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
vs.	:	
	:	ON APPEAL
MERCHANT MARINER DOCUMENT	:	NO. 2694
Issued to: HAROLD LANGLEY	:	

This appeal is taken in accordance with 46 U.S.C. § 7701 *et seq.*, 46 C.F.R. Part 5, and the procedures set forth in 33 C.F.R. Part 20.

By a Decision and Order (hereinafter "D&O") delivered from the bench on February 26, 2010, and memorialized via written D&O dated March 2, 2010 (hereinafter "D&O II"), Administrative Law Judge (hereinafter "ALJ") Michael J. Devine of the United States Coast Guard at Norfolk, Virginia, revoked the Merchant Mariner Document of Mr. Harold Langley (hereinafter "Respondent") upon finding proved one charge of *misconduct*. The misconduct charge found proved alleged that, while serving as a crew member aboard the USNS REGULUS, Respondent submitted a substituted urine sample during a random drug test conducted on June 29, 2009.

FACTS & PROCEDURAL HISTORY

At all times relevant herein, Respondent was the holder of a Coast Guard-issued Merchant Mariner Document. [D&O II at 3] On June 29, 2009, Respondent was employed by Maersk Line as a crew member aboard the USNS REGULUS and was working under the authority of his Coast Guard-issued Merchant Mariner Document.

[*Id.*; Transcript of the Proceedings (hereinafter "Tr.") Volume (hereinafter "Vol.") II at 314]

On June 29, 2009, in accordance with company policy, a random urinalysis was conducted on all Maersk Line employees who were working aboard the USNS REGULUS. [D&O II at 4] Respondent participated in the random drug testing mandated by Maersk Line by providing a urine sample for testing. After Respondent's urine sample was collected, it was forwarded to Quest Diagnostics for analysis. [*Id.*] Testing revealed that Respondent's urine sample had no detectable creatinine and a specific gravity of 1.0000, which is consistent with that of water. [D&O II at 5; Tr. Vol. II at 315] A normal human urine specimen has a creatinine level between 27 and 260 milligrams per deciliter and a specific gravity between 1.0020 and 1.0028. [D&O II at 5]

Dr. Anu Konakanchi, the Medical Review Officer (hereinafter "MRO") in Respondent's case, reviewed the documentation relating to Respondent's urine sample. [D&O II at 5] On July 15, 2009, the MRO contacted Respondent to discuss his test results. [*Id.*] After discussing the test with Respondent, the MRO found that there was no valid medical reason to explain Respondent's urinalysis test results and ultimately concluded that Respondent's sample was inconsistent with human urine and was a substituted sample. [*Id.*]

The Coast Guard filed a Complaint, alleging misconduct for refusal to test by submitting a substituted urine sample, against Respondent's Merchant Mariner Document on September 9, 2009. [D&O II at 1-2] On September 21, 2009, Respondent filed his Answer to the Complaint. [*Id.* at 2] The hearing in the matter convened on February 25, 2010, at Norfolk, Virginia, and continued through the following day. [*Id.*] During the hearing, the Coast Guard submitted the testimony of four witnesses and entered three exhibits into the record. [Tr. Vol. I at 3-4] Respondent submitted the testimony of three witnesses and entered six exhibits into the record. [*Id.*]

Respondent filed a timely Notice of Appeal in the matter on March 2, 2010, and perfected his appeal by filing an Appellate Brief on March 31, 2010. The Coast Guard filed its Reply Brief on May 3, 2010. Accordingly, this appeal is properly before me.

APPEARANCE: At the hearing, Respondent was represented by Mr. Philip N. Davey, Esq. and Mr. Philip A. Chisholm, as a non-attorney representative. On appeal, Respondent was represented by Mr. Philip N. Davey, Esq., of Davey & Brogan, P.C., 101 Granby Street, Suite 300, Norfolk, VA 23510-1636. The Coast Guard was represented by Mr. James Stanton and LTJG Dianna Bailey of U.S. Coast Guard Sector Hampton Roads, Norfolk, Virginia.

BASIS OF APPEAL

On appeal, Respondent raises the following issue:

Whether the ALJ erred as a matter of law, precedent, and public policy in concluding that submitting a substitute urine sample, in and of itself, constitutes "aggravation" such as to permit imposition of a sanction outside the Table of Appropriate Orders, 46 C.F.R. Part 5, Table 5-569.

OPINION

The sole issue presented in Respondent's case is whether the ALJ erred in concluding that submitting a substitute urine sample, in and of itself, constitutes aggravation such as to permit imposition of a sanction outside the table of Appropriate Orders.

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

Table 5.569, Suggested Ranges of an Appropriate Order (hereinafter "table"), in 46 C.F.R. § 5.569, sets forth a range of sanction for a violation of law or regulation relating to refusal to take a chemical drug test of 12-24 months suspension.[1] 46 C.F.R. § 5.569(d) addresses the intent of the table as follows:

> Table 5.569 is for the information and guidance of Administrative Law Judges and is intended to promote uniformity in orders rendered. This table should not affect the fair and impartial adjudication of each case on its individual facts and merits. . . . Mitigating or aggravating factors may make an order greater or less than the given range appropriate.

In this case, the ALJ ordered a sanction of revocation, well beyond the 12-24-month range recommended by the table. Citing the decision of the National Transportation Safety Board (hereinafter "NTSB") in *Commandant v. Moore*, NTSB Order No. EM-201 (2005), Respondent contends that the ALJ did not articulate specific facts to justify a sanction of revocation. In the MOORE case, the Commandant upheld the sanction of revocation where a mariner refused to submit to a random drug test. Mr. Moore's appeal to the NTSB was granted, in part, because the sanction of revocation imposed in that case exceeded that shown in the table. While the NTSB acknowledged the ALJ's right to go outside the table, it noted that in Respondent Moore's case, neither the law judge nor the Vice Commandant articulated any aggravating factors to justify going beyond the sanction range listed in the table. As a consequence, the NTSB stated that "unless and until the Coast Guard changes its regulation, we will not uphold an upward departure from the policy currently embodied in the Coast Guard's regulation without a clearly articulated explanation of aggravating factors." *Commandant v. Moore*, NTSB Order No. EM-201 (2005).

[1] The table does not contain a recommendation for cases involving allegations of misconduct based on a refusal to submit to drug testing. However, the table does address refusal to take a chemical drug test in cases where violations of law or regulation are alleged. Because the table did not provide guidance in misconduct cases like this one, the ALJ relied on the guidance provided in violation of law or regulation cases.

A review of the record shows that the ALJ clearly articulated aggravating factors while assessing a sanction beyond that recommended in the table. The ALJ stated as follows:

> The Coast Guard recommends a sanction of revocation arguing that the substituted sample is a deceptive act and should be met with the most severe penalty allowed.
>
> In opposition Respondent presented argument that he is a well respected and reliable coworker with no history of prior offenses or incidents. Applicable authority indicates that evidence in aggravation should be presented to support going beyond the suggested range of sanctions in the table.
>
> After considering all of the evidence in the record including the fact that a mariner provided a substitute sample in connection with a company ordered random drug test, I find that the aggravating evidence in this case is substantial and outweighs the mitigating evidence by significant degree. Substitution of a specimen is an intentional act and constitutes a refusal to test. Such interference with the integrity of the testing process creates a risk of an impaired mariner continuing to serve in a safety sensitive position. The drug-testing regulations are designed to minimize use of intoxicants by merchant mariners and to promote a drug free and safe work environment. This goal would be undermined if merchant mariners could either substitute a specimen or refuse to participate in a chemical test and receive a lesser sanction than if they tested positive for a controlled substance. The purpose of the regulations for suspension and revocation proceedings is remedial and intended to maintain standards for competence and conduct essential to the promotion of safety at sea. Based on the evidence of record as a whole, I find that the Coast Guard has provided sufficient evidence of aggravating factors to support exceeding the suggested range contained in the table. Therefore, I find that revocation is the appropriate sanction in this case.

[D&O II at 8-9] (internal citations omitted)

In this case, the ALJ found, based on the evidence contained in the record, that in providing a substituted urine sample, Respondent committed a deceptive act meant to subvert the intent of the Coast Guard's drug testing regulations. In so finding, contrary to Respondent's assertion, the ALJ clearly articulated aggravating factors to support going

beyond the suggested sanction in the table. While the record shows that the ALJ considered the mitigating evidence that Respondent submitted, he found "the aggravating evidence in this case substantial" and that it "outweighs the mitigating evidence by a significant degree." [D&O II at 8] After a careful consideration of the record, I find that the ALJ's decision to assess a sanction beyond that stated in the table was not an abuse of discretion. Given the aggravating evidence contained in the record and addressed by the ALJ, the sanction of revocation is not obviously excessive. Accordingly, Respondent's appeal is rejected.

CONCLUSION

The ALJ's decision to revoke Respondent's Merchant Mariner Document was not an abuse of discretion. Given the aggravating evidence in the record, the sanction of revocation was not obviously excessive. Because competent, substantial, reliable, and probative evidence exists to support the ALJ's decision as to the appropriate sanction in this case, Respondent's appeal is denied.

ORDER

The order of the ALJ, dated March 2, 2010, at Norfolk, Virginia, is hereby AFFIRMED.

Sally Brice-O'Hara, VADM, USCG
Vice Commandant
Signed at Washington, D.C. this 25th day of May, 2011.