

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD,
Complainant,

vs.

MERCHANT MARINER'S
DOCUMENT NO. 103524735

ISSUED TO:

PETER LIBUTTI, Jr.,
Respondent

Docket Number: 99-0091
Case Number: PA99001693
New York

DECISION AND ORDER

BEFORE: THOMAS E. P. McELLIGOTT
U.S. ADMINISTRATIVE LAW JUDGE

I. PRELIMINARY STATEMENT

This suspension and revocation hearing is brought pursuant to the legal authority contained in 46 U.S.C. Chapter 77, including §§ 7703-04 (West Supp. 1999); U.S. Administrative Procedure Act, 5 U.S.C. §§ 551-59 (1996); Personnel Action, 46 C.F.R. Parts 4 and 5 (1998); Chemical Testing, 46 C.F.R. Part 16 (1998) and Rules of Practice, Procedure, and Evidence for Formal Administrative Proceedings of the Coast Guard, 33 C.F.R. Part 20 (1998).

On August 3, 1999, this administrative proceeding was commenced against captioned Respondent, Peter Libutti, Jr., [hereinafter Respondent] through personal service on Respondent of two Complaints by the Investigating Officer [hereinafter I.O.],

Daniel J. Fitzgerald (LTJG), stationed at the time at U.S. Coast Guard Marine Safety Office, Activities New York, 212 Coast Guard Drive, Staten Island, New York 10305. The Investigating Officer advised the Respondent of his rights and served Respondent with two Complaints alleging statutory violations with supporting jurisdictional and factual allegations with proposals for final orders.

The first Complaint alleges a statutory violation of "MISCONDUCT" and seeks suspension of Respondent's U.S. Merchant Mariner's Document [hereinafter MMD] for a period of twenty-four months. The first Complaint reads as follows:

MISCONDUCT, in that the Respondent, while being a holder of MMD No. 103524735 and while operating under the authority of said MMD, did on June 22, 1999, wrongfully refuse to submit to a random drug test by wrongfully providing a urine specimen that was not consistent with normal human urine while employed by CR Harbor Towing & Transportation, Inc.

The second Complaint alleges a statutory violation of "USE OF DANGEROUS DRUGS" and seeks the revocation of the Respondent's U.S. Merchant Mariner's Document and reads as follows:

USE of or ADDICTION to the USE of DANGEROUS DRUGS, in that the Respondent, while being a holder of MMD No. 103524735 and while operating under the authority of said MMD, did on June 22, 1999, wrongfully provide a urine specimen that was not consistent with normal human urine and thus

attempted to conceal a positive test result to wit: the Respondent is found to be a user of dangerous drugs while being employed by CR Harbor Towing & Transportation, Inc.

On August 3, 1999, the record shows that the Respondent acknowledged personal service and receipt of both Complaints by signing his name on the Complaints. On August 6, 1999, the Respondent filed a timely written formal answer admitting only to the jurisdictional allegations presented in both Complaints. The Respondent denied all factual allegations giving rise to the Complaint of Misconduct and the Complaint for the Use of or Addiction to the Use of Dangerous Drugs.

The two Complaints together with Respondent's written Answer were filed with the U.S. Coast Guard, Administrative Law Judge [hereinafter ALJ], Docketing Center on August 11, 1999 and were docketed on August 12, 1999. A hearing was held as scheduled on October 21, 1999, at 11:00 am, in the ALJ hearing room at the U.S. Customs House, Room 602A, Six World Trade Center, New York, New York. At the hearing the U.S. Coast Guard was represented by LCDR Charles Dahill, Assistant Senior Investigating Officer and LTJG Daniel J. Fitzgerald, Investigating Officer, MSO Activities New York. The Respondent after being advised of his rights to an attorney well in advance of the hearing by the I.O. and also by the undersigned Judge, chose to represent himself pro se.

The U.S. Coast Guard submitted twelve exhibits, which were admitted into evidence and presented four witnesses who testified under oath. The U.S. Coast

Guard's four witnesses are found to be credible. The Respondent submitted three exhibits and testified for himself. After carefully observing the Respondent and his testimony, the Respondent's credibility leaves much to be desired, as will be explained more fully below. (See also List of Witnesses and Exhibits attached).

A pretrial conference on October 21, 1999 was held by the Judge with all parties present, during it the U.S. Coast Guard moved to amend the Proposed Order of the Complaint for Misconduct, from a twenty four-month suspension to a revocation of the Respondent's U.S. Merchant Mariner's Document. The Respondent was advised of his rights and the implication of changing the Proposed Order of the Complaint of Misconduct from suspension to revocation. The parties agreed to allow the amendment to the Misconduct Complaint. The undersigned Judge granted the U.S. Coast Guard's motion to amend the Proposed Order for the Complaint of Misconduct from a twenty-four month suspension to revocation, if the case and Complaint was proved by a preponderance of the evidence.

During the pretrial conference and at the hearing when the Respondent was asked to produce his Coast Guard issued document, the Respondent brought forth a claim that the ALJ Docketing Center had demanded the surrender of his U.S. Merchant Mariner's Document (MMD). The Respondent contended that the ALJ Docketing Center called his home and requested the surrender of his MMD on August 5, 1999. Respondent claimed he mailed his said MMD to the ALJ Docketing Center on August 6, 1999 and presented a partial U.S. Postal Service form that was date stamped for August 6, 1999 but Respondent did not produce a signed "green card" return receipt. See

Respondent Exhibit A. The Respondent stated he never received the U.S. Postal Service return request signature card ("green card"), establishing the receipt of his MMD at the ALJ Docketing Center.

The ALJ Docketing Center in Baltimore was not and is not in possession of Respondent's MMD. As previously stated, the ALJ Docketing Center did not receive the file or any Complaints against the Respondent until August 11, 1999. The Complaints were only first docketed by the ALJ Docketing Center on August 12, 1999. Since the ALJ Docketing Center had no prior notice or knowledge of Respondent's case until August 11, 1999, it could not have asked him or his mother for the surrender of Respondent's MMD on August 5, 1999. It shows Respondent is not telling the truth about his U.S. Merchant Mariner's Document and that it most probably is still in his possession. Moreover, the ALJ Docketing Center does not make requests to Respondents for the deposit of merchant mariner documents. These facts and others below show Respondent's credibility leaves much to be desired.

II. FINDINGS BASED UPON THE ENTIRE RECORD AS A WHOLE

1. At all relevant times herein mentioned and specifically on and before August 3, 1999, the Respondent was a holder in possession of U.S. Merchant Mariner's Document No. 103524735, issued by the United States Coast Guard.
2. On and about June 22, 1999, the Respondent was employed as a U.S. Merchant Mariner by CR Harbor Towing & Transportation, LLC in the ports of New York and

New Jersey and served as a crewmember on board the uninspected towing vessel, TILLY, Vessel Official Number D244276. Respondent was serving under the authority of his U.S. Coast Guard, U.S. Merchant Mariner's Document.

3. On June 22, 1999, the Respondent and the entire crews of about eight people for two company vessels were ordered to provide urine samples for a random drug test on board the towing vessel BRANDON. Mr. Walter Drain, an experienced, careful and trained collector, employed by NEDPC, properly collected the urine samples from each of the crewmembers from the towing vessels TILLY and BRANDON. Mr. Drain personally appeared in this matter as an I.O. witness under oath. Mr. Drain testified that he carefully collected the Respondent's urine specimen according to approved federal testing procedures while dealing with only one person at a time. This collector only saw Respondent's back, while Respondent, who was about ten (10) feet away, put his purported urine sample into the provided collection cup or bottle. Respondent then gave the collection cup or bottle to this collector. Mr. Drain stated the Respondent's urine sample appeared extra clear, similar to the color of water but within the required temperature specification (90 to 100 ° F). See I.O. Exhibit No. 6, No. 11. Mr. Drain provided credible testimony to establish the proper chain of custody for Respondent's urine specimen. The Respondent signed the Federal Custody and Control form in the collector's presence and in the proper place proving that his specimen bottle was sealed and dated in his presence. See I.O. Exhibit No. 6. The Respondent's and other specimens were later that day sent to the tested and certified laboratory, Lab One Inc. for analysis.

4. Lab One Inc. is the laboratory contracted to analyze the Respondent's urine specimen. It is an approved and certified testing facility and laboratory under the U.S. Department of Health and Human Services. See I.O. Exhibit No. 3. The Vice President of Lab One, Inc., Mr. Alan Davis testified under oath at the hearing. Mr. Davis testified that the Respondent's specimen arrived intact at the laboratory, see I.O. Exhibit No. 6, and that the Respondent's specimen was carefully analyzed according to tested and approved procedures by this laboratory's scientists and computers.

5. Vice President Davis and the laboratory personnel properly identified the Respondent's urine specimen by its specimen identification number and by Respondent's social security number as shown on the collection and chain of custody form. He testified that Respondent's urine specimen, following careful testings by the laboratory, were found by the laboratory to be "not consistent with normal human urine." I.O. Exhibit No. 4. The laboratory finally reported the Respondent's urine specimen as "substituted" pursuant to U.S. Department of Health & Human Service rules. Id.

6. The laboratory analyzed the Respondent's urine specimen for both creatinine concentration and specific gravity to determine whether or not the specimen Respondent provided was consistent with normal human urine. See I.O. Exhibit No. 4. The approved threshold value for creatinine concentration is greater than 5 mg/dl. The approved value for specific gravity is greater than 1.001 but less than 1.020. See id. The Respondent's urine specimen was thoroughly analyzed for

creatinine concentration and specific gravity. The Respondent's specimen contained only 1 mg/dl of creatinine or one-fifth of the normal value in human urine, well below the minimum allowed threshold value of 5 mg/dl. The specific gravity of Respondent's specimen was 1.000 below the cut-off value of 1.001.

7. Laboratory Vice President Davis testified that normal tap water has a specific gravity of 1.000 and stated that creatinine is not a naturally occurring chemical element of normal tap water. Mr. Davis further testified that the laboratory confirmed the Respondent's specimen was not consistent with normal human urine by analyzing a backup sample. Laboratory Vice President Davis is accepted as a credible expert witness. The record indicates this Respondent could have put mostly heated water with only some of his urine into his specimen collection bottle.

8. The medical review officer [hereinafter MRO] is Dr. Mark Horowitz, M.D. with an office in New York City, New York. The MRO testified under oath and is a board-certified doctor who was and is accepted as an expert witness. See I.O. Exhibit No. 8. The MRO testified that the Respondent's urine specimen was not tested at the laboratory for the presence of drugs pursuant to carefully approved procedures because the specimen had been found by the laboratory to be "substituted." The laboratory scientists performing the actual analysis at Lab One Inc. finally reported the Respondent's specimen was found to be "substituted not consistent with normal human urine." I.O. Exhibit No. 6. The MRO testified that Respondent's specimen was not consistent with normal human urine even though it contained a small amount of creatinine. The MRO concluded and agreed that the Respondent's

specimen had been "substituted" as reported by the laboratory after analysis and testing.

9. The Respondent after being advised that he did not have to testify, chose to testify on his own behalf. The Respondent asserted that he did not substitute his urine specimen. The Respondent agreed his urine specimen was within the required temperature range at the time of collection. See I.O. Exhibit No. 6. The testimony of the specimen collector, Mr. Drain, supports the Respondent's claim that his urine specimen was within the normal temperature range. However, Mr. Drain, an experienced and trained collector of human urine specimens did testify that Respondent's urine appeared unusually clear in color, similar to that of water or the color of water. It must be noted that the normal temperature range is only one of many criteria that the laboratory scientists and MRO's are looking for.

10. The Respondent testified that he is not now a user of dangerous drugs. Respondent is forty-one years old and has held an MMD from the U.S. Coast Guard for the last twenty-two years. However, the Respondent did testify to having a long history of drug use, especially the use of cocaine. Respondent testified he started using drugs as a teenager before he first completed and signed a U.S. Coast Guard application form and applied for his MMD. Respondent emphasized that he was heavily involved in the use of drugs especially cocaine for about twenty years. Later, only within the past five years, Respondent claimed he sought counseling and drug rehabilitation on his own merit. During Respondent's five years of rehabilitation from "drug addiction," he usually provided weekly urine specimens for testing.

Respondent said he paid for his twenty years of cocaine use or addiction, by "begging, borrowing and stealing," while he was employed as a deckhand in the ferry systems and vessels, in and around New York City's harbor and navigable waters.

11. The Respondent introduced documentation that he successfully completed a drug treatment program. See Respondent Exhibit B and C. Respondent stated he voluntarily entered into the drug treatment program and now argues and claims that he has been drug free for the last five years. On cross examination, the Respondent did admit that he renewed his MMD in January of 1999 but could not recall having to answer any written questions concerning prior drug use on the U.S. Coast Guard application form for renewal. I will however, take official notice that such questions are contained and always have been during about the past twenty-five years in the U.S. Coast Guard's document original and renewal application form. This is more strong evidence of Respondent's lack of credibility or truthfulness.

III. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent Peter Libutti, Jr. and the subject matter of this hearing are properly within the jurisdiction of the United States Coast Guard and the U.S. Administrative Law Judge in accordance with 46 U.S. Code Chapter 77, including § § 7703-04 (West Supp. 1999), 46 C.F.R. Parts 4, 5 and 16, and 33 C.F.R. Part 20 (1998).

2. At all relevant times, the Respondent was the holder and acting under the authority of U.S. Merchant Mariner's Document No. 103524735 while serving as a U.S. Merchant Mariner and/or deckhand on board the towing vessel TILLY, Vessel Official Number D244276.
3. The random drug test was carefully and satisfactory performed in accordance with all chemical and urine testing rules including, 46 C.F.R. Part 16 (1998).
4. The Complaint "**MISCONDUCT**" is **found PROVED** by a preponderance of the credible evidence of a substantial, reliable and probative nature.
5. The Complaint "**USE of or ADDICTION to the USE of DANGEROUS DRUGS**" is **found NOT PROVED** by a preponderance of the evidence.

IV. OPINION

A. MISCONDUCT WAS PROVED BY THE INVESTIGATING OFFICERS

One underlying purpose of suspension and revocation proceedings and hearings by the United States Coast Guard is to promote safety at sea and in navigable waters and harbors. See 46 U.S.C. Chapter 77, including § 7701 (West Supp. 1999). A U.S. Merchant Mariner's Document may be suspended or revoked when an individual acts under the authority of that document and violates or fails to comply with the applicable laws that apply to that document. See id. § 7703. The holder of a U.S. Merchant Mariner's

Document shall be tested for the use of alcohol and dangerous drugs. The testing shall include periodic, random and reasonable cause testing. See id. § 7702 (2). The refusal to comply with a random drug test is a violation of a formal, duly established statute and rule and represents misconduct on the part of the holder of a U.S. Merchant Mariner's Document. See Commandant's Appeal Decision 2578 (Callahan). Misconduct "is human behavior which violates some formal, duly established rule. . . . It is an act which is forbidden or a failure to do that which is required." 46 C.F.R. § 5.27 (1998).

The Respondent is required, as a holder of a U.S. Merchant Mariner's Document, to properly submit to a random drug test as requested by his marine employer. Respondent is in violation of the statutes and laws applicable to his U.S. Merchant Mariner's Document when he fails to provide his own proper normal urine specimen as required by law. See Commandant's Appeal Decision 2578 (Callahan). The U.S. Coast Guard alleged and proved that the Respondent substituted something for his urine specimen in an attempt to prevent or conceal a positive drug test result. An approved, tested and certified federal testing laboratory analyzed and tested Respondent's urine specimen. It determined in its final report that Respondent's urine sample was not consistent with normal human urine. The Respondent's provided specimen had a verified unbroken chain of custody. The laboratory under carefully approved procedures performed the analysis twice to verify its results. The results were reviewed by a qualified MRO who testified that the Respondent's specimen had been "substituted." The U.S. Coast Guard presented credible testimony and documentation to show that the Respondent submitted a urine specimen that was not consistent with

normal human urine. Thus, the Respondent has refused by his actions to properly submit to a random drug test.

The Respondent argues he provided a urine specimen that was within the normal temperature range for human urine. The Federal Custody and Control form does indicate that the Respondent's specimen was within the normal temperature range (between 90 and 100 ° F). However, the results including testimony and reports from Lab One, Inc., an approved, certified federal testing facility, proved that the Respondent's urine specimen does not exhibit the clinical and scientific signs or characteristics associated with normal human urine and is therefore a "substituted specimen." See I.O. Exhibit No. 6. The laboratory measured both the specific gravity and creatinine concentrations of the Respondent's urine specimen and conclusively proved that the Respondent's specimen did not meet the scientific or medical criteria for normal human urine. Under the guidelines of the U.S. Department of Health and Human Services, the Respondent's urine specimen was determined and reported to be a "substituted specimen." See I.O. Exhibit No. 4. A substituted sample "constitutes a 'refusal to test.'" I.O. Exhibit No. 5; see also 46 C.F.R. § 16.105 (defining refusal to submit to a urine test as failing to provide a urine sample as required or "engages in conduct that clearly obstructs the testing process").

The Commandant approving and affirming revocation on a prior appealed case has recognized that the underlying important policies of the United States Coast Guard and the United States Congress could be seriously damaged when a Respondent refuses by his actions to submit to chemical testing and face a lesser charge. See Commandant's

Appeal Decision 2578 (CALLAHAN). Finding the U.S. Coast Guard has by the preponderance of the evidence proved Misconduct on the part of the Respondent in failing to provide Respondent's own urine specimen as required by the rules and laws governing his U.S. Merchant Mariner's Document, revocation of his document is an appropriate sanction.

B. USE OF OR ADDICTION TO THE USE OF A DANGEROUS DRUG IS NOT PROVED

The U.S. Coast Guard alleges that the Respondent is a user of or is addicted to the use of a dangerous drug. If it is shown that the Respondent is a user of or is addicted to the use of a dangerous drug, the Respondent's U.S. Merchant Mariner's Document shall be revoked unless the Respondent provides satisfactory proof that he is cured. See 46 U.S.C. § 7704 (c); see also Commandant's Appeal Decision 2535 (Sweeney). The Investigating Officer alleges that the substitution and/or adulteration of the urine specimen provided by the Respondent constitutes proof of the use of or addiction to a dangerous drug. The Respondent denies that he is a user of or is addicted to the use of a dangerous drug.

The Investigating Officer must establish a prima facie case that the Respondent is a user of or is addicted to the use of a dangerous drug. See 46 U.S.C. § 7704; see also Commandant's Appeal Decision 2379 (DRUM) (stating U.S. Coast Guard has burden of proof to establish drug use). If an individual provides a proper urine sample that fails a chemical drug test, that individual is presumed to be a user of dangerous drugs. See 46

C.F.R. § 16.201(b). A positive test result indicates the Respondent has failed the chemical drug test. A test result shall only be reported as positive when the specimen equals or exceeds the established levels of metabolites of the five (5) drugs and is confirmed by a confirmatory analysis. See id. § 16.350, 360; see also I.O. Exhibit No. 4-5.

A copy of the Respondent's Federal Drug Testing Custody and Control form [hereinafter CCF], shows that the laboratory did not perform the required drug test. See I.O. Exhibit No. 6. Under approved procedures, a specimen is not analyzed for the presence of drugs if the specimen does not exhibit the clinical or scientific signs or characteristics associated with normal human urine. See I.O. Exhibit No. 4-5. If a specimen is not analyzed for drugs, the laboratory must provide a statement as to why the test was not performed. See I.O. Exhibit No. 4. The CCF for the Respondent states that the drug tests were not performed and reported it as "specimen substituted not consistent with normal human urine." I.O. Exhibit No. 6. A drug analysis that is not performed by the testing laboratory will not create a presumption of drug use if the laboratory did not report a positive test result.

However, the Respondent testified and admitted to having a long history (greater than 20 years) of using drugs, namely cocaine. But the Respondent further testified that he successfully completed a drug treatment program. See Respondent Exhibit No. B and C. Respondent claimed he had voluntarily entered into the drug treatment program in an effort to turn his life around. Respondent claims to have been drug free for the last five years. On cross-examination, the Respondent testified he had previously used drugs throughout his merchant mariner's career. Further, the

Respondent testified that he did not admit to the use of drugs when he completed, signed and renewed his MMD on his January 1999 application form and on his original application. Respondent did not tell the truth when he completed, signed and filed his written application form in January 1999 with the U.S. Coast Guard's Regional Examination Center (REC) or its equivalent. In effect, he filed a false and misleading application form in January 1999 and also when he did submit his prior written original application form for his U.S. Coast Guard Merchant Mariner's Document. This is in violation of the federal criminal statute mentioned on the form.

The Investigating Officer however, has not met his burden to prove by the preponderance of evidence that the Respondent is a user of or is addicted to the use of dangerous drugs. The laboratory analysis for the presence of drugs was not performed due to the Respondent's urine specimen being found "substituted." While the testimony of the Respondent about his past drug use may be evidence of a particular trait of Respondent's character, it can not, by itself, establish or prove that the Respondent is presently a user of or is addicted to the use of dangerous drugs. The second Complaint for the Use of or Addiction to the Use of Dangerous Drugs will therefore be dismissed. The other Complaint, as detailed above, is found proved by a preponderance of the evidence by the Investigating Officer.

V. ORDER

IT IS HEREBY ORDERED that the Respondent's U.S. Merchant Mariner's Document, Number 103524735, all duplicates and all other Coast Guard documents, licenses, certificates and authorizations whatsoever, are hereby **REVOKED**.

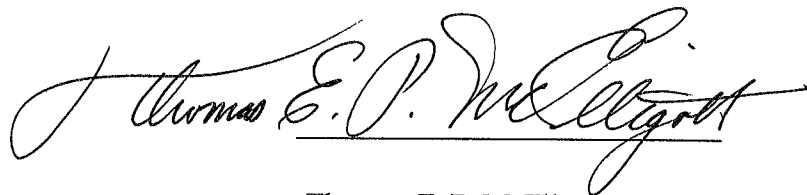
YOU ARE HEREBY NOTIFIED that any party may file a notice of appeal, if any, from a U.S. Administrative Law Judge's decision within thirty days (30) after the issuance of the decision.

An appeal notice, if any, shall be served on all parties and filed with: U.S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, Maryland 21202-4022, phone number (410) 962-7434, fax number (410) 962-1742, and with the undersigned Judge, U.S. Coast Guard, 8876 Gulf Freeway, Number 370, Houston, Texas, 77017-6542, fax number (713) 948-3372.

Each party appealing has sixty days (60) following the U.S. Administrative Law Judge's decision to file an appellate brief. An appellate brief shall be served on all parties and filed with: U.S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, Maryland 21202-4022, phone number (410) 962-7434, fax number (410) 962-1742, and with the undersigned Judge, U.S. Coast Guard, 8876 Gulf Freeway, Number 370, Houston, Texas, 77017-6542, fax number (713) 948-3372.

The rules and procedures for appellate review are found in Subpart J, §§ 20.1001 - 1103, 33 C.F.R. Part 20. A copy of Subpart J has been provided to the Respondent as part of the service of this order.

IT IS FURTHER ORDERED that the Respondent, Peter Libutti, Jr., deliver by return receipt mail or in person, his original U.S. Merchant Mariner's Document, Number 103524735 and all duplicates of it to the Senior Investigating Officer, Marine Safety Office of the U.S. Coast Guard, Activities New York, 212 Coast Guard Drive, Staten Island, New York, 10305, fax number (718) 354-4224.

A handwritten signature in cursive script that reads "Thomas E. P. McElligott". The signature is written in black ink and is positioned above a horizontal line.

Thomas E. P. McElligott
U.S. Administrative Law Judge

Done and dated on this 21st of December, 1999
Houston, Texas