

UNITED STATES OF AMERICA  
U.S. DEPARTMENT OF TRANSPORTATION  
**UNITED STATES COAST GUARD**

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UNITED STATES COAST GUARD

Complainant

vs.

JOSEPH J. KINNEARY,

Respondent.

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Docket Number CG S&R 02-0085  
CG Case No. 1476643

**ORDER**

**Issued: March 12, 2003**

**Issued by: Peter A. Fitzpatrick, Administrative Law Judge**

1. The Decision and Order in this case was issued on February 20, 2003 finding the jurisdictional and factual allegations of the Complaint **PROVED**. Both sides were afforded an opportunity to submit recommendations with regard to sanctions ordered against the Coast Guard credentials. Pleadings have been submitted and I have considered those recommendations. I am persuaded that the Investigating Officer's recommendation seeking Outright Suspension of the Respondent's License and Document for 12 months with an additional 6-month suspension remitted on a 12-month period of probation is reasonable under the circumstances of this case. The Suggested Range of an Appropriate Order codified at 46 CFR 5.569 suggests a 12-24 month suspension for mariners who refuse to take a chemical test. This case involves a serious offense by a licensed officer whose testimony at the hearing raised grave concerns

regarding his credibility. Indeed, Mr. Kinneary urged in his defense that he substituted or diluted his urine sample on two previous DOT chemical tests for dangerous drugs. If this assertion is true, his certifications on the Drug Testing Custody and Control Forms involved necessarily were false. Although the Coast Guard has not charged the mariner with those alleged offenses, Mr. Kinneary's admitted actions do not reflect well on his conduct as a licensed officer in the Merchant Marine.

2. Accordingly, **IT IS HEREBY ORDERED** that all Licenses and Documents issued to Joseph Kinneary by the United States Coast Guard are **Suspended Outright** for a period of 12 months beginning immediately upon tender of those credentials to the Investigating Officer at U.S. Coast Guard Activities New York, Prevention and Compliance – I&A Division, Staten Island, New York. Additionally, upon completion of the 12-month period of Outright Suspension, the License and Document will be returned to the Respondent at which time he will be placed on 12 months probation. If during the period of probation he violates any laws or regulations involving marine safety or the use of alcohol or dangerous drugs, his credentials will be **Suspended Outright** for a six-month period in addition to any other suspension issued by a Judge in a subsequent proceeding.
3. **IT IS FURTHER ORDERED THAT MR. KINNEARY IS HEREBY ORDERED TO SURRENDER HIS LICENSE AND DOCUMENT TO THE ABOVE-NAMED OFFICE OF THE UNITED STATES COAST GUARD ON OR BEFORE MARCH 18, 2003.**

*Peter A. Fitzpatrick*  
**PETER A. FITZPATRICK**  
**Administrative Law Judge**  
**United States Coast Guard**

Done and Dated on March 12, 2003 at  
Norfolk, VA

### Certificate of Service

I hereby certify that I have this day served the foregoing document(s) upon the following parties and limited participants (or designated representatives) in this proceeding at the address indicated by Federal Express:

LT Brian Province  
U.S. Coast Guard Activities New York  
212 Coast Guard Drive  
Staten Island, NY 10305  
Phone: 718-354-4388

Michael H. Sussman, Esq.  
The Goshen Inn  
40 Park Place  
Goshen, New York 10924  
Phone: 845-294-3991

Joseph J. Kinneary  
3 Penrose Lane  
East Northport, NY 11731  
Phone: 631-858-1886

Lucinda H. Shinault, CLA  
Legal Assistant to the Administrative Law Judge

Done and Dated on March , 2003 at  
Norfolk, VA

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U.S. DEPARTMENT OF TRANSPORTATION  
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Docket Number CG S&R 02-0085  
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**DECISION AND ORDER**

**Issued: February 20, 2003**

**Issued by: Peter A. Fitzpatrick, Administrative Law Judge**

**APPEARANCES**

**FOR THE COAST GUARD**

LT Brian Province  
CWO Charles Cobb  
U.S. Coast Guard Activities New York  
212 Coast Guard Drive  
Staten Island, NY 10305

**FOR THE RESPONDENT**

Michael H. Sussman, Esq.  
40 Park Place  
Goshen, New York 10924

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I.

PRELIMINARY STATEMENT

This case began on February 7, 2002 when the Coast Guard filed a Complaint against Joseph J. Kinneary alleging essentially that the mariner refused to submit to a random drug test. The Factual Allegations preferred are as follows:<sup>1</sup>

1. The Coast Guard alleges that on 12/27/01 at New York City DEP facility at Ward's Island, New York, you wrongfully refused to submit to a random drug test, conducted pursuant to Title 46 United States Code (USC) 7702(c)(2) and Title 46 Code of Federal Regulations (CFR) Part 16.230, as directed by his Marine Employer.
2. That you were reporting for your shift as Master of the M/V NEWTOWN CREEK (D513032) at Ward's Island, NY when advised by DEP employee, Mr. Keith Marinoff, that he had been selected for a Random Chemical Test.
3. That the random chemical test selection, the specimen collection and Medical Review Officer determination were provided by consortium/third party administrator, N.E.D.P.C. of 90 Maiden Lane, 4<sup>th</sup> floor, New York, NY 10038.
4. That N.E.D.P.C. collector Walter Drain, allowed you three (3) hours to provide a urine specimen IAW Title 49 CFR Part 40.193(b)(4) during which time no specimen was provided. Fluid was provided for your intake IAW 49 CFR 40.193(b)(2).
5. That you were allowed five days to provide an evaluation from a licensed physician who would recommend that the Medical Review Officer (MRO) make one of the following determinations: (1) A medical condition has or with a high degree of probability could have, precluded the respondent from providing a sufficient amount of urine (45) ml.; (2) There is not an adequate basis for determining that a

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<sup>1</sup> The Jurisdictional Allegations are:

1. Respondent's address is as follows: 3 Penrose Path, East Northport, NY 11731, telephone 631-858-1886
2. Respondent holds the following Coast Guard-issued credential(s): License Number 035506, MMD Number 134 46 5008
3. Respondent acted under the authority of that license and document, on December 27, 2001, by: serving as Master aboard the vessel NEWTOWN CREEK as required by an employer as a condition of employment.

medical condition has, or with a high degree of probability could have, precluded the employee from providing a sufficient amount of urine.

6. That on January 3, 2002 you provided a note on a prescription pad from A.D. Calderbank, M.D. of 184 Larkfield Road East Nortport, NY 11731 dated 28 Dec. 01 stating, "This man has shy bladder syndrome' -- this is a chronic condition that can be helped using a B (Beta) blocker (Thoreax) which I have given him. He is not a substance abuser." This evaluation was based on a single interview with the respondent.
7. That N.E.D.P.C. MRO Dr. Mark Horowitz reviewed Dr. Calderbank's note, interviewed him regarding his evaluation and found no medical reason to explain the inability to void. Dr. Horowitz signed the Custody and Control form indicating a refusal to test IAW 49 CFR 40.193(d)(2).
8. That 49 CFR 40.193(e) calls for a [...medically documented pre-existing psychological disorder, but does not include unsupported assertions of "situational anxiety" or dehydration.]

The Respondent's Answer was timely filed on February 21, 2002 and all Jurisdictional Allegations were Admitted. Factual Allegations Numbers 1, 6 and 7 were Denied and the others (Numbers 2-5 and 8) were Admitted.

The Undersigned was assigned to the case by Order of the Chief Administrative Law Judge on February 27, 2002. Ultimately, the hearing was set for October 16, 2002 at New York City. At the hearing, the Investigating Officers, the Respondent and his counsel, were present. The Coast Guard sponsored 2 witnesses: Peter Brucas, Executive Vice President, N.E.D.P.C., and Dr. Mark Horowitz, MD, Medical Review Officer, N.E.D.P.C. The Coast Guard offered 3 exhibits. The Respondent also sponsored 2 witnesses: Walter Drain, Collection Site Person, N.E.D.P.C., and Mr. Kinneary. The Respondent offered 15 exhibits. All exhibits offered by both sides were Admitted. A listing of evidence is set out at Attachment B.

At the conclusion of the hearing, the pleadings were scheduled. Subsequently, it was discovered that Respondent's counsel had been suspended from the practice of law in New York

State at the time the hearing was conducted. In view of the fact that the evidentiary hearing was completed and the record closed when this situation was uncovered, that only post hearing submissions remained to be filed, and importantly, that Mr. Kinneary expressed his desire to continue to be represented by Mr. Sussman, the suspended attorney was allowed to file the scheduled submissions. See Orders of November 7, November 19, November 21, and December 4, 2002. A pleading entitled "Findings of Fact and Conclusions of Law" was submitted by the Investigating Officer on December 31, 2002. Respondent's "Proposed Findings of Fact and Conclusions of Law" was submitted on January 2, 2003. Reply briefs from the Respondent (January 15, 2003) and the Coast Guard (January 21, 2003) were also received. This case is now ripe for decision.

## II.

### FINDINGS OF FACT

#### **A. Jurisdictional Allegations Admitted by the Respondent in the Answer**

1. Respondent's address is as follows: 3 Penrose Path, East Northport, NY 11731, telephone 631-858-1886
2. Respondent holds the following Coast Guard-issued credential(s): License Number 035506, MMD Number 134 46 5008
3. Respondent acted under the authority of that license and document, on December 27, 2001, by: serving as Master aboard the vessel NEWTOWN CREEK as required by an employer as a condition of employment.

#### **B. Factual Allegations Admitted by the Respondent in the Answer**

2. That you were reporting for your shift as Master of the M/V NEWTOWN CREEK (D513032) at Ward's Island, NY when advised by DEP employee, Mr. Keith Marinoff, that he had been selected for a Random Chemical Test.
3. That the random chemical test selection, the specimen collection and Medical Review Officer determination were provided by consortium/third party administrator, N.E.D.P.C. of 90 Maiden Lane, 4th floor, New York, NY 10038.



4. That N.E.D.P.C. collector Walter Drain, allowed you three (3) hours to provide a urine specimen IAW Title 49 CFR Part 40.193(b)(4) during which time no specimen was provided. Fluid was provided for your intake IAW 49 CFR 40.193(b)(2).
5. That you were allowed five days to provide an evaluation from a licenses physician who would recommend that the Medical Review Officer (MRO) make one of the following determinations: (1) A medical condition has or with a high degree of probability could have, precluded the respondent from providing a sufficient amount of urine (45) ml.; (2) There is not an adequate basis for determining that a medical condition has, or with a high degree of probability could have, precluded the employee from providing a sufficient amount of urine.
8. That 49 CFR 40.193(e) calls for a [...medically documented pre-existing psychological disorder, but does not include unsupported assertions of "situational anxiety" or dehydration.]

**C. Other Facts**

1. Joseph Kinneary was the holder of Coast Guard License No. 035506 and Merchant Mariner's Document No. 134 46 5008 on December 27, 2001 when he was selected to take a random chemical test for dangerous drugs. At the time, he was an employee of the City of New York Department of Environmental Protection, Marine Division C, and was assigned to serve as Master of the M/V NEWTOWN CREEK (D513032).
2. Mr. Walter Drain was the Collection Site Person assigned by the firm N.E.D.P.C. He had eight years experience in U.S.Department of Transportation urine drug screen collections. (Transcript, hereafter Tr., 145). He recognized Mr. Kinneary from previous collections since N.E.D.P.C. has the contract to perform urine drug tests with the City since 1994. (Tr. 145-46). The collection was conducted at the City's Marine Division offices at 100 Wall Street. (IO Exhibit 1).

3. Mr. Drain conducted Mr. Kinneary's collection between 0710 and 1010 on December 27 2001. Mr. Kinneary was unable to produce the urine specimen during that period. (Tr., 157). Mr. Kinneary drank approximately 48 ounces of water during the three hour period but was unable to void. (Tr. 157). The entire collection period actually lasted for nearly 3.5 hours. (Tr. 155).
4. After the unsuccessful collection was terminated, Mr. Drain called Mr. Kinneary's supervisor (Mr. Chen) and his own supervisor, Mr. Brucas, Executive Vice President, N.E.D.P.C. (Tr. 38, 157). Next, Mr. Kinneary was transported to the City's Sanitation Department clinic approximately 45 minutes away. There, he was interviewed by Dr. Remy Obas, the Sanitation Department's physician. (Tr. 51). Dr. Obas concluded that there was no physical impediment preventing the Respondent from voiding. (Tr. 51-52). The Doctor gave Mr. Kinneary the Sanitation Department form entitled "Information and Instructions to Examining Physician." The form instructed him to obtain within five working days an evaluation from a licensed physician who has expertise in the medical issues raised by the Respondent's failure to produce a sufficient specimen and provide that data to the Medical Review Officer. (Rsp. Exhibit J). In pertinent part the form reads (*Id.*)

As the referral physician conducting this evaluation you must recommend that the Medical Review Officer (MRO) make one of the following determinations:

1. A medical condition has or with a high probability could have, precluded the employee from providing a sufficient amount of urine (45) ml.
2. There is not an adequate basis for determining that a medical condition has, or with a high probability could have, precluded the employee from providing a sufficient amount of urine.

3. As the referral physician you must provide a written statement of your recommendations and basis for review by the MRO.

The Instructions also noted that the Medical Review Officer would consider and assess the referral physician's recommendation. Finally, it cautioned that if there is no medical condition involved, a "refusal to test" marking will result and "disciplinary action will commence." (*Id.*).

5. Dr. Obas's report was given to Mr. Brucas, N.E.D.P.C. Executive Vice President who had arrived at the Clinic and he brought it to Dr. Mark Horowitz, the Medical Review Officer. Dr. Horowitz spoke with Mr. Kinneary that same day. (Tr. 105, 115-16). He gave the Respondent the opportunity to provide medical documentation to substantiate why he was unable to provide a specimen. (Tr. 105). The next day, on December 28, 2001 Dr. A.D. Calderbank, the referral physician who Mr. Kinneary visited, wrote the following note which was given to Dr. Horowitz:

This man has 'shy bladder syndrome' – this is a chronic condition that can be helped by using an A blocker (Thoreax) which I have given him. He is not a substance abuser.

Dr. Horowitz called Dr. Calderbank for further information and documentation of the described condition but no such documentation was available. Apparently, Mr. Kinneary had not visited the doctor about his urinary difficulties prior to the drug test involved. (Tr. 108). Dr. Horowitz was looking for a diagnostic test or entry in the patient's record indicating the existence of a condition. (Tr. 109). Dr. Horowitz concluded that there was insufficient data to determine that Mr. Kinneary had a medical condition on December 27, 2001 that prevented him from providing a sufficient amount of urine. (Tr. 110).

Accordingly, he signed the Federal Drug Testing Custody and Control Form (FDTCCF)

and checked the block "Refusal to Test." His comment was "Unable to void in 3 hrs. No sufficient medical explanation provided." (IO Exhibit 1). As a result, Mr. Kinneary was removed from his position as Master of the NEWTOWN CREEK.

6. Later, Mr. Kinneary was examined by an urologist, Dr. William C. Porter and after various tests that specialist concluded that no physical abnormalities were involved. (Rsp. Exhibit E, IO Exhibit 3).
7. On March 7, 2002 Mr. Kinneary submitted to an oral fluid (saliva) drug test and the results were negative. (Rsp. Exhibit F). He was allowed to return to work thereafter pending the outcome of this proceeding. (Tr. 234).
8. Mr. Kinneary took and passed urine chemical tests for dangerous drugs on three occasions during the six years prior to the test involved here on December 27, 2001. They were conducted on April 10, 1996, July 16, 1997, and August 25, 1998. (IO Exhibit 2, Rsp. Exhibits A, B, and C). Those DTCCF were signed by Mr. Kinneary who certified as follows:

I certify that I provided my urine specimen to the collector; that I have not adulterated it in any manner; that each specimen bottle used was sealed with a tamper-evident seal in my presence and that the information provided on this form and on the label affixed to each specimen bottle is correct.

9. Mr. Kinneary now asserts that he substituted water for his urine on two of those tests. (Tr. 195-96).
10. Mr. Kinneary also passed a urine drug test on October 2, 1992. (Rsp. Exhibit I).

### III.

#### STATUTES AND REGULATIONS INVOLVED

1. This proceeding is governed by the Administrative Procedure Act , which is incorporated into these proceedings under 46 U.S.C. 7702, which reads:

##### **§ 7702. Administrative procedure**

- (a) Sections 551-559 of title 5 apply to each hearing under this chapter about suspending or revoking a license, certificate of registry, or merchant mariner's document.
2. 46 U.S.C. §§ 7701-7705 sets out the general procedures governing the suspension and revocation of merchant mariners' licenses and documents. 46 U.S.C. § 7702 (c)(2) provides in pertinent part that the Coast Guard (as delegated by the Secretary of the United States Department of Transportation) shall require drug tests for merchant mariners as follows:
  - (2) The Secretary shall require the testing of the holder of a license, certificate of registry, or merchant mariner's document for use of alcohol and dangerous drugs in violation of law or Federal regulation. The testing may include preemployment (with respect to dangerous drugs only), periodic, random, and reasonable cause testing, and shall include post-accident testing.
3. The Coast Guard regulations governing chemical testing for dangerous drugs are codified at 46 CFR § 16.
4. The regulations governing the performance of chemical tests for dangerous drugs adopted by the United States Department of Transportation are codified at 49 CFR § 40. The section governing the procedures to be followed where an employee does not provide a sufficient amount of urine for a drug test is 49 CFR § 40.193. That rule in its entirety is set out at Attachment A.

IV.

RULINGS ON RESPONDENT'S PROPOSED FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

On January 2, 2003, the Respondent submitted a pleading entitled Respondent's Proposed Findings of Fact and Conclusions of Law. My rulings on each are set out at Attachment C.

The Investigating Officer's pleading entitled "Findings of Fact and Conclusions of Law" does not set out proposed findings.

V.

CONCLUSIONS OF LAW

1. On December 27, 2001, Joseph J. Kinneary was the holder of License No. 035506 and Merchant Mariner's Document Number 134 46 5008 issued by the U.S. Coast Guard.
2. On that date the Respondent reported for assignment as Master of the NEWTOWN CREEK, a vessel owned and operated by the City of New York, Environmental Protection Department, Marine Division. He was required to hold a Coast Guard license to serve as Master of that vessel.
3. The Respondent was selected on a random basis for a chemical test for dangerous drugs pursuant to the Coast Guard and U.S. Department of Transportation regulations.
4. The Respondent's failure to produce a urine sample caused the Medical Review Officer to conclude that a Refusal to Test was involved. That conclusion is supported by the applicable law and regulations.
5. The Jurisdictional and Factual Allegations of the Complaint are **PROVED** by the preponderance of the evidence.

## VI.

### OPINION

1. Congress has mandated that the holder of a Coast Guard License or Merchant Mariner's Document, serving aboard a U.S. vessel like Mr. Kinneary here, be subject to testing for the use of alcohol and dangerous drugs. (46 U.S.C. § 7702(c)(2)). Tests may be conducted on a random basis as in this case. (*Id.*) The Coast Guard rules governing chemical testing for dangerous drugs are codified at 49 CFR part 16. The purpose of the regulations is to minimize the use of intoxicates in the merchant marine and to promote a drug free and safe work environment. (46 CFR. 16.101). The rules provide that such testing is to be conducted "in accordance with the procedures detailed in 49 CFR part 40." (46 CFR 16.201(a)).

The DOT regulations specifically cover instances where an employee engaged in the process of undergoing a drug test is unable to produce a sufficient amount of urine as is the case here. 49 CFR 40.193 which is reproduced in its entirety in a preceding section hereof, details the procedure to be followed. It includes urging the Donor to drink up to 40 ounces of fluid over a period up to three hours. 49 CFR 40.193(a)(3). Where a sufficient specimen is not produced, the collection must be discontinued and that fact noted on the "Remarks" line of the DTCCF. (*Id. at 40.193(a)(4)*). At that point, the Collector is to notify the so-called "designated employee representative" (DER). (*Id.*) See also 49 CFR 40.3. In this case, Mr. Kinneary did not produce a urine specimen during the nearly 3.5 hours the Collector Mr. Drain afforded him starting at 0710 on December 27, 2001. (Tr. 155-56). When the collection was terminated over three hours later, Drain notified Mr. Chen, the Department of Environmental Protection, Marine Division, supervisor responsible for drug testing. Mr. Drain also advised his supervisor at N.E.D.P.C., Mr. Brucas. (Tr. 160).

The DOT regulations require that the DER, after consulting with the Medical Review Officer, direct the employee to obtain within five days, an evaluation from a licensed physician with expertise in the medical issues raised by the employee's failure to provide a sufficient specimen. (49 CFR 40.193(c). Here Mr. Chen directed Mr. Kinneary to go to the City Sanitation Clinic and visit the doctor there. Accordingly, Kinneary was driven to the clinic and Dr. Obas interviewed him. The doctor concluded that there was no physical reason for Mr. Kinneary's inability to produce a specimen. (Tr. 51). He gave Kinneary the Information and Instruction sheet which provided detailed information regarding the need to obtain an evaluation from a specialist within five days and send the Doctor's recommendation to the Medical Review Officer. (Tr. 211). At that point, Mr. Brucas conveyed the doctor's report to Dr. Mark Horowitz, the Medical Review Officer. (Tr. 52-53). Dr. Horowitz spoke with Mr. Kinneary and told him to see a doctor and provide medical documentation as to why he was unable to provide a specimen. (Tr. 105). The documentation received was the note from Dr. Calderbank, dated December 28, 2001, the day following the unsuccessful collection, that stated: "this man has 'shy bladder syndrome' - this is a chronic condition which can be helped" by medication. The referral physician commented that the patient "is not a substance abuser." (Rsp. Exhibit D). Upon receipt of the note, Dr. Horowitz telephoned Dr. Calderbank. At the hearing, Dr. Horowitz described his reason for the call as follows:

Q. What, in Dr. Calderbank's note, did you find insufficient in explaining Mr. Kinneary's condition?

A. Quite simply, the doctor provided me with no documentation that Mr. Kinneary had visited previously, previous to the time of the testing, for documentation of his condition.



Q. Would you expect to see anything in the documentation that would explain Mr. Kinneary having a medical problem that would have prevented him from urinating on demand?

A. I would expect to.

Q. Did you see anything in the documentation that indicated shy bladder syndrome?

A. Not at all.

Q. What would you find acceptable documentation of a pre-existing medical condition?

A. Documentation in the record pre-existing before the date of the test.

Q. If you could be a little bit more descriptive. An entry?

A. An entry in the patient's record, some diagnostic test, diagnostic test indicating existence of the condition.

Q. Why couldn't it be a medical condition?

A. We're talking about a specific medical illness. There are specific criteria for making diagnoses, and those criteria are usually – those criteria are usually tested for and documented by a physician. I can't imagine a nonphysician testing for this condition.

Q. Is it fair to say that only a physician is capable for documenting this condition?

A. That's correct.

(Tr. 108-09).

The DOT regulations are explicit that the referral physician recommend that a medical condition with a high degree of probability has or could have precluded the employee from providing a sufficient amount of urine. (49 CFR 40.195(d)(1)). Alternatively, the referral physician may conclude there is not an adequate basis for determining that a medical condition has or could have precluded the employee's ability to produce a specimen. In this case, Dr.

Calderbank's note simply said that Mr. Kinneary had a chronic condition (shy bladder syndrome). When Dr. Horowitz contacted him to obtain documentation for this diagnosis, no supporting data was available. (Tr. 108).

The DOT regulations provide that it is the Medical Review Officer who must make the final determination whether to accept the referral physician's recommendation. (49 CFR 40.195(h)). The regulations provide that an acceptable medical condition includes an ascertainable physiological condition such as a urinary system dysfunction. (49 CFR 40.193(e)). There is no evidence on this record that Mr. Kinneary had a physical impairment causing a urinary track dysfunction. Indeed, the evidence reveals that there is no such physical impediment in this case. (Rsp. Exhibit E, IO Exhibit 1). The rule also provides that a medical condition can include a medically documented pre-existing psychological disorder. However, that psychological disorder cannot be founded on unsupported assertions of "situational anxiety or dehydration." (*Id.*)

Indeed, the latter situation is exactly what Dr. Horowitz was confronted with in this case. Neither the referral physician nor Mr. Kinneary himself were able to produce any documentation of a pre-existing psychological condition supporting Dr. Calderbank's conclusion that Kinneary suffered from "shy bladder syndrome." Accordingly, Dr. Horowitz correctly concluded that this collection involved a "Refusal to Test" for the reason that the employee failed to produce a sufficient specimen. I agree with the Investigating Officer that Dr. Horowitz had no other alternative. Dr. Calderbank's note does not an adequate basis for determining that a medical condition precluded or with a high degree of probability, could have precluded Mr. Kinneary from providing a sufficient amount of urine at the collection.

2. Not only is the record devoid of any medical data supporting Dr. Calderbank's conclusion, the evidence in this case reveals that Kinneary successfully provided a urine specimen on three occasions in connection with DOT drug tests conducted during the six years prior to the one here. (See Rsp. Exhibits A, B, and C). The DTCCF which Mr. Kinneary signed on each of those occasions includes his certification as follows:

I certify that I provided my urine specimen to the collector; that I have not adulterated it in any manner; that each specimen bottle used was sealed with a tamper-evident seal in my presence and that the information provided on this form and on the label affixed to each specimen bottle is correct.

Mr. Kinneary testified at the hearing that on two of those tests he substituted or diluted his urine. (Tr. 195-96). Thus, Mr. Kinneary's defense necessarily invokes two admitted violations of the DOT regulations. He diluted or substituted his urine sample and falsely certified on the Custody and Control Form that the sample was his and that it was not adulterated in any manner. Mr. Kinneary's disavowal now of these important certifications on the Custody and Control Forms, cause me to doubt the credibility of his testimony on this and other issues.

Mr. Kinneary testified in this case is that he did not seek medical help for his "condition" because it was embarrassing and that was the way things were with him. (Tr. 260). Yet he is an officer in the merchant marine holding a Coast Guard-issued license. One of the well-known safety conditions imposed on all mariners is the requirement to take occasional drug tests. Indeed, the evidence here shows that Mr. Kinneary himself has taken at least four tests in the past ten years. (Rsp. Exhibits A, B, C, H, and I). His failure to seek medical help for an alleged condition which he claims caused him to commit serious violations of the DOT regulations (substitution or adulteration of water for his urine on a drug test and falsely certifying that the substance provided was not adulterated) is difficult to understand. The offenses he allegedly

committed could have lead to the revocation of his license and the abrupt termination of his career as a merchant mariner.

3. The Respondent urges that Dr. Horowitz erred in concluding that the failure to produce a urine specimen amounted to a "Refusal to Test" because a sufficient medical explanation was not provided. Kinneary asserts that 49 CFR 40.193(e) defines a "medical condition" which prevents a donor from providing a sufficient amount of urine, as "a medically documented pre-existing disorder." He points out that Dr. Calderbank's note refers to Kinneary's shy bladder syndrome as a chronic condition which thus must have pre-dated the drug test collection the previous day. It is asserted that standing alone the note is enough to document the fact that the Respondent had this pre-existing condition at the time of the test. Kinneary continues that the word "pre-existing" refers to the condition itself and not the required documentation.

I reject that argument. Dr. Calderbank's note simply concludes that Mr. Kinneary has shy bladder syndrome and that it is a chronic condition which can be treated. No medical data such as tests or earlier treatment were provided. Dr. Horowitz called the physician to find out the basis for Calderbank's conclusion but supporting data was not provided. Dr. Horowitz correctly concluded that the note itself was not sufficient.

Indeed, the Medical Review Officer's conclusion is keeping with the Department of Transportation's interpretation of its own regulation. The Department published its Final Rule revising its Drug and Alcohol testing procedures in the Federal Register on December 19, 2000 (Vol. 65, No. 244, pp 79461-79510). Those amendments and revisions became effective on January 18 and August 1, 2001 or prior to the drug test under review here. In the Department's comments to 49 CFR § 40.193, the specific provision under discussion here, involving the need

for medical documentation of an employee's urinary problems prior to the test is discussed, as follows:

We incorporated in this section an existing DOT interpretation concerning psychological conditions alleged as reasons for a failure to provide a sufficient specimen. The meaning of this interpretation (see paragraph (e)) is that to be regarded as a pre-existing psychological disorder, it is not necessary that the condition be diagnosed before the time of the test, but the symptoms have to have been medically documented before the time of the test. For example, an individual may have brought urination problems to the attention of his urologist over a period of time, but the urologist did not enter a specific diagnosis of a psychological disorder into the medical records. In this situation, the examining physician has the discretion to determine that there was a pre-existing psychological condition, if the physician is convinced that the medically documented symptoms support such a diagnosis.

Federal Register (Vol. 65, No. 244)(December 19, 2000).

Importantly, the Department interpretation of its own regulation makes it abundantly clear that psychological conditions affecting the donor's ability to produce a specimen must be medically documented before the test. In this case, there is no such documentation. Indeed, the evidence of record reveals that Mr. Kinneary successfully provided specimens on drug tests in recent years.

4. The second argument advanced by Respondent is that the Medical Review Officer did not instruct Mr. Kinneary nor Dr. Calderbank regarding the need for medical documentation of the Respondent's difficulty in urinating in this drug test. The evidence in this record reveals that Dr. Obas, the Medical Director of the New York Department of Sanitation, interviewed Mr. Kinneary within an hour after the unsuccessful urine collection and provided him with a sheet entitled "Information and Instructions to Examining Physician." (Rsp. Exhibit J). That instruction letter directed Mr. Kinneary to obtain within five working days an evaluation from a

licensed physician. The sheet includes the language of the regulation regarding the recommendation to be made to the Medical Review Officer. (*Id.*) See also 49 CFR 40.193(d).

That same day too, Dr. Horowitz called Mr. Kinneary and asked him to provide medical documentation of his disorder. (Tr. 107). The Doctor told him he needed to see a physician. Clearly, Mr. Kinneary had notice of exactly what he was required to do under the regulations as a consequence of his failure to provide a urine specimen. Later, Dr. Horowitz went beyond those basic requirements and called Dr. Calderbank to see if he could obtain some documentation. The referral physician however did not have any. (Tr. 108). The DOT regulations were met in this case.


5. Mr. Kinneary also urges that he brought his urinary difficulty to the attention of Dr. Beverly, the Medical Review Officer, at the 1992 drug test which he passed. (Rsp. Exhibit I). The DOT regulations make it clear however that a Medical Review Officer reviewing the results of a drug test does not establish a doctor-patient relationship with the employee involved. (49 CFR 40.123(d)). Mr. Kinneary testified that Dr. Beverly was not his personal physician and the doctor would not have any reason to know his personal history. (Tr. 249-50). In any event beyond the results of the drug test itself, no documentation regarding his alleged urinary difficulty was provided.

6. With regard to the Respondent's reliance on Dwyer v. DuBois (Respondent's Proposed Findings of Fact and Conclusions of Law, p. 20), it appears that this decision of the Suffolk County Superior Court is unpublished. A copy of the decision has not been obtained. Moreover, the DOT regulations here apparently were not involved in that case and thus it is of little relevance.

VI.

ORDER

Both sides have 10 days from service of this Decision and Order to recommend the sanction to be issued against the Respondent's license and document. The Coast Guard is to explain the Proposed Order sought in the Complaint which reads "12 Months Outright Suspension 6 months Suspension on 12 Months Probation." It is not clear whether a) an Outright 12 month suspension is sought suspending the Respondent from working under his credentials during the entire period; b) whether the 12 month suspension is to be remitted on probation; or c) a combination of both. Also, the basis for the recommendation is to be provided.

  
PETER A. FITZPATRICK  
Administrative Law Judge  
United States Coast Guard

Done and Dated on February 20, 2003 at  
Norfolk, Virginia