27 and 46 U.S. Code Chapter 77, by providing a urine specimen on July 31, 2000 for required pre-employment drug testing which was reported by the certified drug testing laboratory and the Medical Review Officer as being "substituted: inconsistent with normal human urine," thus constituting a refusal to test under 46 C.F.R. Part 16, including § 16.105.

5. The Respondent has failed to rebut or otherwise discredit the Coast Guard's I.O.'s case and proof.

6. The testimony of Respondent's witness and personal physician, Dr. Jack Wayne Janoe, M.D., concerning Respondent McDonald's blood tests measuring creatinine concentration is deemed immaterial and irrelevant. Dr. Janoe admitted and testified that comparing creatinine concentration from a blood test and that from a urine test is like comparing "apples to oranges."

7. The totally unsupported opinion testimony of Respondent's witness, Dr. Anthony V. Colucci, Sc. D., concerning low normal creatinine concentration and specific gravity is found not credible. The so called study was unreported and not published upon which Dr. Colucci's expert opinion is based has not been peer reviewed and peer supported and is not consistent with the extensive clinical and forensic studies and reports that establish the validity and reliability of the "substituted" urine specimen criteria established by U.S. DHHS in careful study and consultation with U.S. DOT.

8. The opinion testimony of Dr. Colucci concerning the side effects of Respondent's medication on his creatinine concentration and specific gravity is not given any weight. Dr. Colucci's testimony is inconsistent with and directly contrary to the testimony of Dr. Janoe, who testified that the medication would not have caused Respondent's creatinine concentration and specific gravity levels to drop well below the DOT and DHHS cut-off normal levels for creatinine concentration and specific gravity. Moreover, except for his own oral opinion, there is no scientific or other basis that supports Dr. Colucci's claim. This scientist was paid thousands of dollars to testify on Respondent's side of the case. His credibility is found questionable.

9. Pages 34 through 43 of *Respondent Exhibit 17*, which shows that one of the less common side effects of Timolol Maleate Oral (i.e., tablets) that has been clinically reported is urination difficulty, is given little weight. The evidence shows that Respondent McDonald was using eye drops, which, when used in combination

with the Deconamine SR, could have caused him to suffer eye pain. There is no evidence that the eye drops would have caused Respondent to experience difficulties urinating.

10. The testimony of the SAP, Kurt O. Schenker, that Respondent has a low probability of having a substance abuse problem is given little weight. The evidence shows that Mr. Schenker did not consider all factors in reviewing the results of his own substance abuse examination. Respondent either lied in our hearing or to Mr. Schenker when he denied to him that Respondent was on medication. Respondent's contention at the hearing and before was that he was on about three (3) medications and taking one (1) vitamin. Therefore, the test results and the conclusions of Mr. Schenker are found not reliable.

11. Respondent McDonald's uncorroborated testimony that he may have been taking Zocor to lower his cholesterol when he took the pre-employment drug test on July 31, 2000 is based on speculation and conjecture, and thus, it is rejected. Neither Dr. Janoe, Respondent's own physician, nor any of the other witnesses ever testified that Respondent was taking Zocor on July 31, 2000. Moreover, during Respondent McDonald's testimony, he revealed that he could not recall whether he was taking Zocor on July 31, 2000. Respondent's credibility leaves much to be desired.

12. Neither the DOT memorandum dated December 7, 1993 concerning reporting abnormal test results and the analysis for presence of adulterants nor DOT's most recent amendments to the drug testing regulations codified at 49 C.F.R. Part 40, which became effective later on January 18, 2001, apply in this case.

OPINION

As a preliminary matter, it is necessary to clarify which drug testing procedures governing urine specimen validity testing applies in this case. DOT's memorandum dated December 7, 1993, which authorized employers to obtain a urine specimen under direct observation if the laboratory analysis revealed that the last urine specimen collected on a previous occasion had a creatinine concentration below .2 g/L or, stated otherwise, 20 mg/dL and a specific gravity of less than 1.003, does not apply in this case. (*I.O. Exhibit* 9). The 1993 memorandum was later superceded by: (a) DHHS Program Document #35 issued on September 28, 1998; (b) DOT's complementing memorandum dated September 28, 1998 concerning MRO Guidance for Interpreting Specimens Validity Test; and (c) the clarifying DHHS Program Document #37 issued on July 28, 1998. Thus, it is immaterial that under the older 1993 memorandum, this case would not have been reported to the Coast Guard. In 1993, they may not have as carefully checked the creatinine and specific gravity for substitutions. The rules, guidelines and regulations had been amended before July 31, 2000, when Respondent gave his urine sample for laboratory testing. Those that were in effect at the time and that were applicable were followed in this case on and after July 31, 2000.

Moreover, the DOT's amended drug testing regulations published in the *Federal Register* on December 19, 2000, referred to by the Respondent's counsel during the hearing also do not apply in this case. Generally speaking, there is a strong presumption that regulations are prospective in nature. The United States Supreme

Court has held that "[r]etroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988). In other words, absent express language or regulatory history indicating otherwise, regulations are presumed to address the future not the past. Union Pac. R.R. Co. v. Laramie Stock Yards Co., 231 U.S. 190, 199 (1913).

Here, a review of the DOT amendments to the drug testing regulations to be codified at 49 C.F.R. Part 40 indicates that said regulations do not apply retroactively. See 65 Fed. Reg. 79462. The plain language of the amended DOT regulations and the DOT's preliminary statement published in the *Federal Register* indicate that the regulatory framers intended the amended drug testing regulations to be given prospective or future application. Therefore, the interim 49 C.F.R. Part 40 regulations, which went into effect on January 18, 2001, and the successor 49 C.F.R. Part 40 regulations, which went into effect on August 1, 2001, do not apply in this case.

The decision in this case is based on the federal drug testing rules, laws, policies and guidance that were in effect on July 31, 2000 and August 2000, when Respondent provided this urine specimen in question for drug testing. Some of the then applicable Federal Drug Testing Directives, include: (1) DHHS Program Document #35 issued on September 28, 1998; (2) DOT's complementing memorandum dated September 28, 1998 concerning MRO Guidance for Interpreting Specimens Validity Test; and (3) the clarifying DHHS Program Document #37 issued on July 28, 1998. These were all issued

and in effect and being followed well before Respondent provided his urine sample for testing by a federally certified laboratory.

In these proceedings, the burden of proof is on the Coast Guard to establish the allegations contained in the I.O's Complaint by a preponderance of reliable, probative, substantial and credible evidence. 5 U.S.C. § 556(d)(2000); 33 C.F.R. 20.709 (2000); Appeal Decision 2485 (YATES) (citing Steadman v. SEC, 450 U.S.91 (1981)). The threshold level of proof is met if the Coast Guard establishes that the existence of a fact is more probable than its nonexistence. The U.S. Supreme Court has so ruled in 1993. Concrete Pipe & Products v. Construction Laborers Pension Trust, 508 U.S. 602, 622 (1993). The Coast Guard may satisfy its burden by presenting a case based on either direct or circumstantial evidence. Appeal Decision 1930 (CRUZ). Once the burden of proof has been satisfied by a preponderance of the evidence, the burden of producing contrary evidence shifts to the Respondent to rebut or discredit the Coast Guard's evidence. Steadman v. SEC, 450 U.S. at 100.

Misconduct is defined as "human behavior which violates some formal, duly established rule." 46 C.F.R. 5.27 (2000). The act in this case constituting Misconduct is Respondent McDonald's submission of a substituted urine specimen on July 31, 2000 during a pre-employment drug test, which was required by MM&P for the issuance of a drug-free certificate and for Respondent to be permitted to bid on union contract jobs. A certified laboratory analysis of Respondent's submitted urine specimen revealed that the specimen was not consistent with "normal human urine" because the creatinine concentration was 3 mg/dL and also the specific gravity was 1.001.

DOT rules and regulations authorize validity testing of the donor's urine sample by the inspected and certified laboratory of urine specimens during the drug testing process for a determination of specific gravity, creatinine concentration, or the presence of adulterants. 49 C.F.R. § 40.21(d) (2000). Pursuant to the authority contained in: (a) Presidential Executive Order 12564 dated September 15, 1986, codified in 5 U.S.C. § 7301 note; (b) the Mandatory Guidelines for Federal Workplace Drug Testing Programs published in 59 Fed. Reg. 29908 on June 9, 1994; and (c) DOT drug testing regulations, codified at 49 C.F.R. Part 40, DHHS established validity testing of urine specimen guidance for such laboratories. (*I.O. Exhibit 9; R. Exhibit 10*). DHHS Program Document #35 characterizes and establishes any urine specimen with a creatinine concentration of equal to or less than (or ≤) 5 mg/dL and a combined specific gravity of equal to or less than (≤) 1.001 or equal to or greater than (or ≥) 1.020 as a "substituted" urine specimen not consistent with normal human urine. (*Id.*). Medical Review Officers were at that time directed by DOT and/or DHHS to treat all urine samples that test within the "substituted" urine specimen scientific criteria as a refusal to test. (*I.O. Exhibit 9; R. Exhibit 9*).

The phrase "refuse to submit" a proper urine specimen is defined in Coast Guard chemical testing rules codified at 46 C.F.R. § 16.105 (2000) as follows:

> Refuse to submit means that a crewmember fails to provide a urine sample as required by 49 C.F.R. part 40, without a genuine inability to provide a specimen (as determined by a medical evaluation), after he or she has received notice of the requirement to be tested . . . , or engages in conduct that clearly obstructs the testing process," such an act is deemed a refusal to submit. 46 C.F.R. § 16.105 (2000). (Emphasis supplied).

A determination by a federally certified drug-testing laboratory that an individual's urine specimen is "substituted" serves as prima facie evidence that a Respondent refused to submit to chemical drug testing within the meaning of 46 C.F.R. § 16.105 (2000).

The evidence supporting a finding of Misconduct establishes that Respondent's urine specimen was collected and analyzed by a federally certified drug-testing laboratory in accordance with 49 C.F.R. Part 40. The results of the laboratory's tests revealed that the urine specimen was "not consistent with normal human urine."

Respondent provided what was supposed to be his urine sample from behind closed doors of a restroom. Trained and experienced urine collector Ms. Rodriguez testified that she properly collected a urine sample from Respondent on July 31, 2000. (*Tr. Vol I: 113-120*). The specimen looked like human urine and the specimen was within the acceptable temperature range. (*I.O. Exhibit 2, 3;Tr. Vol I: 120*). Respondent McDonald testified that the urine specimen he gave her was poured and divided into two specimen bottles, which were sealed in his presence with tamper-evident seals and the seals were initialed by Respondent. (*Tr. Vol. II: 288-289*). Ms. Rodriguez the collector and Respondent McDonald both completed the official collection form, the CCF, certifying that the collection was performed in accordance with all Federal requirements. (*I.O. Exhibit 2, 3*). Thereafter, Ms. Rodriguez released the sealed urine specimen bottles to a courier for direct delivery to Quest Diagnostics, a federally certified urine-testing laboratory. (*Id.*).

Mr. James A. Callies, the Scientific Director for Quest Diagnostics Laboratory, testified that the chain of custody for Respondent McDonald's urine specimen remained intact throughout the entire laboratory testing process. The evidence shows that Respondent McDonald's urine specimen was received by Quest Diagnostics the next day on August 1, 2000 and was assigned a laboratory accession number. This is the third of three (3) identifying numbers of Respondent's urine specimen. The other two (2) identifying numbers are Respondent's social security number and the specimen identification number from the official urine collector form, the CCF. (*I.O. Exhibit 3, 5; Tr. Vol I: 128, 139*). The initial screening test performed on Respondent McDonald's urine specimen revealed that the creatinine concentration was 3 mg/dL and the specific gravity was 1.001. (*I.O. Exhibit 3-5, 9; R. Exhibit 10; Tr. Vol I: 126-168*). Based on the laboratory results and pursuant to DHHS Program Documents #35 and 37 (now in evidence), the laboratory's certifying scientist reported on the official form, the CCF, that the second test was not completed because "substituted" and reported that the specimen was substituted (i.e., not consistent with normal human urine). (*Id.*). The Medical Review Officer (MRO) reviewed and verified the laboratory test results and, pursuant to DOT's MRO Guidance dated September 28, 1998, Dr. David Katsuyama, M.D. and MRO for Greystone Health Sciences Corporation determined and reported that the Respondent's specimen was substituted and constituted a refusal to test. (*I.O. Exhibit 3, 9; R. Exhibit 9; Tr. Vol II: 20-32, 110, 122*).

There is no credible evidence that there was a break in the chain of custody in this case or either the collector or the drug-testing laboratory jeopardized the integrity

of Respondent McDonald's urine specimen, the Coast Guard's case is found proved. The mere fact that the Medical Review Officer did not interview Respondent McDonald before making a final determination does not invalidate the laboratory's tests. Under DOT and/or DHHS drug testing rules and regulations applicable at that time, the Medical Review Officer was not required to interview the Respondent prior to making a final determination. The MRO received the laboratory's results and then confirmed them by making his report on the CCF and dating and signing his signature. This he did. A Medical Review Officer was then only required to conduct an interview of the urine donor if a non-substituted or normal human urine specimen tested positive for the presence of drugs. 49 C.F.R. § 40.33 (2000).[5]

The Coast Guard appropriately relies on the DHHS' definition of "substituted" urine specimen and the Medical Review Officer's determination to establish that Respondent McDonald refused to submit a proper urine specimen to laboratory chemical testing thereby committing Misconduct in violation of 46 U.S.C. § 7703(1)(B) and 46 C.F.R. § 5.27. The "substituted" urine specimen criteria, was carefully constructed by DHHS in consultation with DOT only after conducting an extensive review and study of clinical and forensic toxicology findings, reports and publications, which all established that the "substituted" urine specimen laboratory criteria

[5] Under the amended DOT regulations, the medical review officer is now required to verify testing results involving adulterated or substituted specimens and offer the individual an opportunity to provide a medical explanation for the laboratory finding regarding the adulterant or the creatinine and specific gravity for the specimen. See 65 Fed. Reg. 79520 and 79543 (49 C.F.R. § 40.215, which became effective on January 18, 2001, or 49 C.F.R. § 40.129, which became effective on August 1, 2001). These were not in effect on July 31, 2000, when Respondent provided a substituted urine sample.

represents a specimen condition that is "not consistent with normal human urine." (*I.O. Exhibit 9-11*).[6]

More specifically, DHHS reviewed and examined forty-seven (47) scientific studies, including random clinical studies, studies on medical conditions (such as diabetes insipdus) resulting in severe overhydration or polyuria, and water loading studies. (*I.O. Exhibit 9*). Those forty-seven (47) studies and reports established clearly the validity and reliability of the "substituted" specimen criteria used by the drug testing laboratories. (*Id.*). In addition, at the hearing in the instant case, I took judicial notice of *I.O. Exhibit 10*, which is a reported study and summary review of seventy-five (75) clinical and forensic toxicology studies and reports, compiled and reported by Janine Denis Cook of the University of Maryland, School of Medicine, *et. al.* published in the *Journal of Analytical Toxicology* on October 2000, which seventy-five (75) studies give further convincing support for the "substituted" urine specimen criteria used by this certified laboratory in this case under consideration.

Respondent McDonald's contention that he did not substitute or otherwise tamper with his submitted specimen is found rejected. The Respondent's expert witness, Dr. Colucci, opined at the hearing without showing peer agreement nor any published reports that agreed with his theory or claim that very few people (i.e.,

[6] This "substituted" specimen definition has been adopted and incorporated into DOT's amended drug testing regulations codified at 49 C.F.R. Part 40, which first went effect on January 18, 2001. See 65 Fed. Reg. 79519, (Dec. 19, 2001) (to be codified at 49 C.F.R. § 40.209(b)). As of August 1, 2001, the entire Part 40 regulations were revised and renumbered. "Substituted" specimen is now defined in 49 C.F.R. § 40.93(b). See 65 Fed. Reg. 79540.

approximately 2.5% of the population), who have not tampered with or substituted their urine specimen, will produce a creatinine concentration and specific gravity that meets the DHHS "substituted" urine specimen laboratory criteria. (*R. Exhibit 18; Tr. 156-157, 178-181, 227, 290*). In cases where both a very low creatinine concentration and specific gravity is produced which satisfies the DHHS "substituted" urine specimen criteria, the urine sample donor is usually suffering from advanced or serious stages of disease. (*Id.; I.O. Exhibit 10*). No evidence has been presented that provides a sound medical or scientific explanation for Respondent McDonald having both a low urine creatinine concentration as well as a low urine specific gravity. It is also interesting to note and compare that Respondent was able to produce a urine specimen with normal creatinine concentration and urine specific gravity only one month later, on August 31, 2000, while taking the same claimed medications.

The evidence shows that, to date and on July 31, 2000, Respondent McDonald was in fairly good health. (*Tr. Vol II: 132-133, 145-151, 290*). Although Respondent McDonald claimed he was taking several medications that would or could have made it difficult for him to urinate on demand, none of the medicines substantially reduced Mr. McDonald's creatinine concentration and specific gravity to the point in which it would have been deemed a "substituted" urine specimen under applicable Federal Drug Testing Directives. (*R. Exhibit 12, 13, 17; Tr. Vol II: 132-133, 138-139, 145-151*). Respondent's own witness and personal physician, Dr. Janoe, even testified that Mr. McDonald was capable of producing urine at normal elemental levels. (*Tr. Vol II: 145-*

151). Respondent McDonald's subsequent drug test on August 31, 2000, in which his creatinine concentration was recorded at 54 mg/dL, provides further evidence that he is capable of producing creatinine concentration at normal human urine levels. (*R. Exhibit 7-8; Tr. Vol I: 153-154; Tr. Vol II: 148, 260-262*).

Moreover, although Respondent McDonald may have consumed a large amount of water and liquids prior to the drug test on July 31, 2000, the evidence adduced at the hearing shows that drinking excessive amounts of water or other liquids would not have changed the creatinine concentration and also specific gravity to a point in which it satisfied the "substituted" urine specimen requirements. In the DHHS literature review of reports of medical overhydration or drinking excessive amounts of water or liquids studies, no urine specimen was identified in which the urine creatinine concentration and urine specific gravity satisfied the "substituted" urine specimen requirements or criteria. (*I.O. Exhibit 9*). The literature review by DHHS of "water loading" studies also revealed that no urine specimen was identified with a urine creatinine concentration less than or equal to (≤) 5 and also at the same time a specific gravity equal to or less than (≤) 1.001 or equal to or greater than (≥) 1.020. (*Id.*). These findings are further supported by DOT's study of paired measurements of creatinine and specific gravity after water loading or drinking excessive amounts of water and Ms. Cook's article published in the Journal of Analytical Toxicology, mentioned above of seventy-five (75) studies. (*I.O. Exhibit 10 and 11*).

As such, the very unsupported opinion of Respondent's expert witness, Dr. Colucci, that an individual can fall within the "substituted" urine specimen category at

any given time and Respondent's medications combined with his consumption of a large amount of water and liquids caused this result is incredible and is rejected. The study upon which Dr. Colucci's expert opinion is based has not been reported or peer reviewed and is not consistent with numerous relevant scientific studies, which all establish that a creatinine concentration $\leq$ 5 mg/dL and a specific gravity of $\leq$ 1.001 or $\geq$ 1.020 unequivocally represents a specimen that is not consistent with normal urine of a normal healthy human being. See these U.S. Supreme Court cases, Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); General Electric Company v. Joiner, 522 U.S. 136 (1997); Kumho Tire Co. v. Carmichael, 119 S.Ct. 1167 (1999); Federal Rules of Evidence, including Rules 104 and 702; and the U.S. Administrative Procedures Act, 5 U.S.C. 551-559.

Respondent has failed to rebut or otherwise discredit the evidence presented by the Investigating Officers. The Investigating Officers' allegation of Misconduct is found proved by a preponderance of reliable, probative, substantial and credible evidence.

In determining the appropriateness of a sanction, the administrative law judge has exclusive authority and discretion. See 46 C.F.R. § 5.569(a); see also Appeal Decision 2427 (JEFFRIES), Appeal Decision 2452 (MORGANDE). Except for acts or offenses for which revocation is mandatory, the presiding administrative law judge may consider both aggravating and mitigating factors that include:

> Remedial actions which have been undertaken independently by the respondent;
> Prior record of the respondent, considering the period of time between prior acts and the act or offense for which presently charged is relevant; and
> Evidence of mitigation or aggravation.

See 46 C.F.R. § 5.569(b). Although the Table of Suggested Range of an Appropriate Order ("Table") codified at 46 C.F.R. § 5.569(d) recommends 12-24 months' suspension for refusal to properly submit to laboratory testing, the Commandant has recognized that the Table is not binding authority on an administrative law judge. Appeal Decision 2578 (CALLAHAN).

The undersigned is not insensitive to the facts that this Respondent McDonald: (1) has no prior history of violations of Coast Guard laws or regulations; (2) has never tested positive for dangerous drugs; (3) does not have a history of drug use or abuse; and (4) only needs an additional 0.65 years of credited maritime services to qualify for a retirement pension from MM&P. Therefore, revocation, as proposed by the Investigating Officers will not be Ordered. Instead, Respondent's said license and document will be subject to twelve (12) months' outright suspension and followed by twelve (12) months on twelve (12) months' probation.

CONCLUSION

The Investigating Officers have proved by a preponderance of reliable, probative, and substantial evidence that Respondent Dominic McDonald acted under the authority of Merchant Mariner's License Number 788349 and Merchant Mariner's Document Number 446-76-9713 when he provided a substituted urine specimen for pre-employment testing on July 31, 2000. This act constitutes a refusal to test under 46 C.F.R. § 16.105 and is misconduct under 46 C.F.R. § 5.27. Thus, resulting in a violation

of 46 U.S.C. § 7703(1)(B) and the underlying regulations. After careful review of the facts and circumstances of this case, it is determined that outright suspension coupled with additional probation is the most appropriate order. The Investigating Officer's Complaint is found proved.

ORDER

IT IS ORDERED THAT delivery of this Decision and Order on Respondent or his counsel shall constitute service and shall serve as notice to Respondent of his right to appeal, the procedures for which are set forth in Attachment A and made part of this Order.

Absent an appeal taken by either party, this decision shall become the final action of this governmental agency 30 days after the date of issuance as provided in 33 C.F.R. § 20.1101.

IT IS HEREBY ORDERED THAT Merchant Mariner's License Number 788349, Merchant Mariner's Document Number 446-76-9713, and all duplicates thereof and all other valid documents and certificates issued to Dominic D. McDonald by the United States Coast Guard or any predecessor authority and now held by Respondent are hereby **SUSPENDED OUTRIGHT** for **TWELVE (12) MONTHS** beginning on the date said license and document are delivered to the Investigation Department at Marine Safety Unit in the port of Galveston, Texas.

IT IS FURTHER ORDERED THAT Mr. McDonald is to immediately deliver by mail, Federal Express or in person, the license and document to the Coast Guard Investigating Officers in Galveston, Texas, and he is no longer authorized to serve under these Coast Guard credentials aboard any vessel registered in the United States for the said twelve (12) months' period.

IT IS FURTHER ORDERED THAT following the period of **OUTRIGHT SUSPENSION,** Mr. McDonald's license and document shall be returned to Respondent and he will be required to serve an additional period of **PROBATION** for an additional **TWELVE (12) MONTHS,** which if violated by Respondent's negligence or misconduct, his said credentials will be suspended for an additional twelve (12) months. If a drug case violation is later proved against him, his said credentials will be Revoked.

IT IS FURTHER ORDERED THAT any failure on the part of Respondent to comply with this Order or any subsequent violations of any laws or regulations proved by any Coast Guard Investigating Officer as occurring during the period of probation may result in Respondent's license and document being further suspended.

Done and dated this 09th day of November 2001.

Thomas E. McElligott

THOMAS E. MCELLIGOTT
Administrative Law Judge

UNITED STATES OF AMERICA
DEPARMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	Docket No. CG S&R 01-0118
vs.	Case No. PA00001665
DOMINIC MCDONALD **Respondent**	

ORDER DENYING RESPONDENT'S MOTION TO ALTER OR AMEND DECISION AND ORDER; ORDER GRANTING THE COAST GUARD'S MOTION TO ALTER AND AMEND DECISION AND ORDER; AND ORDER GRANTING RESPONDENT'S ATTORNEY LEAVE TO ENTER AN APPEARANCE

On December 6, 2001, Respondent Dominic McDonald filed a Motion to Alter or Amend the November 9, 2001 Decision and Order issued by the undersigned in the above captioned case. The Decision was based on a finding that the Coast Guard had proved that Respondent McDonald wrongfully refused to submit to a required chemical test for dangerous drugs by providing a substituted urine specimen for pre-employment drug screening on July 31, 2000 in violation of 46 U.S.C. § 7703 and 46 C.F.R. Parts 5 and 16. The Order suspended Respondent McDonald's Merchant Mariner's License and Document for a period of twelve (12) months beginning on the date said license and document was delivered to the United States Coast Guard Marine Safety Unit in Galveston, Texas. The Order also imposed an additional 12 months of probation following expiration of the 12-month period of outright suspension.

In his December 6th motion, the Respondent requests that the Decision and Order be modified so that the 12-month outright suspension begins on July 31, 2000. The Respondent argues that good cause exists to authorize him to return to work on probation because of the national emergency resulting from the events of September 11, 2001 and the critical shortage of licensed third mates needed to assist the United States Military Sealift Command in carrying fuel, supplies, and other material on board chartered International Organization of Master, Mates and Pilots ("MM&P") vessels to directly support United States military bases and operations overseas.[1] The Respondent further argues that he is an excellent and reliable candidate for immediate return to work without further incident because of his long unblemished record of service and low probability of a having a substance abuse dependence problem.[2] The Respondent further points out that he has not worked for the past eighteen (18) months and a 12-month outright suspension of his license and document would result in the Respondent not working for a total of thirty (30) months.

On December 12, 2001, the Coast Guard filed a motion in opposition to the Respondent's Motion to Alter or Amend the Decision and Order. The Coast Guard points out that Respondent McDonald intentionally maintained control of his license

[1] Respondent McDonald attached an affidavit signed under the penalty of perjury by Captain Glen P. Banks, International Secretary-Treasurer for MM&P to support this argument.

[2] The testimony of the substance abuse professional ("SAP") regarding the Respondent's probability of having a substance abuse problem was given little weigh and was found to be unreliable because the SAP failed to consider all factors in reviewing the results of the substance abuse examination. USCG v. McDonald, Docket No. CG S&R 01-0118, at 22 (November 9, 2001). More specifically, the SAP failed to consider the Respondents elevated "defensiveness" score on the substance abuse examination in assessing Respondent McDonald's probability of having a substance abuse problem. Furthermore, Mr. McDonald's inconsistent and contradictory response at the substance abuse interview regarding use of medication and his testimony during the hearing calls his credibility into question. *Id.* at 18-19.

and document until September 7, 2001 when the Respondent attempted to renew his license and document and the Regional Examination Center in Houston, Texas took physical possession of said license and document pending the outcome of the hearing. The Coast Guard moves that the November 9, 2001 Decision and Order be modified to permit the 12 month outright suspension to commence on September 7, 2001, i.e., the day the Regional Examination Center in Houston, Texas took physical possession of Respondent McDonald's license and document.

After careful review of the applicable law and facts of this case, including the parties' respective arguments and evidence in support thereof, the Respondent's Motion to Alter or Amend the November 9, 2001 Decision and Order is **DENIED**. However, the Coast Guard's motion is well taken. The period of 12-month outright suspension shall be deemed to have commenced on September 7, 2001.

(I)
DISCUSSION

In these proceedings, at any time, upon party motion and for good cause shown, an administrative law judge may issue an order rescinding an order suspending a merchant mariner's license and/or document. 33 C.F.R. § 20.904. Selection of an appropriate order solely rests in the exclusive authority and discretion of the administrative law judge. 46 C.F.R. § 5.569(a); see also Appeal Decision 2427 (JEFFRIES); Appeal Decision 2452 (MORGANDE). In determining, the appropriate order in this case, the undersigned took into consideration the fact that Respondent McDonald: (1) has no prior history of violations of Coast Guard laws or regulations; (2) has never tested positive for dangerous drugs; (3) does not have a reported history of

drug use or abuse; and (4) only needs an additional 0.65 years of credited maritime services to qualify for a retirement pension from MM&P. Based upon these considerations, the undersigned determined that an order at the lower end of the Table of Suggested Range of an Appropriate Order codified at 46 C.F.R. § 5.569(d) was appropriate.

The mere fact that Respondent has not worked in eighteen months beginning on July 31, 2000 when he provided a substituted urine specimen for pre-employment drug testing does not justify reducing the order or otherwise providing Respondent with credit towards satisfaction of the November 9, 2001 decision and order. The regulations clearly state that "[t]he time of any period of outright suspension ordered **does not commence until the license, certificate or document is surrendered to the Coast Guard**." 46 C.F.R. § 5.567(e). The term "surrender" means to relinquish or give up possession or control to the Coast Guard either by order or voluntarily. See generally Webster's II New College Dictionary 1110 (Houghton Mifflin Co. 1995); see also Blacks Law Dictionary 1444 (6th ed. 1990) (defining "surrender" as "to relinquish, to deliver into lawful custody, or to give up in favor of another"); 46 C.F.R. § 5.203(b)(2) (defining voluntary "surrender" as a permanent relinquishment of all rights to the license, certificate or document); Word v. United State, 223 F. Supp. 614, 616 (S.D. Al 1963).

Here, Respondent maintained physical possession and control of his license and document until September 7, 2001 when the Coast Guard Regional Examination Center in Houston, Texas took actual possession and control of said license and document. Respondent McDonald maintained custody of the license and document even though

he was presented with numerous opportunities to relinquish control of his merchant mariner's license and document. In maintaining custody of his Coast Guard credentials, Respondent McDonald was cognizant that an adverse ruling could be rendered against him with respect to his license and document. Yet, Respondent McDonald held on to his license and document at his own expense and, thus, is not entitled to any credit for the period of time in which he did not work. The mere fact that Respondent McDonald did not, or otherwise could not, work under said license and document for 18 months is immaterial. The computation of the time period of outright suspension begins when the Coast Guard takes actual physical control and possession of the license, document, or certificate, which, in this case, occurred on September 7, 2001.

Moreover, although the undersigned is acutely aware of the events of September 11, 2001, at this juncture, I decline to reduce the 12-month suspension order based solely on the averment of Captain Banks. The Respondent has filed a notice of appeal and may explore other avenues permitting him to work pending resolution of the appeal. See 46 C.F.R. § 5.707.

(II)
ORDER

WHEREFORE,

IT IS HEREBY ORDERED that Respondent's Motion to Alter or Amend the November 9, 2001 Decision and Order in the above captioned case is **DENIED**.

IT IS FURTHER ORDERED that the Coast Guard's Cross-Motion to Alter or Amend the November 9, 2001 Decision and Order in the above captioned case is

GRANTED. Merchant Mariner's License Number 788349 and Merchant Mariner's Document Number 446 76 9713, and all duplicates thereof and all other valid documents and certificates issued to Dominic D. McDonald by the United States Coast Guard or any predecessor authority is hereby **SUSPENDED OUTRIGHT** for **TWELVE (12) MONTHS** beginning on September 7, 2001. Following the period of **OUTRIGHT SUSPENSION** said license and document shall be returned to the Respondent, who will be required to serve an additional **TWELVE MONTHS PROBATION**, which if violated by Respondent's negligence or misconduct will result in an additional twelve (12) months suspension. However, if a drug case violation is later proved against the Respondent, his Coast Guard credentials will be revoked.

IT IS FURTHER ORDERED THAT, while resolution of the appeal is pending in this case, Respondent may apply for temporary issuance of Coast Guard license or document in accordance with 46 C.F.R. § 5.707.

IT IS FURTHER ORDERED THAT the Respondent's motion for leave to enter the appearance of William Hewig, III, Esq. as legal counsel is **GRANTED.**

IT IS FURTHER ORDERED THAT, pursuant to 33 C.F.R. §§ 20.904(d) and 20.1003(a)(3), the appellate brief must be received in the Docketing Center no later than 60 days from the date of issuance of this order.

Done and dated this 27th day of December 2001 at Houston, Texas

Thomas E. McElligott

THOMAS E. MCELLIGOTT
Administrative Law Judge

Certificate of Service

I hereby certify that I have this day served the foregoing documents upon the following parties and limited participants (or designated representatives) in the proceeding at the address indicated as follows:

United States Coast Guard
Marine Safety Unit
Investigations Department
Attention: Petty Officer Kenneth M. Bellino
P.O. Box 0149
Galveston, Texas 77553-0149
(Certified Mail, Return Receipt Requested & Facsimile 409-766-5415)

William Hewig, III, Esq.
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ALJ Docketing Center
United States Coast Guard
United States Custom House
40 South Gay Street, Room 412
Baltimore, MD 21202-4022
(Facsimile 410-962-1742)

Done and dated this ____ day of December 2001.

JANICE M. EMIG
Legal Assistant to
Houston Administrative Law Judge