

UNITED STATES OF AMERICA
U.S. DEPARTMENT OF HOMELAND SECURITY
UNITED STATES COAST GUARD

UNITED STATES COAST GUARD,

Complainant

vs.

CHRISTOPHER LEE SAMUEL,

Respondent

Docket Number CG S&R 03-0285
CG Case No. 113956

DECISION AND ORDER

Issued: September 22, 2003

Issued by: Joseph N. Ingolia, Chief Administrative Law Judge

Appearances:

LTJG Scott Baranowski
and
LCDR Mark Hammond

U.S. Coast Guard Activities Baltimore
2401 Hawkins Point Road
Baltimore, MD 21226-1791

For the Coast Guard

Christopher Lee Samuel, (pro se)

For the Respondent

PRELIMINARY STATEMENT

The United States Coast Guard (Coast Guard) initiated this suspension and revocation proceeding against Respondent, Christopher Lee Samuel's Merchant Mariner's Document (MMD). This case is brought pursuant to the legal authority contained in Title 46 of the United States Code (U.S.C.) section 7703 and underlying regulations.

Respondent was charged with Misconduct on April 28, 2003 pursuant to Title 46 of the Code of Federal Regulations (CFR) section 5.27. The Coast Guard sought to revoke Respondent's MMD. The Coast Guard alleged that on March 10, 2003, Respondent took a pre-employment drug test for K-Sea Marine Transportation and wrongfully substituted his urine sample, resulting in a refusal to test. Respondent answered the Coast Guard's allegations by denying that he refused to submit a urine sample for pre-employment drug testing.

The hearing was held on August 4, 2003 in Baltimore, Maryland. The hearing was conducted in accordance with the Administrative Procedure Act as amended and codified in 5 U.S.C. 551-559, and Coast Guard procedural regulations codified at 33 CFR Part 20.

After opening statements, the Coast Guard presented telephonic testimony of 4 witnesses and entered five exhibits into the record. Respondent testified on his own behalf and entered three exhibits into the record. The witness and exhibit list is provided in Attachment A.

At the conclusion of the trial, I recommended that Respondent contact the Coast Guard to discuss the possibility of a settlement. He did so and on

Monday, August 25, the IO informed the ALJ Docketing Center that the parties could not agree on settlement. Respondent filed a letter on August 28 confirming that there was no settlement. Respondent explained that he was not going to go through drug rehabilitation because he did not have a drug problem. Given the above, the case is ready for decision and order.

FINDINGS OF FACT

1. Respondent, Christopher Lee Samuel, is the holder of a Merchant Mariner's Document issued by the United States Coast Guard.
2. On the morning of March 10, 2003, Respondent appeared at K-Sea Marine Transportation for a pre-employment drug test. (*IO Ex. 1*).
3. Respondent's urine specimen was collected by George Wilson. (*IO Ex. 1*).
4. Mr. Wilson has been a trained collector since December 2002.
5. Prior to Respondent's arrival, Mr. Wilson prepared the collection site for drug testing. However, since all marine employees needed access to the bathroom, Mr. Wilson failed to turn off the water source in the bathroom and failed to add blue dye to the toilet water.
6. Upon his arrival for drug testing, Mr. Wilson positively identified Respondent through a photo ID, requested Respondent's Social Security Number (SSN), recorded Respondent's SSN on the Department of Transportation Custody and Control Form (CCF), and completed step 1 of the CCF. (*IO Ex. 1*).

7. Since a split specimen drug test was being performed, Mr. Wilson provided Respondent with a collection kit consisting of a large collection container and two small specimen bottles.
8. Respondent went into the bathroom and returned the filled collection container to Mr. Wilson.
9. Mr. Wilson also asked Respondent for the reading on the temperature strip attached to the collection container. The temperature was recorded as being between 90° and 100° F on Step 2 of the CCF. (*IO Ex. 1*).
10. Respondent's urine specimen was poured into the two small specimen bottles and the bottles were sealed in Respondent's presence with a tamper-evident seal bearing Specimen Identification Number (Specimen ID No.) 4279557. Respondent then initialed the tamper-evident seal and completed step 5 of the CCF, certifying that he had provided the urine specimen identified by the Specimen ID No. 4279557. He also certified that the information on the CCF and the labels affixed to each specimen bottle were correct. (*Id.*).
11. Mr. Wilson also executed the CCF certifying that Respondent provided the urine specimen, which was collected, labeled, and sealed in accordance with applicable Federal requirements. (*Id.*).
12. Mr. Wilson then placed Respondent's urine specimen in locked storage until it was released to a Quest Diagnostic Courier.

13. Quest Diagnostics (Quest) received Specimen ID No. 4279557, which was assigned a unique Lab Accession Number (Lab Accession No.) 6587381. Melissa Lewis signed for the specimen and recorded the information on the Quest internal chain of custody form. (*IO Ex. 3*).
14. The sample was then released to Robin Weikel and the initial drug test was performed and analyzed by Brian Estelle. (*IO Ex. 3, p 12*).
15. The results of the initial drug test revealed a specific gravity level of 1.000 and a creatinine level of 0.2. (*IO Ex. 3, p 17*).
16. As a result of the initial test levels a confirmation test was performed to corroborate the initial results. The results of that test were a specific gravity level of 1.000 and a creatinine level of 0.1. The Laboratory reported that the urine specimen was substituted in accordance with 49 CFR 40.93(b). (*IO Ex. 3*).
17. The urine specimen, with Specimen ID No. 4279557, was then placed in long-term storage.
18. A Medical Review Officer (MRO), Dr. Katsuyama, reviewed the results and verified that Respondent's urine specimen, identified by Specimen ID No. 4279557, was not consistent with human urine and classified it as a substituted specimen. (*IO Ex. 1*).
19. The MRO interviewed Respondent to determine whether there was a medical explanation for the test results.
20. The Respondent failed to provide a medical explanation for the test results.

21. The MRO advised the United States Coast Guard that Respondent's pre-employment drug test revealed that his urine was substituted. (*IO Ex. 5*).

ULTIMATE FINDINGS OF FACT

1. Respondent Christopher Lee Samuel and the subject matter of this hearing are within the jurisdiction vested in the United States Coast Guard under 46 USC 7703.
2. Respondent, at all relevant times, was acting under the authority of his Merchant Mariner's Document.
3. Respondent's pre-employment drug test was performed properly in accordance with 46 CFR Part 16 and 49 CFR Part 40.
4. The United States Coast Guard has **PROVED** by a preponderance of the evidence that Respondent has committed misconduct by wrongfully submitting a substituted urine specimen for pre-employment drug testing.

DISCUSSION

In suspension and revocation proceedings, the burden of proof is on the Coast Guard to establish the allegations in the complaint by a preponderance of the evidence. See 33 CFR 20.701 and 20.702(a); see also Appeal Decision 2485 (YATES); Steadman v. Securities and Exchange Commission, 450 U.S. 91, 102 (1981) (adopting the preponderance of the evidence standard of proof in proceedings conducted under the

Administrative Procedures Act [5 U.S.C. 551-559]). To satisfy the burden of proof, the Coast Guard must establish that it is more likely than not that Respondent committed the alleged violations. See Herman & Maclean v. Huddleston, 459 U.S. 375, 390 (1983).

In this case, Respondent is charged with **MISCONDUCT**. Misconduct is defined as any conduct or behavior that violates a duly established rule. 46 CFR 5.27. The Coast alleged that Respondent committed Misconduct by submitting a substituted urine specimen for pre-employment drug testing. This constitutes a refusal to test, which is a violation of applicable Coast Guard and DOT drug testing regulations. See 49 CFR 40.191(c).

Coast Guard regulations incorporate, by reference, the definition of "refused to take a drug test" as set out in 49 CFR 40.191. See 46 CFR 16.105. Under 49 CFR 40.191(b), a mariner is considered to have "refused to take a drug test" if an MRO verifies that a substituted specimen was submitted for drug testing. A laboratory considers a specimen to be substituted "if the creatinine concentration is less than or equal to 5 mg/dL and the specific gravity is less than or equal to 1.0001 or greater than or equal to 1.020." 49 CFR 40.93(b). A urine specimen is verified as substituted if, after conducting a verification interview, the mariner fails to provide the MRO with a legitimate medical explanation for the laboratory findings. See 49 CFR 40.145.

Here, Respondent submitted to a pre-employment drug test on March 10, 2003 as required by K-Sea Marine Transportation in accordance with 46

CFR 16.210(a). Mr. George Wilson collected Respondent's urine specimen. (*IO Ex. 1*). The urine specimen was then forwarded to and tested by Quest in accordance with 46 CFR Part 16 and 49 CFR Part 40. The initial test results revealed a creatinine level of 0.2 mg/dL and a specific gravity of 1.000. (*IO Ex. 3, p. 17*). The confirmation test corroborated the initial test results and, in accordance with 49 CFR 40.93, the laboratory reported that Respondent's urine specimen was substituted. The MRO, Dr. Katsuyama, then verified the substituted test result after Respondent failed to provide a legitimate medical explanation for the laboratory findings.

At the hearing, Respondent also failed to provide any legitimate explanation, medical or otherwise, for the test results. Instead, Respondent argued that several procedural errors occurred during the collection process: 1) Mr. Wilson handed the collection kit to Respondent without explaining what should be done with the collection cup and two small vials; and 2) Mr. Wilson asked Respondent for the temperature reading on the collection cup. In addition, the facts show that Mr. Wilson failed to turn off the water source in the bathroom and failed to add blue dye to the toilet water.

Minor procedural errors in the collection process that do not adversely effect the chain of custody of a specimen will not invalidate the laboratory's test results. See Appeal Decision 2555 (LAVALLAIS); 49 CFR 209(b)(1). An ALJ determines whether a procedural error is minor by evaluating the ultimate impact of the errors on the final result of the drug test. 49 CFR 40.209(a). Not adding blue dye to the toilet water is a minor procedural error that does

not establish grounds for invalidating the test results. 49 CFR 40.209(b)(2). The purpose of adding the blue dye to the toilet water and turning off all water in the lavatory is to assist the collector in determining if the specimen has been tampered with. Id. Similarly, the temperature of the specimen is used to help the collector determine if the specimen has been substituted. Thus, I conclude that the failure of the collector to personally read the temperature of the specimen is a minor procedural error.

In this case, the procedural errors provided Respondent with ample opportunity to substitute the urine specimen. As stated earlier, the water source in the bathroom was not turned off and there was no blue dye in the toilet. Further, Mr. Wilson's failure to verify the temperature reading of the specimen gave Respondent an opportunity to mask that the specimen was substituted.

Respondent also attempted to show that he was not a drug user by introducing prior drug free certificate cards into evidence. The Coast Guard is not alleging that Respondent is a user of drugs, Respondent is charged with misconduct stemming from a substituted urine specimen. The Respondent's prior history of drug testing does not serve as an adequate defense in a refusal to test case based on a submission of a substituted urine specimen for drug testing. However, Respondent's prior negative drug test results may be used by the ALJ for mitigation purposes in determining an appropriate sanction. See Appeal Decision 2625 (ROBERTSON).

Based on the facts in this case, I find that the Coast Guard has established by a preponderance of the evidence that Respondent submitted a substituted urine specimen for a pre-employment drug test on March 10, 2003. This constitutes a refusal to test under 49 CFR 40.191(b), which is Misconduct under 46 CFR 5.27.

SANCTION

The Coast Guard proposes an order of revocation of Respondent's MMD. The suggested sanctions for violation of regulations are set forth in the Table of Suggested Range of Appropriate orders in 46 CFR 5.569. The recommended sanction for a refusal to take a chemical drug test is 12 to 24 months. However, the Commandant has held that revocation in a refusal to test case may be an appropriate sanction after the ALJ considers the aggravating or mitigating circumstances of the case. See Appeals Decision 2578 (CALLAHAN). The purpose of the suggested ranges of sanctions is to provide guidance and promote uniformity in ALJ rendered orders. 46 CFR 5.569(d).

In the present case, Respondent has no prior drug offenses and has tested negative in the past for drugs. Upon review of all the facts and testimony presented, I find an appropriate sanction is an outright 12-month suspension with an additional condition placed on Respondent. If it is determined in a future Suspension and Revocation proceeding that Respondent violated any Coast Guard drug testing regulations within the

above mentioned 12-month period, the Coast Guard may move to reopen this proceeding to request revocation.

The period of suspension commenced on August 4, 2003. On that date, in accordance with 46 CFR 5.521, this Judge took possession of Respondent's MMD upon finding that Mr. Samuel committed an act or offense that constitutes a threat to public health, interest, and safety at sea. The MMD is being forwarded to the Coast Guard Activities Baltimore along with this decision and order. The MMD shall be returned to Mr. Samuel upon completion of 12-month period of suspension ending on August 4, 2004.

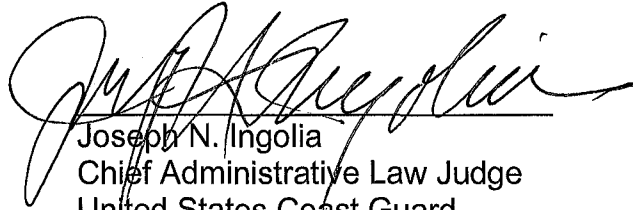
ORDER

WHEREFORE,

IT IS HEREBY ORDERED that the Merchant Mariner's Document issued by the United States Coast Guard to Christopher Lee Samuel is **SUSPENDED** for a period of 12 months. If it is determined in a future Suspension and Revocation proceeding that Respondent violated Coast Guard drug testing regulations within the above mentioned 12-month period, the Coast Guard may move to reopen this proceeding to request revocation. The period of suspension commenced on August 4, 2003 and ends August 4, 2004, at which time the MMD shall be returned to Mr. Samuel.

PLEASE BE ADVISED, either party has a right to appeal this Decision and Order by filing a notice of appeal with the United States Coast Guard ALJ Docketing Center within 30 days of the issue date of this decision. All

appeals must be in accordance with the procedures set forth in 33 CFR
20.1001-20.1003.



Joseph N. Ingolia
Chief Administrative Law Judge
United States Coast Guard


Date this 23rd day of September, 2003
Baltimore, Maryland

Certificate of Service

I hereby certify that I have served the foregoing Decision and Order upon the following parties (or their designated representatives) to this proceeding at the address indicated by Federal Express:

Lt(jg) Scott Baranowski
United States Coast Guard Activities Baltimore
2401 Hawkins Point Road
Baltimore, MD 21226-1791

Christopher Samuel
708 College Lane, Apt. 5
Salisbury, MD 21804


GLADYS P. KASTELL-PAUL, ESQ.
**Attorney-Advisor to
Chief Administrative Law Judge
United States Coast Guard**

Done and date this 23rd day of September 2003.

PROCEDURES GOVERNING APPELLATE REVIEW
TITLE 33 - NAVIGATION AND NAVIGABLE WATERS
CODE OF FEDERAL REGULATIONS
PART 20 RULES OF PRACTICE, PROCEDURE, AND EVIDENCE FOR FORMAL
ADMINISTRATIVE PROCEEDINGS OF THE COAST GUARD
SUBPART J - APPEALS

33 CFR § 20.1001 General.

- (a) Any party may appeal the ALJ's decision by filing a notice of appeal. The party shall file the notice with the U. S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022. The party shall file the notice 30 days or less after issuance of the decision, and shall serve a copy of it on the other party and each interested person.
- (b) No party may appeal except on the following issues:
 - (1) Whether each finding of fact is supported by substantial evidence.
 - (2) Whether each conclusion of law accords with applicable law, precedent, and public policy.
 - (3) Whether the ALJ abused his or her discretion.
 - (4) The ALJ's denial of a motion for disqualification.
- (c) No interested person may appeal a summary decision except on the issue that no hearing was held or that in the issuance of the decision the ALJ did not consider evidence that that person would have presented.
- (d) The appeal must follow the procedural requirements of this subpart.

33 CFR § 20.1002 Records on appeal.

- (a) The record of the proceeding constitutes the record for decision on appeal.
- (b) If the respondent requests a copy of the transcript of the hearing as part of the record of proceeding, then,--
 - (1) If the hearing was recorded at Federal expense, the Coast Guard will provide the transcript on payment of the fees prescribed in 49 CFR 7.45; but,
 - (2) If the hearing was recorded by a Federal contractor, the contractor will provide the transcript on the terms prescribed in 49 CFR 7.45.

33 CFR Sec. 20.1003 Procedures for appeal.

- (a) Each party appealing the ALJ's decision or ruling shall file an appellate brief with the Commandant at the following address: U.S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022, and shall serve a copy of the brief on every other party.
 - (1) The appellate brief must set forth the appellant's specific objections to the decision or ruling. The brief must set forth, in detail, the--
 - (i) Basis for the appeal;
 - (ii) Reasons supporting the appeal; and
 - (iii) Relief requested in the appeal.

- (2) When the appellant relies on material contained in the record, the appellate brief must specifically refer to the pertinent parts of the record.
- (3) The appellate brief must reach the Docketing Center 60 days or less after service of the ALJ's decision. Unless filed within this time, or within another time period authorized in writing by the Docketing Center, the brief will be untimely.

(b) Any party may file a reply brief with the Docketing Center 35 days or less after service of the appellate brief. Each such party shall serve a copy on every other party. If the party filing the reply brief relies on evidence contained in the record for the appeal, that brief must specifically refer to the pertinent parts of the record.

(c) No party may file more than one appellate brief or reply brief, unless--

- (1) The party has petitioned the Commandant in writing; and
- (2) The Commandant has granted leave to file an added brief, in which event the Commandant will allow a reasonable time for the party to file that brief.

(d) The Commandant may accept an amicus curiae brief from any person in an appeal of an ALJ's decision.

PROCEDURES GOVERNING COAST GUARD APPELLATE REVIEW

TITLE 33 - NAVIGATION AND NAVIGABLE WATERS CODE OF FEDERAL REGULATIONS

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