UNITED STATES OF AMERICA

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

UNITED STATES COAST GUARD

Complainant

vs.

STEVEN MARCUS CALHOUN

Respondent.

Docket Number: CG S&R 04-0225
CG Case No. 2047648

DECISION AND ORDER

Issued: December 13, 2004

Issued by: Jeffie J. Massey, Administrative Law Judge

Appearances:

For Complainant
Lt. Timothy Tilghman
CWO Jason Boyer
U.S. Coast Guard
MSO Morgan City
800 David Drive
Morgan City, La 70380

For Respondent
Steven Marcus Calhoun, pro se

PRELIMINARY STATEMENT

On April 27, 2004, the United States Coast Guard ("USCG" herein) initiated an administrative proceeding against credentials issued to Steven Marcus Calhoun by the USCG. Specifically, it was alleged that, while acting under the authority of his Coast Guard issued credentials on April 8, 2004, the Respondent committed an act of Misconduct by submitting a urine sample that did not fall within the temperature limit for human urine; then, he refused to submit another urine specimen, all within the course of a periodic/random drug screen.

On July 13, 2004, Respondent's Answer was received by the Docketing Center. In his Answer Respondent denied all of the allegations and requested to be heard on the proposed order.

A hearing was duly scheduled and convened in Houma, Louisiana on December 2, 2004 (after two continued hearing dates). The USCG called the following witnesses: Gary Gros, Melanie Callahan, Beth Caro, and Todd Albert. Eleven exhibits were admitted for evidentiary purposes; one exhibit was retained for record purposes only. The Respondent testified in his own behalf.

At the end of the testimony, the evidentiary record was closed. Both sides waived the filing of written proposed findings of fact and conclusions of law, and the filing of post-hearing briefs. The undersigned then announced her decision on the record. Further, the undersigned informed the parties that this written rendition of the findings of fact and conclusions of law announced on the record would be issued as soon as possible. This document constitutes said issuance.

FINDINGS OF FACT

1. On and about April 8, 2004, the Respondent was employed by Offshore Specialty Fabricators, Inc. and was serving aboard the Crewboat TYPHOON EXPRESS.
2. While serving aboard the Crewboat TYPHOON EXPRESS, the Respondent was acting under the authority of credentials issued to him by the USCG.
3. On and about April 8, 2004, Respondent's employer instituted a random drug screen for all crewmembers aboard the TYPHOON EXPRESS.
4. The first urine specimen submitted by the Respondent, pursuant to the random drug screen collection process, was outside of the acceptable temperature range.
5. The Respondent was informed that his first specimen was outside of the acceptable temperature range, and was asked to submit a second specimen under direct observation.
6. After being asked to submit a second specimen under direct observation, the Respondent refused to submit a second specimen.

DISCUSSION

The Administrative Procedure Act (APA), 5 U.S.C. 551-59, governs Coast Guard suspension and revocation hearings. 46 U.S.C. 7702(a). The APA only authorizes sanctions to be imposed if, upon consideration of the record as a whole, the charges are supported by reliable, probative, and substantial evidence. 5 U.S.C. 556(d). "The term substantial evidence is synonymous with preponderance of the evidence as defined by the Supreme Court." **Appeal Decision 2477 (TOMBARI)** (1998). The burden of proving a claim by a preponderance of the

evidence "simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence.'" Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 622 (1993)(citing In re Winship, 397 U.S. 358, 371-72 (1970)(Harlan, J., concurring)(brackets in original)). Under Coast Guard procedural regulations, the Coast Guard bears the burden of proving the charges by a preponderance of the evidence. 33 CFR 20.701, 20.702(a). Therefore, the Coast Guard must prove with reliable and probative evidence that Respondent more likely than not committed the violations charged.

Title 46 U.S.C. §7703(1)(B) provides that a license, certificate of registry, or merchant mariner's document may be suspended or revoked if the holder when acting under the authority of his license, certificate, or document has committed an act of incompetence, misconduct, or negligence. "Misconduct" is partly defined as human behavior that violates some formal, duly established rule, and such rules are found in, among other places, statutes, regulations, the common law, the general maritime law, a ship's regulation or order, or shipping articles and similar sources. See 46 CFR §5.27.

A person employed in the service of a vessel is considered to be acting under the authority of his/her license, certificate, or MMD when the holding of that license, certificate, or MMD is required by law, regulation, or by the employer as a condition of employment. 46 CFR §5.57(a). If law, regulation, or condition of his employment did not require the Respondent to have a license or MMD, then the Coast Guard does not have jurisdiction under 46 CFR §5.57(a) over the alleged violation of law. See **Appeal Decision 2620 (COX)** (2001). Therefore, the Coast Guard must prove Respondent was employed in the service of a vessel when he committed

a violation of law and Respondent's merchant mariner's credentials were either (1) required by law or regulation or (2) as a condition of his employment.

The testimony of Todd Albert, Health, Safety, and Environmental Administrator for Offshore Specialty Fabricators, Inc. (sometimes referred to herein as "OSFI"), established that the Respondent was, on April 8, 2004, an employee of OSFI, and that he was employed in a capacity that both required him to hold Coast Guard issued credentials and be subject to random drug testing. (Respondent's own testimony was consistent with these facts as well.) Mr. Albert was a participant in the testing process on April 8, 2004, once it had reached the point where Respondent was told he needed to submit a second urine specimen under direct observation. It was Mr. Albert's testimony that Respondent discussed his options for a considerable length of time with him, and with Mr. Gros, the certified specimen collector employed by OSFI on a full-time basis. Mr. Albert further testified that during this process the Respondent indicated to him and Mr. Gros that he knew he was "dirty."

Mr. Gros' testimony was consistent with Mr. Albert's on this last point. Mr. Gros provided detailed testimony about the testing process that occurred aboard the TYPHOON EXPRESS on April 8, 2004, including his observation that the first specimen given to him by the Respondent was out of the acceptable temperature range. While Mr. Gros was unable to produce the Federal Drug Testing Custody and Control Form (referred to herein as the "CCF" or the "DOT Form") upon which he could have noted that the first specimen was outside of the acceptable temperature range, his testimony clearly explained the procedures he followed on April 8, 2004. Specifically, his testimony credibly explained that immediately upon observing that the Respondent's specimen was out of the acceptable temperature range, and at his first

opportunity (when the collection process was completed for the remaining crewmembers), he took the Respondent to a location where an observed specimen could be collected.[1]

The Respondent chose to testify in his own behalf. He adamantly denied having told Mr. Albert and Mr. Gros that he knew he was "dirty", but he was unable to supply a motive for either witness to lie about what he said to them. The Respondent took issue with the procedures followed on April 8, 2004, saying that they were "different" than other procedures followed during other drug tests he had taken. However, on cross examination he was unable to provide any information which, in the opinion of the undersigned, amounted to a legally defensible abnormality in the testing process. In fact, he attempted to feign ignorance about what drugs the test would be screening for. Only after being pointedly questioned by the undersigned did he capitulate that he was aware what types of drugs were tested for during random drug screens.

Ultimately, it was clear from the testimony of Mr. Albert, Mr. Gros, and the Respondent that, on April 8, 2004, the Respondent refused to submit a second urine specimen after being told he was required to do so. Similarly, it was clear that when he signed the "refusal form" utilized by OSFI to document refusals, the Respondent knew that he was refusing to participate in a drug screen required by his employer and the regulations that governed the terms of his Coast Guard issued credentials. In other words, he was fully aware of the grave consequences of his refusal.

Other witnesses by the USCG testified about two "sea letters" that were issued to the Respondent by OSFI, subsequent to his dismissal on April 8, 2004, the first of which mistakenly

[1] 49 CFR §40.65(b)(4) contemplates that the collector will note the exact temperature of the out-of-range specimen in the "remarks" line of the CCF. The CCF would only be needed later if an employee provided a second specimen under direct observation (because the out-of-range specimen is transported for testing with the original CCF, and the second specimen is transported for testing with a new CCF). Once an employee refuses to provide a second specimen under direct observation, the first specimen (the out-of-range one) is discarded, and the first CCF

indicated he had *not* failed a drug test or refused to participate in a drug test while an employee of OSFI. A considerable amount of testimony was also elicited about the forms that the Respondent signed at some point in time, forms that advised Respondent of the policies of OSFI with respect to drug testing, etc. On the record as a whole, there is slight disagreement about when these forms were actually signed by the Respondent. However, when these forms were signed has no significance with respect to whether or not what happened on April 8, 2004 constituted proper procedures under Part 40 of Title 49. There is sufficient testimony in this record for me to find that the procedures followed on April 8, 2004 were substantively sufficient, and that the Respondent refused to participate in a random drug screen without considering the testimony and documents connected with the orientation or hiring process at OSFI.[2]

In these proceedings, the Administrative Law Judge is vested with broad discretion to determine witness credibility and resolve inconsistencies in the evidence, and the findings of the Administrative Law Judge are not required to be consistent with all the evidence in the record as long as there is sufficient evidence to justify the finding. **Appeal Decision 2639 (HAUCK)** (2003). As I noted on the record after the close of the evidence, I find the testimony of Mr. Gros and Mr. Albert to be entirely credible. Any minor technical flaws in the documentation process of the procedures followed on April 8, 2004 in no way taint the validity and integrity of the testing process itself. There is substantial testimony in this record to support the finding that the Respondent first submitted a urine specimen which was out of the acceptable temperature range, and—after being given ample opportunity to submit a second specimen under direct

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serves no further purposes in the testing process (because the testing process is terminated by the refusal to provide the second specimen.)

[2] "Refuse to Test" means a person refuses to take a drug test as set out in 49 CFR §40.191. See 46 CFR §16.105. Part 40 of Title 19 does not place any particular burden on an employer with respect to employee orientation procedures.

observation—he refused to do so. His motivation for submitting a specimen the undersigned can reasonably conclude was an adulterated specimen in the first place, and then refusing to submit a second specimen under direct observation is relevant only to my decision to revoke his credentials, not to the question of whether or not he committed an act of Misconduct. To the extent that inconsistencies exist between the testimony of Mr. Albert and Mr. Gros versus the testimony of the Respondent, I resolve those inconsistencies against the Respondent, as I find him to be less than credible.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. On and about April 8, 2004, Respondent was employed with Offshore Specialty Fabricators, Inc., at which time he was acting under the authority of credentials issued by the USCG.
2. On and about April 8, 2004, Offshore Specialty Fabricators, Inc., initiated a drug screen procedure for all crewmembers of the TYPHOON EXPRESS, the Crewboat upon which Respondent was serving.
3. Respondent submitted a urine specimen which was out of the acceptable temperature range, then refused to submit a second urine specimen under direct observation.
4. As an employee of Offshore Specialty Fabricators, Inc., and as a person who held credentials issued by the USCG, Respondent was required by law to submit an acceptable urine specimen during this random drug screen.
5. Failure on the part of the Respondent to submit a valid urine specimen on April 8, 2004, constituted a refusal to take a chemical test and, thus an act of Misconduct pursuant to 46 USC §7703 and 46 CFR §5.27.

6. The USCG proved by a preponderance of the evidence that sanctions are warranted against Respondent's Coast Guard issued credential(s) under 46 U.S.C. §7703, because the evidence proved an act of Misconduct by the Respondent on and about April 8, 2004.

7. Pursuant to the provisions of 46 USC §7703(1)(B), the evidentiary record supports a revocation of all credentials issued to the Respondent by the USCG.

SANCTION

Under the provisions of 46 USC §7703, it is within my discretion to suspend or revoke the credentials issued to the Respondent by the USCG. Based upon the record as a whole in this proceeding, and as I announced on the record, I have concluded that revocation is the appropriate sanction. Based on the record as a whole, the Respondent was, in the opinion of the undersigned, not truthful during his testimony. He attempted to offer every conceivable excuse for his conduct on April 8, 2004, all of which left him blameless and without responsibility for his refusal to provide a viable urine specimen to his employer for testing. He attempted to convince the undersigned that the random testing procedures were faulty, that his employer had failed to provide him sufficient orientation as a new employee, that his overall conditions of employment were so unpleasant that he was forced to refuse the test as a vehicle that would result in his being fired from his job, and that two witnesses had misrepresented to the undersigned what he had said on April 8, 2004.

Ironically, a document the Respondent voluntarily provided to the USCG—a document that otherwise would never have been discovered during this proceeding—

demonstrated to the undersigned how far the Respondent was willing to go to mask his deceit. This document, a job application filled out a mere twelve days after his discharge from OSFI, asked the Respondent to list his last three jobs (See Exhibit IO-12). The Respondent should have listed his employment at OSFI, but he omitted it. When asked to explain this, he testified that he knew OSFI would not give him a good reference, so he didn't list them. He maintained that OSFI would give him a bad reference, not because he had refused to participate in a drug test, but because of "other" things.

Whatever the reason for this material omission, it indicates a clear intent on the part of the Respondent to manipulate the system—he was apparently determined to find other employment in the maritime industry based on lies about his drug testing history. That is exactly the kind of manipulative conduct that undermines the legitimate purposes of the drug testing regulations.[3] The Respondent's action on April 8, 2004 constituted a circumvention of the drug testing program, and his conduct on April 12, 2004 (the date of the job application) demonstrated that he was perfectly willing to perpetuate a pattern of deceptive conduct to hide his unwillingness to participate in the testing program of the USCG.

[3] Per 46 CFR §16.101, the purpose of the chemical testing regulations is to "provide a means to minimize the use of intoxicants by merchant marine personnel and to promote a drug free and safe work environment." Employers have a right to know the drug testing history of job applicants so that they can make informed decisions that maintain a drug free and safe work environment for other employees.

ORDER

IT IS HEREBY ORDERED that all credentials issued to the Respondent by the United States Coast Guard, including but not necessarily limited to License Number 1015696 are hereby REVOKED. **You must immediately surrender all documents in your possession to the Coast Guard. If you knowingly continue to use your documents, you may be subject to criminal prosecution.**

PLEASE TAKE NOTICE that service of this Decision on the parties and/or parties' representative(s) serves as notice of appeal rights set forth in 33 CFR 20.1001 – 20.1004. (Attachment A).

Done and dated December 13, 2004.
New Orleans, Louisiana

JEFFIE J. MASSEY
ADMINISTRATIVE LAW JUDGE
U.S. COAST GUARD